

(2017) 11 DEL CK 0752

In the Delhi High Court

Case No : Civil Writ Petition No. 6719, 6720 Of 2017, Civil Miscellaneous
Application No. 27989, 27991 Of 2017

M/S Mohandas V Rajani

APPELLANT

Vs

National Highways Authority Of India

RESPONDENT

Date of Decision : 02-11-2017

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2017) 11 DEL CK 0752

Hon'ble Judges : S. Ravindra Bhat, J;Sunil Gaur, J

Bench : Division Bench

Advocate : Varun Pathak, Sowmya Saikumar, Sudhir Nandrajog, Madhu Sweta,
Kanika Tandon

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J

1. The petitioner (hereafter referred to as "Mohandas") is aggrieved that its bid in response to the Notice Inviting Tender ("NIT") inviting two separate bids for Short Term Improvements & Routine Maintenance Work of sections of Porbandar-Bhiladi-Jetpur; (Km. 0.000 to Km.117.600) of NH-8B in the State of Gujarat (hereafter "the works") issued by the National Highways Authority of India ("NHAI") was not accepted. The NITs were issued on 15.12.2016 and 22.02.2017 (both are subject matter of two separate writ petitions, WP 6719/2017 and WP 6720/2017).

2. The petitioner is a works contractor; it claims to have gained experience in construction and maintenance of roads and highways. It responded to the two NITS, issued on separate dates. The scope of the project included routine maintenance of all the assets, facilities and services created within Right of Way (hereinafter "ROW") on the specified sections of national highways including maintenance of carriageway, shoulders, median etc., providing incident

management by way of route patrol and surveillance, value addition to the road by way of providing crash barriers, median fencing, road signage and road marking etc, wherever required, road property management, horticulture maintenance etc. for a period of 36 months. The petitioner was issued two separate rejection letters - dated 19.07.2017 and 24.07.2017. NHA expressed the opinion that Mohandas did not fulfill the eligibility conditions stipulated in the NIT.

3. The relevant eligibility condition (in WP 6719/2017, which is identical to the other NIT, except that in WP 6720/2017 it is numbered as Clause 4.5A) reads as follows:

"4.4 A. To qualify for award of the contract, each bidder in its name should have the following:-

(a) achieved an average annual financial turnover (In all classes of civil engineering construction works only) equal to the amount Indicated In NIT during last three years ending 31st March of the previous financial year duly certified by Chartered Accountant (Notwithstanding anything to the contrary contained herein. In the event that the bid due date falls within three months of the closing of the latest financial years. It shall ignore such financial year for the purpose of the bid and furnish annual financial turnover w.r.t. 3 years preceding In last financial year).

(b) satisfactorily completed (not less than 90% of contract value), as a prime contractor (or as a nominated/approved subcontractor, provided further that all other qualification criteria are satisfied) similar works during last seven years ending last day of month previous to the one in which bids are invited, either of the following;

i. three similar completed works costing not less than amount equal to Rs, 876 lakhs,

ii. two similar completed works costing not less than amount equal to Rs. 1095 lakhs.

iii. one similar completed work costing not less than amount equals to Rs. 1752 lakhs.

(The similar work constitutes experience in operation and maintenance/ construction of four/six laned highway for O&M contracts whereas for special repairs /renewal work contracts, similar work constitutes experience of bituminous work on 2/4/6 lane highways)

(Escalation factor as under shall be used to bring the value of such completed works to the level of current financial year i.e. 2017-18)

Escalation factor (for the cost of works completed during the last 7 years & financial figures required for the calculation of bid capacity) may be taken as follows:

Year before

Multiplying Factor

One

1.10

Two

1.21

Three

1.33

Four

1.46

Five

1.61

Six

1.77

Seven

1.95"

4. NHA I by its letters dated 19.07.2017 and 24.07.2017 determined the Petitioner's technical bid to be non-responsive in terms of clause 4.4 A (b) (and clause 4.5A(b)) of tender documents/NITs issued by it. The petitioner alleges that the rejection of its bids is arbitrary and without application of mind as it had completed various projects for NHA I in the past few years. This includes the present project itself and has complied with similar conditions for the purposes of qualification in Uttar Pradesh and has already been issued the letter of award there. The rejection of the petitioner's technical bid, it is alleged, is for ulterior motives to benefit others and further, the introduction of narrower qualification clauses makes competition thinner and as such results in the windfall of a few private players and thus, is contrary to public interest.

5. To establish that the petitioner has the requisite experience, fulfilling the criteria specified in the eligibility conditions, reliance is placed on the following chart (for which copies of the relevant certificates have been produced with the two writ petitions):

S. NO.

Name of Employer

Description of Work

Contract No.

