

(2010) 10 BOM CK 0236

In the Bombay High Court

Case No : Writ Petition No. 1542 of 2009

Reliance Infrastructure Limited and Reliance Infrastructure
and Consultants Limited and Shri Surendra R. Khot

APPELLANT

Vs

Maharashtra State Road Development Corporation Limited
and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 3 ALLMR 682 : (2011) 3 BomCR 349 : (2010) 112 BOMLR
4670 : (2011) 1 MhLj 443

Hon'ble Judges : Mohit S. Shah, C.J

Bench : Single Bench

Advocate : J.J. Bhat and Janak Dwarkadas, Anjali Chandorkar, Naval Agarwal and D.J. Kakalia, instructed by Mulla and Mulla and CBC, for the Appellant; Rafique Dada Prashant Chavan, J. Kapadia, F. Lakdawala and M. Bootwala, instructed by Little and Co., for Respondent No. 1, D.A. Nalavade, Government Pleader for Respondent No. 2, Rohington Nariman, Furdoon De'vitre and Aspi Chinoy, Rajev Kumar, Rudreshwar Singh, Deepak Y. Chitnis, instructed by Chitnis Chinparikar and Co., for Respondent No. 3, R.S. Apte instructed by Aniruddha A. Garge, for Respondent No. 4, Savitha Kundar, instructed by Negandhi, Shah and Himayatulla, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J.—The Maharashtra State Road Development Corporation (MSRDC) has been engaged in the implementation of a project involving the construction of fifty five flyovers in Mumbai. In order to recover the cost of construction, MSRDC has been given a right to collect a toll at five entry points to the city. MSRDC proposed to award a contract under which it would take an upfront payment for the repayment of a project loan, against the securitization of collection at the five entry points into Mumbai, and for other related work. In addition to the payment of upfront money to MSRDC, the proposal required (i) Operation and maintenance of flyovers and allied structures; and (ii) Collection of

tolls at five entry points into Mumbai. In order to implement the project, MSRDC floated a tender inviting bids for the appointment of a contractor. The tender notice invited bids from Companies or Consortia of not more than three members. An upfront payment of Rs. 2,100/- crores was stipulated and there was a requirement of bid security in the amount of Rs. 105 crores.

2. The eligibility criteria for bidders contained financial criteria and toll experience. The financial criteria stipulated that where the bidder was a consortium or a joint venture, the lead member must continue to hold at least a 26% equity stake at all times during the lock-in-period and all members of the Consortium together must hold 51% of equity. The minimum annual turnover, including toll collection, in any one of the previous three years as per the audited balance sheet/profit and loss account for a period ending not earlier than 31 March 2008 was required to be Rs. 125 crores for all the members of the consortium taken together. Of this, the Lead Member was required to have an average annual turnover towards toll collection of at least Rs. 75 crores. The toll experience required was as follows:

i) Individual Company/ at least one member of consortium shall have experience of operating minimum 20 automated - computerized toll lanes under one contract for minimum 1 year. Certificate from competent authority not below the rank of Executive Engineer or equivalent shall only be accepted for this purpose.

ii) The turnover and experience of octroi collection will not be considered for the above eligibility.

3. Clause 5.5.1.1.2 of the bid document provided that where a bidder was a Consortium, each member shall furnish a Power of Attorney in favour of the lead member duly signed by an authorised representative of the members in accordance with a stipulated format. The bid was required to be signed by a duly authorised signatory of the lead member and was to be legally binding on all the members of the Consortium. Under Clause 5.6, every bidder was required to submit or participate in only one bid in the bidding process either individually as a bidder or as a consortium partner in a joint venture. The draft contract appended to the bid stipulated that the first installment of Rs. 1350/- crores (out of a total payment of Rs. 2100/- crores) was required to be paid within 90 days of the letter of allotment.

