(2008) 12 DEL CK 0095

In the Delhi High Court

Case No : Writ Petition (C) No. 6638 of 2008

Reliance Infrastructure Ltd. and Others APPELLANT

Vs

National Highway Authority of India and Another RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:
Constitution of India, 1950 — Article 226
National Highways Authority of India Act, 1988 — Section 33

Citation : (2008) 12 DEL CK 0095

Hon'ble Judges : Mukul Mudgal, J;Manmohan, J

Bench : Division Bench

Advocate : A.M. Singhvi, Mahesh Agarwal, Rishi Agarwal and Akshay, Gopal Subramaniam, A.S.G., Gaurav Duggal and Chetan Chawla, for the Appellant;

Final Decision : Dismissed

Judgement

Manmohan, J.—The present writ petition under Article 226 of the Constitution of India has been filed for setting aside the letter dated 27th August, 2008 issued by National Highway Authority of India (hereinafter referred to as ?NHAI?) whereby the Petitioners have been held ineligible to participate in the financial bid for Hyderabad ? Vijayawada section from K.M. 40.000 to K.M. 221.500 of N.H.9 in the State of Andhra Pradesh. The Petitioners have further prayed for a direction to NHAI to issue ?Request for Proposal? Document, hereinafter referred as RFP, for the said road project so as to enable them to participate at the second stage of the bidding process, namely, the price bid.

2. It is pertinent to mention that in this writ petition, the Petitioners have also challenged the legality and validity of Clause 3.5.2. in the Request for Qualification (hereinafter referred to as ?RFQ?) by virtue of which only the six highest technical scorers can advance to the second stage of the tender i.e. price bid, but we have already upheld the constitutionality, legality and validity of the said Clause in our judgment and order dated November 3rd, 2008 delivered in WP(C) No. 566/2008 and reported as National Highways Builders Federation v.

The National Highways Authority of India and Ors. Consequently, the said challenge no longer survives.

3. The material facts of this case are that NHAI floated a tender for construction of a road between Hyderabad ? Vijayawada section from K.M. 40.000 to K.M. 221.500 of N.H.9 in the State of Andhra Pradesh. The bidders under the said tender had not only to fulfill the minimum eligibility criteria but had also to be short-listed amongst the top six highest scorers at the technical bid stage so as to be entitled to participate at the price bid stage.

4. Under Clause 2.2.2(B) of RFQ the minimum net-worth of the bidder had to be Rs. 365 crores. Clause 2.2.4(ii), stipulated that a bidder had to provide a Certificate from a Statutory Auditor specifying its net-worth.

5. In the present case, the Petitioners provided a Certificate from an Auditor ? Chaturvedi & Shah? showing the Petitioner No. 1?s net-worth at Rs. 8641 crores. Though, the net-worth stipulated in the Auditor?s Certificate was higher than the required net-worth of Rs. 365 crores, the Certificate admittedly did not state that it had been issued by a Statutory Auditor. The Net-worth Certificate issued by the Auditor of Reliance Energy Ltd. is reproduced hereinbelow for ready reference:

CHATURVEDI & SHAH

Chartered Accountants

TO WHOMSOEVER IT MAY CONCERN

We have examined the audited financial statements for the year ending March 31 2007 of M/s Reliance Energy Limited (hereinafter referred to as the ?the Company?). On the basis of such examination and the information and explanation given to us by the management, we hereby certify the Net-worth of the Company as set out in the following table:

Name of the Company Net-worth (Note 1) For year 1(2006-07) in Rs. Crore

Reliance Energy Limited 8,641.31 Note 1: Net-worth = (Subscribed and Paid up Equity + Reserves) ? (Revaluation reserves + miscellaneous expenditure not written off + accrued liabilities*)

* Accrued liabilities, represents liabilities not accounted in the books of account.

(Seal)

CHARTERED ACCOUNTANTS

Place: Mumbai

Dated: 16/01/2008.