Value of Contract (Rs. in Crores)

Multiplying factor

Value as per Multiplying factor

Date of Issue of Work Order

Stipulation Period of Completion

Actual Date of Completion

Brief Scope of Work

Remarks

1.

NHAI PIU, Palan pur

Short Term Improvement & Routine Maintenance of 4 lane road Samakhiyali Gandhidham Section Km. 306.000 to Km. 362.160 of NH-8A in the state of Gujarat

NHAI/C M/SG/O& M/2009 /940

4.890

1.950

9.536

16.01. 2010

15.01. 2011

10.09. 2010

Lane Road & Items as per Shown in Form 3A & BOQ both were attached

Work Completed within time limit. Routine maintenance of 4 lane highway was completed satisfactorily.

2.

NHAI PIU, Adipur

Renewal Work of Garamore Samakhiyali Section from Km. 254.000 to Km. 306.000 of NH-8A in the state of Gujarat

NHAI/P IU/GD M(PLN)/Gara Samakhiyali/20 14/SO2394

29.152

1.210

35.27 4

11.12. 2014

14.06. 2015

10.06. 2015

4 Lane Road & Items as per Shown in Form 3A & BOQ both were attached

Work Completed within time limit. Routine maintenance of 4 lane highway was completed satisfactorily.

3.

Ex. Engineer, NH Division, Adipur

Construction of Single Lane to Two Lane by 1.5m wide paved side shoulder between Km. 104/20 0 to 134/00 on NH8A (Extn.) (New NH-41) except widening of major bridge at Km. 115/30 0 & 123/60 0 in the State of Gujarat (Job No. 8A (Extn)/ GJ/201 4- 15/567) (Mandvi Naliya Road)

SBD-07 of 2014- 15

17.800

1.210

21.538

05.03. 2015

04.09. 2016

31.03. 2016

Work Completed within time limit. Construction of single lane to two lane work completed satisfactorily with maintenance guarantee of 6 months.

4.

Ex. Engineer, NH Division, Adipur

Strengthening of existing four lane carriageway between Km. 362.16 0 to 371.13 5 of NH-8A (Section KFTZ to Kandla) in the state of Gujarat (Job No.8A/ GJ/201 4-15/570)

SBD-01 of 2015- 16

12.578

1.21 0

15.21 9

10.04. 2015

09.03. 2016

09.03. 2016

4 Lane Road & Items as per Shown in Form 3A & BOQ both were attached

Work Completed within time limit. Routine maintenance of 4 lane highway was completed satisfactorily with maintenance guarantee of 3 years.

6. Mr. Varun Pathak, learned counsel for Mohandas, urged that arbitrariness is writ large in the rejection of the petitioner's bids. It is pointed out that for the project in the state of U.P., Mohandas' experience was duly accepted by NHAI, therefore, the decision of NHAI declaring the bids in question as non responsive was completely arbitrary and without application of mind. It is argued that Clause 4.4 A (b) (or Clause 4.5A(b)) has been introduced subsequently and earlier for similar projects, the clauses were widely worded. In a condition, which was widely worded, the Petitioner was awarded a contract for short-term improvement and routine maintenance of Lakhanpur- Jammu section including Jammu bye-pass (km 16.350 to km 97.200 and km 0.000 to 15.000 of Jammu bye-pass) of NH-IA (New NH-44) in the state of J&K. The letters intimating the grant of the contract, dated 28.10.2015 and 26.11.2015 were issued by NHAI. Reliance is placed on copies of letters dated 28.10.2015 and 26.11.2015 along with the relevant portions of the tender document, which were annexed to the writ petitions.

7. It is submitted that as public interest is involved the public trust doctrine is applicable and NHAI, a state entity is duty bound to act with fairness and ensure that the maximum number of bidders participate in the tender process. The purpose of each condition is geared at ensuring that the best available options, having regard to the various technical criteria, enter the zone of consideration. The object of every tendering process is to ensure the availability of the best options, and the elimination of the ineligible or potentially inefficient parties, who might hold up, or not be in a position to execute the contract. It is therefore, stated that the Petitioner's price bid should be opened by NHAI. It is argued that the narrow interpretation, which drove NHAI to reject Mohandas' bids as technically ineligible, is unreasonable. If such interpretation were to be upheld, the condition in fact is required to be set aside as subversive of public interest and contrary to Article 14 of the Constitution of India. Learned counsel also emphasized that the NHAI's action in bid rejection amounts to ignoring relevant factors and not examining all documents, based on a narrow understanding of its role. Lastly, it is urged that NHAI has acted in a wholly capricious manner, because in the previous contracts, it accepted and even awarded bids to the petitioner, whereas now it prefers a restricted interpretation, contrary to public policy.