4. MSRDC had appointed an independent consultant for scrutinizing, evaluating and advising on the bid submitted by various bidders. Seven bidders including the Petitioners submitted their bids. The bids were required to be submitted in two covers, the first being the technical proposal and the second the financial proposal. Technical bids were opened on 23 July 2009. During the course of the scrutiny, clarifications were sought by the Consultants from bidders, including the Petitioner. A joint inspection was carried out of the Toll Plaza in Kolkata in respect of which the Petitioner had submitted a certificate of experience dated 31 August 2006 and a subsequent certificate dated 11 August 2009. The Consultant

submitted a final report on 17 August 2009 of the technical scrutiny. The Board of Directors of MSRDC, at a meeting held on 17 August 2009, concluded that four bids, including that of the Petitioner were to be rejected as non-responsive.

5. The reasons for the rejection of the bid of the Petitioner were communicated by a letter dated 18 August 2009 addressed to the Lead Member of the Consortium, SMS Infrastructure Limited by MSRDC. The grounds on which the bid submitted by the Petitioner was disqualified are as follows:

(i) The consortium of the Petitioners - SMSIL-Rel Infra-RICL had by a letter dated 17 August 2009 shown a turnover of Rs. 34.45 crores from a Delhi based toll collection agreement for 2007-08. The work was executed by SMS Infrastructure Limited on behalf of Banas Sands TTC JV. The toll collection was on behalf of Banas Sands TTC JV with whom there was a Government toll collection contract. Banas Sands TTC JV is a member of another Consortium, Sadhav-Prakash, which was also one of the bidders for the present project. This breached the Anti-Collusion Certificate and was in violation of the eligibility criteria which specified that "Experience of any activity relating to an eligible project shall not be claimed by two or more members of the consortium. In other words, no double counting by a consortium in respect of the same experience shall be permitted in any manner whatsoever";

(ii) One of the Consortium partners of the Sadhav-Prakash Consortium, is Banas Sands TTC JV, a partnership firm which holds 33.34% of the capital of Valancia Construction Pvt. Ltd. ("Valancia"). Valancia has an 87.36% equity holding by Anil Sancheti and has been shown as an Associated Company in the annual report of SMS Infrastructure Ltd. Anil Sancheti is also a Director in SMS Infrastructure Ltd. The authorised signatory of Banas Sands TTC JV is an employee of SMS Infrastructure Ltd. Hence, the Consortium involving the Petitioner and the Sadhav-Prakash Consortium had a common interest in both the respective bids;

(iii) The Consortium of the Petitioner claimed a toll collection experience of Rs. 97.53 crores. The bidder had clarified on 17 August 2009 that the toll collection at Delhi was on behalf of the Banas Sands TTC JV. Hence, that could not be taken as valid experience of the Consortium of the Petitioner. If that turnover is excluded, the Consortium did not satisfy the eligibility criteria for toll collection turnover;

(iv) The eligibility criteria of toll experience stipulates that at least one member of the Consortium must have experience of operating a minimum of twenty automated computerized toll lanes under one contract for at least one year. In October 2008, SMS Infra while submitting a certificate, during the bidding process, for a six months" toll collection tender for five toll stations at the Entry Points to Mumbai had stated that the toll collection points at Vidyasagar Setu Kolkatta had eighteen toll lanes. Hence, the experience certificate submitted less than one year earlier showed that the number of lanes was less than twenty. As

a result, the toll collection experience did not meet the stipulated criterion;

(v) The comfort letter of the State Bank of India had not been signed by a prescribed authority; and

(vi) The MoU between the members of the Consortium involving the Petitioner stated that SMS Infrastructure Ltd. would be a 34% equity partner in the Consortium as lead member of the Consortium. Reliance Infrastructure Ltd. (RIL) and Reliance Infrastructure Consultancy Ltd. (RICL) each held 33% equity, aggregating to 66%. Both these Companies are related Companies and RIL held 40.17% equity in RICL. Hence, the bid criteria that the lead member should hold the maximum share would be defeated.