6. The RFQ document stipulated that if a bid was filed by a consortium, then the net-worth of the bidder would also include its associates? net-worth. By virtue of Clause 3.2.1, the categories of experience was defined to include ?telecom? and ?

power?.

7. On 30th April, 2008, the NHAI sought clarification from the Petitioners with regard to a Power-of-Attorney issued by Reliance Energy. However, no clarification was sought with regard to the above referred Auditor?s Certificate.

8. In the initial evaluation exercise carried out in June, 2008 the independent financial consultant of NHAI awarded the Petitioner a Technical score of 439.19 against the Petitioners self-proclaimed score of 49628.67 for the following reasons:

Name of member/ associates Claimed score Evaluated score Remark Reliance Energy Ltd. (Member) 16708.470 In the experience Certificate it is not mentioned that it is from Statutory Auditor Reliance Communications Ltd. (associate) 32501.220 Certificate in support of Associate relationship with AAA Communication (P) Ltd. (member) is from Chartered Accountant but it has not been mentioned that it is from the Statutory Auditor. JPTEGCL 418.98 439.19 Due to the applicable Foreign Currency Conversion rate there is an increase in the Technical Score9. Thus, the reduction in score was firstly due to non-submission of documents certified by a Statutory Auditor in support of Associate Status and secondly because of submission of net-worth certificate from a Chartered Accountant without mentioning that it was from a Statutory Auditor of the company. Thirdly, the experience relating to electricity had been quoted in a consolidated form without giving the required project specific detail.

10. Dr. Singhvi, learned Senior Counsel for the Petitioners, stated that as the Petitioners ?were informed? that they were not being pre-qualified in the absence of a Statutory Auditor?s Certificate under Clause 2.2.4(ii), the Petitioners on 30th June, 2008 wrote to NHAI that the Certificate provided by the Petitioner along with its bid document was that of a Statutory Auditor although the words ?Statutory Auditor? had not been mentioned in the said Certificate.

11. It seems that the Petitioner made a similar representation to the Government of India, Ministry of Shipping, Road Transport and Highways Department (hereinafter referred to as ?the Ministry?). In pursuance to the Petitioner?s and other similarly placed bidders? representations, the Ministry on 2nd July, 2008 requested NHAI to send its comments to the representations within three days. It was also requested by the Ministry that for at least ten days the process of issue of RFP be deferred. It was further mentioned that the said letter had been issued with the approval of the Minister (S, RT&H).

12. On 7th & 10th July, 2008, the Petitioner again wrote to the Secretary to the Ministry regarding the alleged irregularities in the bidding process. In pursuance to the Ministry?s letter dated 2nd July, 2008, NHAI vide its letter dated 4th July, 2008 sent its comments to the representations made by the various bidders.

13. By another letter dated 11.07.2008 the Ministry directed NHAI to place the matter before its Board and requested that the process of issue of RFP be

deferred until further intimation. However, the Secretary to the Ministry on 11th July 2008 itself, at its own initiative, also appointed a two Member Committee comprising of the Director General (Road Development) & Special Secretary and Member Technical, NHAI to review the entire matter. The said Committee submitted its report, which was forwarded to the Ministry under cover of its letter dated 29.07.2008.

14. The recommendations of the Technical Committee appointed by the Ministry are reproduced hereinbelow for ready reference:

Recommendations

In view of above observations, the situation is now that evaluation for qualification under Hyderabad-Vijaywada project package has been carried out in different way as against the other seven packages, for which request for qualifications (RFQ) were received during the same period based on the same guidelines/RFQ document. As such the procedure being followed for other seven packages cannot be ignored. Further, in case of two project packages namely, (i) MP/Maharashtra Border-Dhule and (ii) Pimpalgon-Gonde, for which shortlist was finalized but the above procedural exercise is being carried out before the declaration of result. The Committee, therefore, feels that in order to have fair exercise, all the applicants of Hyderabad-Vijaywada project also deserve equity and natural justice. Had the same procedure been adopted for this package and the necessary clarifications been asked from the applicants, the outcome of the qualification exercise may have been different. Therefore, the Committee recommends that:

(i) In order to ensure equity and natural justice, NHAI may relook into the qualification exercise for this projects packages following the same procedure as for the other seven project package and ask the bidders for clarification on the qualification aspects without allowing them to submit additional document and without any addition in further claims of score as is being followed in other seven project packages. As such, it could be limited to clarification for example whether the Chartered Accountant furnishing certificate is actually the Statutory Auditor or not. Following the same procedure, NHAI may consider to give one week time for clarifications as being followed for subsequent cases subject to that the clarifications do not result in increase in claimed score.

(ii) This exercise could be carried out for all the applicants.

(iii) As a result of above exercise there is likelihood of change in the shortlist of top six bidders. In case it is decided to issue RFPs on the changed list of six shortlisted bidders, this may lead to further representations and possible litigation. Under the circumstances there could be two options for carrying the project further:

(a) NHAI Board may consider one time relaxation for this particular package and may increase the number of bidders in the shortlist to accommodate those who qualify in the review exercise and whose experience score is higher than the final score (after review) of the present lowest scorer (M/s Madhucon-Galfar-SREI)in the already declared shortlist. However, its implication on other seven project packages where evaluation is going on will also need to be kept in view as also the legal implications.

(b) NHAI Board may consider annulling the whole exercise and direct re-invitation of RFQ for this package (Hyderabad-Vijaywada). This would also meet the ends of justice as all prospective bidders would have an opportunity to apply and be evaluated as per the present evaluation procedure.

(Nirmaljit Singh) (G. Sharan) Member (Technical) Director General (Road Development) National Highways & Spl Secretary Department of Road Authority of India Transport & Highways.

15. By communication dated 7th August, 2008, the Ministry without waiting for NHAI Board?s decision asked NHAI to obtain necessary clarifications from the various bidders and to revaluate the technical score of all the bidders. The findings of the revaluation were directed to be placed before the NHAI Board for a decision. The relevant portion of the said letter is reproduced hereinbelow:

A meeting was taken by Hon?ble Minister (S, RT&H) on 5.8.2008 to review the progress of evaluation of RFQ and award of concessions for projects under NHDP. In the meeting taken by Secretary (RT&H), the matter relating to Hyderabad-Vijaywada Project was also discussed....

In order to expedite the process, it is requested that necessary clarifications from the applicants may be obtained immediately and the applications re-evaluated. The findings of the re-evaluation may be placed before the NHAI Board for a decision in the matter.

16. In view of the aforesaid directions of the Ministry, NHAI vide letter dated 08.08.2008 asked the Petitioner to furnish clarification on the following issues:

1 Furnish clarification for the below mentioned Project Code(s).

Project Codes Clarifications Required.

1a, 1b, 1c, 1d, 1e, 1f, 1g, (Reliance Energy Ltd.) To clarify details/specific document in the application which establishes associate relationship and to clarify that experience certificate is from the statutory auditor. (Please indicate the precise location/page number)

2a (AAA Communication Pvt. Ltd.) 1. Certificate to substantiate ?Associate relationship? from the Statutory Auditor is not available. Please clarify. Please indicate the precise location/page number.

2. To clarify whether the experience certificates are from Statutory Auditor. (Please indicate the precise location/page number)

17. However, in the forwarding letter accompanying the clarification it was

specifically mentioned as under:

For the sake of clarifications, we would like to inform you that no additional documents whatsoever will be accepted for the purpose of clarifications. The clarifications have to be in the form of a letter and you can refer to documents already submitted by you along with your RFQ Application.

18. On 12th August, 2008, the Petitioners sent their clarification. While it reiterated that the net-worth Certificate provided by the Petitioner along with the bid document was that of a Statutory Auditor, the Petitioner clarified in respect of AAA Communications Pvt. Ltd. that the annual report clearly mentioned that the said Company owned 63.41% of Reliance Communications. Additionally, the Petitioner also enclosed a new Certificate of a Statutory Auditor confirming the association between AAA Communications and Reliance Communications Ltd.