8. NHAI repels the petitioners' contentions. It urges that in all it issued three NITs; in response a total of 15 bids (five, four and six) were received from various contractors. Of these bids, 5 (1+1+3) were found to be compliant with

and fulfilling tender eligibility criteria. NHAI explains its position, stating the first NIT was issued on 15.12.2016 in response to which five bids were received. Upon consideration, it was found that one bidder qualified; the same tender was republished again, on 22.02.2017. In the first round of tender process (which was not pursued) as well as in the second round, the petitioner's bid was found to be non-responsive. Likewise, in respect of the other tender, issued on 21.04.2017 (to which 6 bidders responded), the petitioner was not one among the three found eligible. Reliance is placed on the evaluation committee's decisions, contained in the minutes of its meetings dated 01.06.2017, 08.06.2017, 23.06.2017 and 14.07.2017. In each of these meetings NHAI's committee decided that Mohandas did not fulfill the eligibility criteria which it applied, in terms of the NIT conditions:

"The committee considered similar work experience [Similar work constitutes experience in Operation & Maintenance / Construction of 4/6 laned Highway only as per clause 4.4 A (b))"

It was submitted that in the latter two meetings, the committee had set out the condition as follows:

"(The similar work constitutes experience in operation and maintenance/ construction of four/six laned highway for O&M contracts whereas-for special repairs /renewal work contracts, similar work constitutes experience of bituminous work on 2/4/6 lane highways)"

It is highlighted that the relative eligibility condition of the U.P Tender, relied upon by Mohandas, read as follows:

"4.4A(b) satisfactory completed (not less than 90% of contract value), as a prime contractor (or as a nominated/approved subcontractor, provide further that all other qualification criteria are satisfied) similar works during last seven years ending last day of month previous to the one in which bids are invited, either of the following:

i) Three similar completed works costing not less than amount equal to Rs. 120.732 lakhs.

ii) Two similar completed works costing not less than amount equal to Rs.150.915 lakhs,

iii) One similar completed work costing not less than amount equals to Rs.241.464 lakhs.

I. (The similar work constitutes experience in operation and maintenance/ construction of four/six laned highway for O&M contracts)

(Escalation factor as under shall be used to bring the value of such completed works to the level of current financial year i. e. 2017-18)

Escalation factor (for the cost of works completed during the last 7 years &

financial figures required for the calculation of bid capacity) may be taken as follows:

Year before

Multiplying Factor

One

1.10

Two

1.21

Three

1.33

Four

1.46

Five

1.61

Six

1.77

Seven

1.95"

9. Learned counsel for NHA I argued that a plain reading of the tender conditions proves that the financial threshold of both the tenders were drastically different and could not be considered to be similar to one another at all. It is submitted that the Petitioner was duly eligible for the U.P. tender as was limited only to a value of Rs. 301.83 Lakhs. The Petitioner satisfied the eligibility criteria by meeting the threshold of "One similar completed work costing not less than amount equals to Rs. 241.464 lakhs". However, the present tender is based on a higher financial value of Rs. 2153.99 lakhs, and the Petitioner miserably failed to meet even the minimum mandate of 'Three similar completed works costing not less than amount equal to Rs. 862 lakhs'. NHA I therefore, submits that reliance placed by the Petitioner on the tender conditions in the UP contract is misplaced.

10. NHA I accuses the petitioner of acting further to its vested interests; in this context it submits that Mohandas deliberately concealed from the court that it was awarded the Contract of Incident Management of Jetpur-Somnath Section of NH-3D Section i.e. the same stretch as of the present tender for a period of 3 months from 09.03.2017 to 07.06.2017. The Petitioner has sought an extension of time from NHA I, pending which it does not want tender for O&M to be

awarded to any other agency. It is contended that the present petition is vexatious because Mohandas is just leveraging to buy time through the court and delay the bidding process. A copy of the Incident Management contract dated 28.02.2017 has been produced and relied upon.

11. It is argued that unless the court finds palpable unreasonableness or absence of fair play, or glaring procedural irregularities or discrimination, the court cannot substitute its interpretation of the tender conditions. The state instrumentality, it is highlighted, has the discretion and free play in the joints to interpret tender conditions in the light of prevailing market conditions and other surrounding commercial considerations, which cannot be lightly upset in judicial review, upon substitution of the court's view.