6. After receipt of the letter communicating that the bid submitted by the Petitioner's Consortium had been found to be non-responsive, the authorised signatory of the Consortium, by a letter dated 18 August 2009 applied to MSRDC for refund of the earnest money deposit of Rs. 105 crores and the financial bid. The letter was signed by the authorised signatory of the Consortium. MSRDC returned the financial bid and refunded the earnest money deposit of Rs. 105 crores to the authorised representative of the Consortium on 18 August 2009.

7. After the financial bids were opened, the Third Respondent was found to be the lowest bidder, having quoted a concession period of seventeen years and one month. By a letter dated 18 August 2009, the Superintending Engineer of MSRDC called the Third Respondent for negotiations in accordance with Clause 5.25 of Vol. I of the Bid Document. The Third Respondent by a letter dated 18 August 2009 reduced the concession period to sixteen years, eleven months and twenty seven days.

8. In these proceedings under Article 226 of the Constitution, the Petitioner has inter alia, challenged the decision of MSRDC to reject its consortium bid and has sought a direction in the nature of Mandamus to the Corporation to award the contract for securitization of five entry points to Mumbai pursuant to the tender notice to the Petitioner or, in the alternative, to invite fresh bids.

9. The submissions which have been urged on behalf of the contesting parties can now be summarised.

Arguments of the Counsel for the Petitioners:

A) Mr. J.J. Bhat, learned Counsel for the Petitioners has raised following contentions:

(i) The Petitioners' technical bid has been held non-responsive on the basis of the grounds raised in the impugned communication but none of the grounds is germane to the matter;

(ii) The Petitioners' bid was for 11 years and 7 months which is a much shorter period than the offer of Respondent No. 3 for 16 years 11 months and 27 days. Since the same amount has to be paid by the successful bidder i.e. Rs. 2,100

crores, the length of period for which the successful bidder is to be permitted to collect the toll, should be the only determining criterion for deciding who should be awarded the contract;

(iii) By awarding the contract to Respondent No. 3, MSRDC will suffer a loss of about Rs. 10,000 crores as per the statement submitted before the Court at the hearing ;

(iv) The CAG has made scathing remarks in respect of various contracts awarded by the Respondent-Corporation to Respondent No. 3;

(v) In the past, this Court had also an occasion to examine the legality and bona fides of the decision of MSRDC in favour of Respondent No. 3;

Arguments of the counsel for respondent Nos. 1 & 3:

(i) On the other hand, the learned Counsel Mr. Rafique Dada and Mr. Nariman appearing for the MSRDC and Respondent No. 3 respectively opposed the petition and submitted that the Petitioner has been disqualified from the tender process and has no right to challenge the decision of MSRDC in awarding the contract to Respondent No. 3;

(ii) The Petitioner has been held to be ineligible on five counts and this Court would not sit in appeal over the decision taken by the Respondent authorities. Judicial review under Article 226 of the Constitution of India does not contemplate a review of the decision itself but only a review of the decision making process. Since the tender notice was issued in daily newspapers; seven bidders had submitted their bids; after a detailed scrutiny only three bids were held to be qualified and the Petitioner was one of the four non-responsive bidders, no further judicial scrutiny is called for;

(iii) The petition has been filed by only two members of the consortium but the lead member, SMS Infrastructure Ltd. with a 34% share in the equity has not come forward to file the petition. After initial letters dated 12 August 2009 and 18 August 2009 the authorized signatory and constituted attorney for the consortium has not signed any document and, therefore, the other two members of the consortium have no locus standi to file the present petition;

(iv) Even otherwise, the present two Petitioners hold 66% share in the equity stake of the consortium (33% + 33%). Since Petitioner No. 2 is holding 40% share in Petitioner No. 1 company, they are inter-related and their total holding exceeds the holding of the lead member of the consortium;

(v) The calculations given by the Petitioners at the hearing today are given for the first time but there is no basis for such calculations;

(vi) The Petitioner having asked for a refund of the financial bid and the refund of the earnest money of Rs. 105 crores, waived all its rights and, therefore, the Petition is not maintainable.