19. The clarification of the Petitioner concerning project codes at Sl. No. 1a to 1g regarding Associate relationship were accepted and its experience score increased. However, in respect of Associate status with AAA Communication Pvt. Ltd., NHAI?s independent consultant did not accept the certificate submitted by M/s. M.S. Sethi & Associates along with the RFQ application at page 50 as M/s. M.S. Sethi & Associates were admittedly not the Statutory Auditors of the Member Applicant. In fact, after receipt of Petitioner?s clarification, NHAI?s independent consultant increased the Petitioner?s score from 439.19 to 2354.51, but as the Petitioners still did not make it to the list of first six shortlisted bidders, it was not allowed to move to the price bid stage.

20. Dr. A.M.Singhvi appearing for the Petitioners submitted that NHAI?s insistence in the initial valuation of requiring the words ?Statutory Auditor? written on the net-worth certificate was a hyper technicality. He submitted that in any event because of the revaluation conducted by NHAI themselves at the insistence of two member Committee, this objection no longer survived.

21. Dr. Singhvi further submitted that Clause 2.2.9 did not require that to confirm association, a Statutory Auditor?s Certificate was required. According to him, the request for a Statutory Auditor?s Certificate with regard to confirming only the shareholding of a company in another company which does not increase or decrease a person?s financial capability or technical capability is perverse. He further pointed out that the annual report filed along with the bid document clearly mentioned that AAA Communications owns 63.41% share of Reliance Communications, but the same was arbitrarily ignored. Clause 2.2.9 is reproduced hereinbelow for ready reference:

2.2.9. In computing the Technical Capacity and Net-worth of the Applicant/ Consortium members under Clauses 2.2. and 2.2.3, the Technical Capacity and Net-worth of their respective Associates would also be eligible hereunder.

For purposes hereof, Associate means, in relation to the Applicant/Consortium member, a person who controls, is controlled by, or is under the common control with such Applicant/Consortium member. As used in this definition, the expression ?control? means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise.

22. Lastly, Dr. Singhvi submitted that despite Clause 3.2.2 of the RFQ stipulating that a bidder?s Power and Telecom projects are to be taken into account, the Respondents illegally did not consider both the businesses and kept the Petitioners out of the race through this illegal calculation.

23. Mr. Gopal Subramaniam, Additional Solicitor General, appearing for the UOI initially tried to minimize the importance of a Statutory Auditor?s Certificate by stating that only the most meritorious must proceed to Stage-II, namely, the price bid stage and for an oversight/mistake by an Auditor, a bidder should not be penalized. But when it was pointed out to Mr. Subramaniam that the stand of UOI seemed to be at variance with the stand of NHAI, as NHAI had rejected bids at the initial stage not only in Hyderabad ? Vijayawada project but in other similar projects also for want of a net-worth Certificate specifying that the same had been issued by a Statutory Auditor even though, the said Auditor may be a Statutory Auditor, Mr. Subramaniam took time to obtain instructions.

24. Subsequently, Mr. Subramaniam submitted to the Court that on a detailed perusal of the RFQ, he was of the view that the Statutory Auditor?s Certificate was not only a primary but a mandatory document as it was an assurance by a responsible authority that a bidder met the net-worth and experience criteria. In this context, he referred to Clauses 2.2, 3.2 as well as Annexures and Forms mentioned in Appendix I of the RFQ. The relevant portion of the said Clauses and Annexures are reproduced hereinbelow:

2.2 Eligibility of Applicants??

2.2.2 To be eligible for pre-qualification and short-listing, an Applicant shall fulfill the following conditions of eligibility:

(A) Technical Capacity: For demonstrating technical capacity and experience (the ?Technical Capacity?), the Applicant shall, over the past 5 (five) financial years preceding the Application Due Date, have:

(i) received payments for construction of Eligible Project; and/or

(ii) commissioned and paid for execution of BOT (Build-Operate-Transfer), BOLT (Build-Own-Lease-Transfer), BOO (Build-Own-Operate), BOOT (Build-Own-Operate-Transfer) or other similar projects that qualify as Eligible Projects; and/or

(iii) collected and appropriated revenues of BOT/BOL/BOO/BOOT or other similar projects that qualify as Eligible Projects,

such that the sum total of the above is more than Rs. 1460Crore (Rs. One thousand four hundred sixty crore) (the ?Threshold Technical Capability?).