Analysis and conclusions

12. NHAI's interpretation of the tender condition, leading to rejection of both bids by Mohandas is in issue. The relevant tender condition requires the bidder, to "qualify for award of the contract" (a) achieving an average annual financial turnover "(In all classes of civil engineering construction works only) equal to the amount indicated In NIT during last three years ending 31st March of the previous financial year duly certified by Chartered Accountant". The crucial portion, which is the focus of the controversy, requires each bidder to (have):

"(b) satisfactorily completed (not less than 90% of contract value), as a prime contractor (or as a nominated/approved subcontractor, provided further that all other qualification criteria are satisfied) similar works during last seven years ending last day of month previous to the one in which bids are invited, either of the following;

- i. three similar completed works costing not less than amount equal to Rs. 876 lakhs,
- ii. two similar completed works costing not less than amount equal to Rs. 1095 lakhs.
- iii. one similar completed work costing not less than amount equals to Rs. 1752 lakhs.

(The similar work constitutes experience in operation and maintenance/ construction of four/six laned highway for O&M contracts whereas for special repairs /renewal work contracts, similar work constitutes experience of bituminous work on 2/4/6 lane highways)"

The NHAI asserts that the contracts relied upon by Mohandas do not fulfill the above conditions; there were no similar three completed works of not less than Rs. 876 lakhs; or two completed works of not less than Rs. 1095 lakhs; or one similar work of not less than Rs. 1752 lakhs. It is also highlighted that the works relied upon are not "similar" in view of the stipulation that such similar works constitute experience in operation and maintenance/ construction of four/six

laned highway for O &M contracts and that similar works "for special repairs / renewal work contracts, similar work constitutes experience of bituminous work on 2/4/6 lane highways".

13. Established principles in relation to judicial review in matters concerning tender invitations by public authorities were revisited in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, where the Supreme Court, after reviewing a number of its previous decisions, noted as follows:

"Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

14. Later, in *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr* 2016 SCC Online SC 940 the Supreme Court held as follows:-

"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

.....

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will

escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

15. While exercising judicial review, a court, under Article 226 of the Constitution reviews the decision making process, its legality and procedural regularity, and not the merits of the decision of the executive agency. The principal decision maker is the administrative or public agency. That the courts might view tender conditions- or a particular stipulation differently (from the public agency) is insufficient reason for interference. *Afcons Infrastructure* (supra) is clear on this aspect; it instructs that courts are to defer to executive decisions, largely unless manifest mala fides or procedural irregularity or illegality is established. Similarly, the Supreme Court, in *Montecarlo Ltd v National Thermal Power Corporation Ltd* 2016 (15) SCC 272 stated that:

"Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

Again, in *JSW Infrastructure Ltd v Kakinada Seaports Ltd* 2017 (4) SCC 170 and *Central Coalfields Ltd v SLL-SML (JV Consortium)* 2016 (8) SCC 622, it was held that tender documents and stipulations are to be construed in the context of their background and that no condition is to be treated as redundant or superfluous.

16. In the present case, Mohandas argues that the rejection of its two bids is arbitrary and capricious; it also urges inconsistency in NHAI's behavior in accepting two previous tenders containing similar eligibility conditions and rejecting the present bids pursuant to the NITs issued. A comparison of the two

sets of tender eligibility conditions in the present case, with the tender eligibility condition in the UP contract, awarded to the petitioner, clearly brings out the fact that in the latter (i.e. the UP tender) the value was much lower. As against the total tender value of Rs. 2153.99 lakhs, in the two NITs in question, the tender value in the UP case was about Rs. 303 crores. Furthermore, "similar works" is defined as three completed works of not less than Rs. 876 lakhs; or two completed works of not less than Rs. 1095 lakhs; or one similar work of not less than Rs. 1752 lakhs. The documents relied upon by Mohandas show that NHAI awarded a contract to it on 09.02.2015 for execution of the work of "Short Term Improvements & Routine Maintenance Work of Porbandar - Bhiladi - Jetpur section (Km. 0.000 to Km. 117.600) of NH-8B in the state of Gujarat". Its bid "for a contract price of Rs. 2,30,77,100.63 (Rupees two crore thirty lakh seventy seven thousand one hundred and sixty three paise only) has been accepted for and on behalf of NHAI". The eligibility condition for this work was a turnover requirement of Rs. 198 lakhs in the last three years; experience of similar work (Single Work Rs. 264 lacs Or Two Works Rs. 165 lacs or Three Works Rs. 132 lacs in the last 7 years).

17. The factual background and the documents relied on by the parties, in the opinion of the court, show that Mohandas did not fulfill the tender eligibility conditions, published for the two contracts for Short Term Improvements & Routine Maintenance Work of sections of Porbandar-Bhiladi-Jetpur (Km. 0.000 to Km.117.600) of NH-8B in Gujarat. The court's interpretation about the tender conditions, in these circumstances, cannot prevail over that of NHAI's. Likewise, there is neither any apparent or proven illegality nor procedural irregularity in regard to the decision making process. The decision taken, to reject the petitioner's bid is also not arbitrary or unreasonable, in the circumstances of the case. For these reasons, the writ petitions have to fail; they are dismissed without order on costs.