(vii) On account of various projects undertaken by the Corporation, the Corporation is in dire need of funds to the tune of Rs. 2,100 crores to pay off its debts immediately. On this account, as per tender conditions, Rs. 1,340 crores is required to be paid by the successful bidder within 90 days from the date of acceptance letter to be issued by the Respondent Corporation and the remaining amount in the 2nd to 5th years, but Respondent No. 3 has, by a letter dated 31 August 2010, agreed to pay a substantial sum of Rs. 1,710 crores within 90 days from the date of acceptance letter of the Respondent Corporation and the remaining amount in the 2nd to 5th Years. It is, therefore, submitted that the project should start as early as possible and any further litigation will only result into uncertainty and unbearable financial burden on the Respondent-Corporation;

(viii) Without prejudice to the rights and contentions in this petition, Mr. Nariman, the learned senior counsel appearing for Respondent No. 3 has stated that Respondent No. 3 is ready to pay the entire contract amount of Rs. 2,100 crores up-front within 90 days from the date of the letter of acceptance by the Respondent-Corporation and Respondent No. 3 is also agreeable to have the concession period reduced from 16 years 22 months and 27 days to 16 years.

10. The submissions can now be considered.

11. The eligibility criteria specified in Clause 5.5.2.1 of the bid document stipulated a requirement of a minimum annual turnover in any one of the last three years as per the audited balance sheet/profit and loss account for a period starting not earlier than 31 March 2008. In the case of a consortium, the turnover had to be at least Rs. 1250 million (Rs. 125 crores) for all members taken together out of which, the lead member of the consortium was required to have an average annual turnover towards toll collection of at least Rs. 750 million (Rs. 75 crores). On 13 August 2009, the Petitioners submitted a break up, project wise of the receipt of toll collection of the lead member, SMS Infrastructure Ltd. For financial year 2007-08 the lead member of the consortium claimed a turnover of Rs. 97.53 crores in order to meet the requirement of a turnover of at least Rs. 75 crores in one financial year. Of this, the lead member claimed a turnover of Rs. 34.45 crores against a toll collection contract at New Delhi. However, it was found that for 2007-08, the work was executed by the lead member of the consortium on behalf of Banas Sands JV. This was clarified by the Petitioners in a letter dated 17 August 2009. In holding that the bid of the Petitioner was not responsive, MSRDC has found that the lead member of the consortium did not satisfy the eligibility criteria of a minimum toll turnover of Rs. 75 crores in one financial year, upon the exclusion of an amount of Rs. 34.45 crores for the Delhi toll contract where the project was executed on behalf of Banas Sands JV. Banas Sands JV is independently a consortium member of the Sadhav Prakash Consortium, which was one of the bidders for the contract in this case. This conclusion which has been arrived at by MSRDC cannot be regarded as perverse. The determination is consistent with the eligibility criteria. The rejection of the bid as non responsive on this ground does not suffer from any

illegality.

12. Clause 5.5.2.2 of the bid document stipulated as a condition of eligibility that at least one member of the consortium shall have experience of operating a minimum of twenty automated computerized toll lanes under one contract for at least one year. SMS Infrastructure Ltd., the lead member of the Petitioners' consortium, had participated earlier in what is described as a "short tender" of twenty six weeks in 2008 floated by MSRDC. In connection with that tender, the lead member had produced a certificate from the Hooghly River Bridge Commissioner in respect of Vidyasagar Setu Toll Plaza which showed that there were eighteen lanes involved in the work under the contract. The Learned Counsel appearing on behalf of MSRDC has drawn the attention of the Court to the pre-qualification notice issued by the Hooghly River Bridge Commissioner which was to the effect that toll bars will have to be installed at eighteen toll gates of the toll plaza. Out of the eighteen lanes, one "up" and one "down" lane had been converted into four lanes dedicated for two wheeler traffic for safety and smooth movement. The position was verified by the consultants appointed by MSRDC in a second Report dated 18 August 2009, as stated in the affidavit in reply. A site visit was jointly conducted together with the representative of the Petitioners on 13 August 2009. MSRDC has stated in its affidavit in reply that in a certificate of October 2008 submitted by the lead member of the consortium for the earlier tender of twenty six weeks, it had claimed an experience of operating an eighteen lane facility for the Vidyasagar Setu. Later, in a subsequent certificate dated 11 August 2009, the experience claimed was of twenty lanes. In any event, from October 2008 until August 2009 when the fresh certificate of experience was produced, the experience of twenty lanes was for the period of less than one year. The material upon which reliance has been placed by MSRDC before the Court supports the finding of ineligibility of the Petitioners' consortium. This finding essentially turns upon an evaluation of facts by MSRDC. The conclusion which was drawn by MSRDC cannot be regarded as perverse or contrary to the weight of the evidence on record. In the exercise of the jurisdiction under Article 226 of the Constitution, this Court would not be justified in reappreciating a determination of fact based upon which an inference of ineligibility has been drawn.