Provided that at least one fourth of the Threshold Technical Capability shall be from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 3.2.1.

(B) Financial Capacity: The Applicant shall have a minimum Net-worth (the ? Financial Capacity?) of Rs365Crore (Rs. Three Hundred and Sixty Five Crore)

In case of a Consortium, the combined technical capability and net-worth of those members, who have an equity share of at least 26% each in such Consortium, should satisfy the above conditions of eligibility?..

2.2.4 The Applicants shall enclose with its application, to be submitted as per the format at Appendix-I, complete with its Annexures, the following:??.

(ii) certificate(s) from its statutory auditors specifying the net-worth of the Applicant, as at the close of the preceding financial year, and also specifying that the methodology adopted for calculating such net-worth conforms to the provisions of this Clause 2.2.4(ii). For the purposes of this RFQ, net-worth (the ? Net-worth?) shall mean the sum of subscribed and paid up equity and reserves from which shall be deducted the sum of revaluation reserves, miscellaneous expenditure not written off and accrued liabilities??

3. CRITERIA FOR EVALUATION?

3.2 Technical Capacity for purposes of evaluation.

3.2.1 Subject to the provisions of Clause 2.2., the following categories of experience would qualify as Technical Capacity and eligible experience (the ? Eligible Experience?) in relation to eligible projects as stipulated in Clauses 3.2.3 and 3.2.4 (the ?Eligible Projects?):

Category 1 : Project experience on Eligible Projects in highways sector that qualify under Clause 3.2.3

Category 2 : Project experience on Eligible Projects in core sector that qualify under Clause 3.2.3

Category 3 : Construction experience on Eligible Projects in highways sector that qualify under Clause 3.2.4

Category 4 : Construction experience on Eligible Projects in core sector that qualify under Clause 3.2.4

For the purpose of this RFQ:

(i) highways sector would be deemed to include highways, expressways, bridges, tunnels and airfields; and

(ii) core sector would be deemed to include power, telecom, ports, airports, railways, industrial parks, petroleum and natural gas, pipelines, irrigation, water supply, sewerage and real estate development??

3.2.3 For a project to qualify as an Eligible Project under Categories 1 and 2:

(a) It should have been implemented on BOT, BOLT, BOO, BOOT or other similar basis;

(b) The entity claiming experience should have held, in the company owing the Eligible Project, a minimum of 26% equity during the period for which Eligible Experience is being claimed.

(c) the capital cost of the project should be more than Rs. 146 Crore (Rs. One Hundred Forty Six crore); and

(d) the entity claiming experience shall, during the past 5 (five) financial years preceding the Application Due Date, have (i) commissioned the construction work of the project and paid for it, and/or (ii) collected and appropriated the revenues of such project after commencement of commercial operation??..

3.2.6 Applicant?s experience shall be measured and stated in terms of a score (the ?Experience Score?). The Experience Score for a given category would be the project costs or certified payments/receipts, as the case may be, divided by one crore and then multiplied by the applicable factor in Table 3.2.6 below. In case the Applicant has experience across different categories, the score for each category would be computed as above and then aggregated to arrive at his Experience Score.

Table 3.2.6. : Factors for Experience across categories. Category Factor

Category 1 1.25 Category 2 1.00 Category 3 0.75 Category 4 0.50

ANNEX-III FINANCIAL CAPACITY OF THE APPLICANT

(Refer to Clauses 2.2.2(B), 2.2.4(ii) and 3.4 of the RFQ)

Applicant type* Member Code** Net Cash Accruals Net Wroth***

Year1 Year2 Year3 Year4 Year5 Year1 Single entity Applicant Consortium Member 1 Consortium Member 2 Consortium

Member 3 Consortium

Member 4 TOTAL Name & address of Applicant?s Bankers:

* An Applicant consisting of a single entity should fill in details as per the row titled Single entity Applicant and ignore the rows titled Consortium Members. In case of a Consortium, row titled Single entity Applicant may be ignored.

** For Member Code, see instruction 4 at Annex-IV of this Appendix-I.

*** The Applicant should provide details of its own Financial Capability or of an Associate specified in Clause 2.2.9.

Instructions:

1. The Applicant/its constituent consortium members shall attach copies of the balance sheets, financial statements and Annual Reports for 5 (five) years preceding the Application Due Date. The financial statements shall:

(a) reflect the financial situation of the Applicant and its Associates where the Applicant is relying on its Associate?s financials;

(b) be audited by a statutory auditor;

(c) be complete, including all notes to the financial statements; and

(d) correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).

2. Net Cash Accruals shall mean Profit Tax + Depreciation.

3. Net-worth shall mean (Subscribed and Paid-up Equity + Reserves) less (Revaluation reserves + miscellaneous expenditure not written off + accrued liabilities)???

7. The Applicant shall provide an Auditor?s Certificate specifying the net-worth of the Applicant and also specifying the methodology adopted for calculating such net-worth in accordance with Clause 2.2.4 (ii) of the RFQ document.

ANNEX-IV

DETAILS OF ELIGIBLE PROJECTS

(Refer to Clauses 2.2.2(A), 3.2 and 3.3 of the RFQ)

Project Code:

Item Refer Instruction Particulars of the Project Title & nature of the project Category 5 Year-wise payments received/made or revenues appropriated 6 Entity for which the project was constructed/developed 7 Location Project cost/ revenues/payments 8 Date of commencement of Project/contract Date of completion/commission 9 Equity shareholding (with period during which equity was held) 10

Instructions : ???

6. The total payments received/made or revenues appropriated for each Eligible Project are stated in Annex-II of this Appendix-I. The figures to be provided here should indicate the break-up for the past 5 (five) financial years. Year 1 refers to the financial year immediately preceding the Application Due Date; Year 2 refers to the year before Year 1, Year 3 refers to the year before Year 2, and so on?..

12. Certificate from the client or the Applicant?s statutory auditor must be furnished as per format below.

13. If the Applicant is claiming experience under Categories 1 & 2, it should

provide a certificate from its statutory auditor in the format below;

Certificate from the Statutory Auditor regarding BOT projects

This is to certify that ____________________(name of the Applicant) is/was an equity shareholder in __________ (title of the project company) and holds/held Rs. *** cr. of equity (which constitutes __% of the total paid up and subscribed equity capital) of the project company from ______ (date) to ______ (date). The project was completed and commissioned on _____ (date of commission of the project).

We further certify that the total estimated cost of the project as on the date of commission was Rs. *** cr., of which Rs. *** cr. of capital expenditure was incurred during the past five financial years as per year-wise details noted below:

* * *

We also certify that the annual revenues collected and appropriated by the Applicant during the past five financial years were Rs. *** cr. as per year-wise details noted below:

* * *

Authorised Signatory

Name:

Designation :

Signature of the Authorised

Signatory and date.

14. If the Applicant is claiming experience under Categories 3 & 4, it should provide a certificate from its statutory auditors or the client in the format given below:

Certificate from the Statutory Auditor/Client regarding construction works

This is to certify that ____________________(name of the Applicant) was engaged by __________ (title of the project company) to execute _________ (name of project) for _______ (nature of project). The construction of the project commenced on ______ (date) and the project was commissioned on ______ (date). It is certified that _________ (name of the Applicant) received Rs. *** cr. By way of payment for the aforesaid construction.