13. Finally, the attention of the Court has been drawn to the fact that on 18 August 2009, the consortium of the Petitioners was intimated of its tender being held to be non-responsive. Thereupon, Mr. D.V. Deshkar, who was the authorized representative of the consortium applied by his letter dated 18 August 2009 for refund of the earnest money deposit of Rs. 105 crores and Envelope 2 containing a financial bid. By the letter, MSRDC was requested to issue a demand draft or cheque towards refund of the EMD, in favour of the First Petitioner. Accordingly EMD of Rs. 105 crores was returned to an authorized representative on 18 August 2009 together with the financial bid. Once the financial bid was returned on the request of the authorized representative together with the earnest money deposit, no valid bid remained in the field. This petition has been instituted by

two members of the consortium. SMS Infrastructure Ltd., the lead member has not joined in the Petition.

14. It was urged on behalf of the Petitioners that the Consultants had underestimated the revenue realization. The Consultants, while computing the estimated concession period adopted an IRR of 11.50% and a 5% traffic growth rate. On this basis, the concession period was worked out as fifteen years. We do not propose to examine the contentions assailing the working out of the period by the Consultants, which was done on the basis of upfront payment of only Rs. 1350 crores to be made within ninety days of acceptance and the rest to be paid over a period of 2-3 years. Now that Respondent No. 3 has agreed to pay the entire amount of Rs. 2100 crores within ninety days, the contention pales into insignificance. In any event due consideration would now be given to the circumstance that the Third Respondent has agreed to make a payment of the entire amount of Rs. 2100 crores upfront, while reducing the concession period to sixteen years.

15. For these reasons, we are of the view that MSRDC was justified in coming to the conclusion that the bid submitted by the Petitioners was not responsive on the ground that it did not meet the eligibility criteria. That apart, upon the communication of ineligibility by MSRDC, the earnest money deposit was withdrawn and the financial bid was returned. The plea which was urged before the Court at the hearing was that if the financial bid of the Petitioners were to be opened, it would be found to be more favourable, in terms of the period of concession, than the bid which has been accepted. The submission is lacking in substance. Such an argument would have been open to a bidder who is found to be eligible and who had a grievance about the award of the contract. A bidder who does not meet the eligibility criteria, cannot complain of the award of the contract on the ground that its financial bid offers better terms. The question of comparing financial bids arises as between bidders who are eligible. The bid submitted by the Petitioners was non-responsive since the Petitioners did not fulfill the conditions of eligibility. There is hence no merit in the submission.

16. While we find that there is no substance in the petition, for the reasons noted earlier, Learned Senior Counsel appearing on behalf of the Third Respondent stated that the Third Respondent is ready and willing to pay the entire contract amount of Rs. 2100 crores upfront within ninety days from the date of the letter of acceptance of MSRDC and the Third Respondent has reduced the concession period from 16 years 11 months 27 days to 16 years. We record that statement.

17. For the reasons aforesaid, we do not find any merit in the Petition. The Petition is accordingly dismissed.