We further certify that the total estimated cost of construction of the project is Rs. **** cr., of which Rs. **** cr. was paid to the Applicant by the project company during the past five financial years as per year-wise details noted below:

* * *

[It is further certified that the payments indicated above are restricted to the share of the Applicant who undertook these works as a partner or a member of joint venture/consortium.]

Authorised Signatory

Name:

Designation :

Signature of the Authorised

Signatory and date.

15. It may be noted that in the absence of any detail in the above certificates, the information would be considered inadequate and could lead to exclusion of the relevant project in computation of Experience Score.

25. He further submitted that any ambiguity in the Auditor?s Certificate would be contrary to public interest as most of the bidders were multi-national corporations and it would be difficult, if not impossible, for NHAI to verify the facts mentioned by the bidder, other than by requiring a Statutory Auditor to vouch for the same.

26. We are of the opinion that furnishing a net worth certificate by a statutory auditor was an essential condition of eligibility which was to be enforced rigidly and not treated merely as an ancillary or subsidiary condition which could be deviated from. In our view, an Auditor?s net worth certificate without specifying that it was being issued by a Statutory Auditor could not be considered to be responsive and conforming to the mandatory eligibility criteria as, firstly, the said certificate was of crucial, critical importance and interlinked with various other tender terms. The Statutory Auditor?s certificate had to be absolutely transparent and self-speaking. It was not the Respondents responsibility to conclude that an auditor?s certificate was a statutory auditors certificate either by way of a process of derivation or by way of search through a maze of papers. Secondly, the RFQ had cast a heavy duty on a responsible authority like a Statutory Auditor to vouch for facts and figures and any ambiguity or relaxation could, in our opinion, lead to disastrous consequences. It is pertinent to mention that most of the bidders were consortiums comprising of foreign companies and NHAI was in no position to verify their net worth or the value of the projects executed by them or the revenues generated by them from their projects. Thirdly, the project in question is an infrastructure project having huge financial stakes in which the bidders would have surely created a large professional team to prepare, scrutinize and submit their bids. Consequently, in our view, neither in law nor in equity, the Petitioners are entitled to any relaxation or waiver of the mandatory term of the tender.

27. Though Mr. Subramaniam, learned ASG, submitted that the Ministry had not interfered in the functioning of NHAI, the counter affidavit of NHAI candidly admits that the revaluation of the bids had been done only in accordance with

the directions of the Ministry. The relevant extract of the counter affidavit of NHAI is reproduced hereinbelow:

That it is the humble and respectful submission of the Respondent No. 1 that the entire sequence of events as aforesaid confirm that the Respondent No. 1 Authority has acted as per the directions of the Government of India, Ministry of Shipping, Road Transport and Highways?..

The whole exercise of re-evaluation was subsequent to the directions of the Government of India by which the Respondent No. 1 is bound under the provisions of Section 33 of the National Highways Authority of India Act, 1983????.

28. We have already held in accompanying judgment rendered by us in WP(C) No. 6792/2008 titled as GMR Infrastructure Ltd and Anr. v. National Highways Authority of India and Anr. that the Ministry?s order directing a review/ revaluation of bids was neither legal nor justified as the same was not in accordance with the provisions of the NHAI Act which envisages NHAI as an autonomous statutory body. In any event, in view of Mr. Subramaniam?s subsequent stand that the statutory auditors certificate was a mandatory requirement which could not be dispensed with, the entire raison d?etre behind the revaluation exercise directed by the Government of India no longer survived. Consequently, we are of the view that NHAI?s insistence of requiring the phrase ? Statutory Bidder? written on the net-worth certificate was not a hyper-technicality and the revaluation conducted at the directive of the Ministry was beyond its jurisdiction, illegal and unjustified. Therefore, the initial valuation exercise conducted by NHAI was proper and the Petitioners were not entitled to be short-listed for the RFP/price bid stage.

29. Moreover, we also do not agree with the submission that to confirm association, a Statutory Auditor?s Certificate was not required. NHAI has drawn our attention to the clarification issued by it during a pre-bid meeting held on 5th November, 2007. In the said clarification, it was specifically stated that to establish an associate relationship, a Statutory Auditor?s Certificate had to be provided.

30. The clarification is reproduced hereinbelow:

CLARIFICATIONS TO THE QUERIES RECEIVED FROM APPLICANTS WITH REGARD TO RFQ

Sub: Design, Engineering, Finance, Construction, Operation and Maintenance for 4/6 leaning of selected stretches on different National Highways under NHDP Phase III. ? Pre-Application Conference for 6 Sub-projects in the States of Andhra Pradesh, Orissa & Rajasthan approved by PPPAC vide minutes of meeting dt. 5.11.2007 ? Clarification Queries concerning RFQ.

S. No. Reference clause in RFQ Queries/Request Reply from NHAI 14. Regarding the definition of Associates provided in Clause 2.2.9, we would need further clarifications of the documentation to be provided to evidence the condition of associate of any member of the Consortium.

Supporting Statements certified by Statutory Auditor should be provided.

31. In our opinion, in view of the clarification provided by NHAI in its pre-bid meeting, it was mandatory on the part of the Petitioners to furnish a Statutory Auditor?s Certificate to establish its association.

32. Though the Petitioners had stated that the Associate Relationship can be verified from the Annual Report for the year ending 31.03.2008 submitted along with the RFQ, NHAI?s counter states that only on one of the unsigned pages in the Application, it had been written that Reliance Communications Limited is subsidiary company of AAA Communications. Moreover, as a complete balance-sheet along with Auditors report had not been submitted and the balance-sheets of earlier years submitted along with the application were only signed by the Director and not by the Statutory Auditor, the same could not be treated as an authentic supporting document in support of Associate Relationship.

33. We also find from NHAI?s affidavit that the experience relating to electricity business had been wrongly quoted in a consolidated form without giving the required project specific details which was a basic requirement for understanding in which Category the Project fell and whether the Project was having the required threshold limit.

34. Before we conclude, we may note that the RFQ document specifically prohibited any representation from a bidder who had not been shortlisted for the second stage of the tender, namely, the price bid. The relevant Clause 2.2.1 of the RFQ document reads as under:

E. QUALIFICATION AND BIDDING

2.21 Short-listing and notification

After the evaluation of Applications, the Authority would announce a list of short-listed pre-qualified Applicants (Bidders) who will be eligible for participation in the Bid Stage. At the same time, the Authority would notify the other Applicants that they have not been short-listed. The Authority will not entertain any query or clarification from Applicants who fail to qualify?..

35. Further, Clause 4.2(d) of the RFQ prohibited receiving of representations from the unsuccessful applicants. The said clause reads as under:

(d) ?Undesirable practice? means establishing contact with any person connected with or employed by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process.

36. Clause 2.18. of the RFQ states that all information submitted to NHAI shall be treated as confidential. The representations made by the Petitioner, however, clearly indicate that the information qua other bidders was available with the

Petitioner.

37. In our view, the Petitioner in approaching the Ministry tried to circumvent the bar imposed by Clauses 2.2.1 and 4.2(d) of the RFQ. We have already held in our accompanying judgment in GMR?s case (supra) that the Petitioner in order to achieve what was forbidden by Clauses 2.2.1 and 4.2(d) could not have adopted the route of approaching the Ministry. To our mind, in case the Petitioners were aggrieved by NHAI?s decision not to shortlist them amongst the six top technically qualified bidders, the Petitioners? remedy lay in approaching a Court of Law and not in filing representations to NHAI and the Ministry in violation of the specific stipulation in the RFQ. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Ors. reported in (2006) 10 SCC wherein the Petitioner in response to newspaper reports kept on supplying fresh documents for consideration to the Tender Committee, the Apex Court held that not only the Petitioner?s conduct constituted a breach of tender terms but it went against the very concept of fairness in the process of evaluation of bids.

38. Keeping in view the aforementioned facts and the conduct of the Petitioners, the present Petition is dismissed but with no orders as to costs.