

SUPREME COURT OF INDIA

Isolux-Soma-Omaxe Consortium

Vs.

Madhucon Projects Pvt. Ltd.

C.A.No.1826 of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

24.03.2009

JUDGEMENT

Dr.Arijit Pasayat, J.

1. Leave granted.

2. These three appeals are directed against the judgment of the Delhi High Court disposing of two writ petitions being W.P.(C) No. 6792/2008 and 6419/2008. The first writ petition was filed by GMR Infrastructure Ltd. and another, and the latter writ petition was filed by Madhucon Projects Pvt. Ltd. and another. The National Highway's Authority of India (in short `NHAI') had indicated to the writ petitioners in each writ petition that the writ petitioner was not eligible to participate in the second stage of the bid process. The tender in question related to design, engineering, construction, development, finance operation and maintenance of Hyderabad Vijaywada Section of the National Highway (NH-9) from KM 40.00 KM 221.500 in the State of A.P. under NHDP Phase IIA on Build, Operate and Transfer basis.

3. Factual situation is almost undisputed. There were 19 bidders and two of them were non-responsive leaving 17 bidders in the field. There are two stages in the evaluation according to points scored method. The initial stress is on financial stability and technical competence and experience. The modalities for short listing of bidders is covered by clauses 2.21 and 3.5.2. The latter clause reads as follows:

“The Applicants shall then be ranked on the basis of their respective Aggregate Experience Scores and short-listed for submission of Bids. The Authority expects to short-list upto 5 (five) pre-qualified Applicants for participation in the Bid Stage. The Authority, however, reserves the right to extend the number of short-listed pre-qualified Applicants ("Bidders") upto 6 (six).”

4. Placing reliance on clause 3.5.2 originally six persons were short listed. They were as follows:

“S.No. Name of the Bidder Re-evaluated Score 1Maytas Infra Limited Nagarjuna Construction 22779.70 Company Limited China Railway 18 Bureau Corporation Limited.

1Hindustan Construction company Limited-John 21657.26 Laing Investments Limited.

1GVK Power and infrastructure Limited Thiess 15722.52 Leighton India-Oriental Structural Engineers India Private Limited.

1Larsen Toubro Limited 15052.47 B.Seenaiah & Company Limited.”

5. GMR Infrastructure Limited-Punj Lloyd Limited 8362.73 6.Madhuchon Projects Limited-Galfar Engineering and 2839.00 contracting S.A.O.G. sultanate of oman-Wade Adams (Middle East) Limited Dubai, UAE-SREI Infrastructure Finance Limited.

“It appears that Central Government had in purported exercise of power under Section 33 of the *National Highways Authorities of India Act, 1986*, (in short the ‘Act’) imperated transparency in the process of evaluation and in fact re-evaluation was done in which the following six bidders were short-listed:

S.No. Name of the Bidder Re-evaluated Score

1. Maytas Infra Limited Nagarjuna Construction 24376.03 Company Limited China Railway 18 Bureau Corporation Limited.

2. Hindustan Construction company Limited-John 21657.26 Laing Investments Limited.

3. Cintra Concessions De Infraestructuas De 21247.98 Transporte, S.A. Shapoorji Pallonji and Company Ltd.

4. Larsen Toubro Limited 16232.58 B.Seenaiah & Company Limited.

5. GVK Power and infrastructure Limited Thiess 15722.52 Leighton India-Oriental Structural Engineers India Private Limited.

6. Isolux Corsan Concession-Soma Enterprise Ltd.- 9896.79 Omaxe Infrastructures and Constructions Private Ltd..”

6. Undisputedly a Committee was appointed to work out the modalities of the evaluation process. Challenge in the writ petitions was to the permissibility to apply Section 33 of the Act to individual tender process, as according to the writ petitioners it was exercisable only in respect of the policy matters and to that limited extent direction can be given by the

Central Government. The High Court apparently has accepted this stand of the writ petitioners.

7. Learned counsel for the appellants in each case submitted that the materials, which would have shown that the appellant in each of the appeals is eligible to be short-listed, have been allegedly kept out of consideration thereby making them ineligible. It is also submitted that two of the bidders (Maytas Infra Limited Nagarjuna Construction Company Limited-China Railway 18 Bureau Corporation Limited and Madhucon Projects Limited-Galfar Engineering and contracting S.A.O.G. sultanate of oman-Wade Adams (Middle east) Limited Dubai, UAE-SREI Infrastructure Finance Limited) do not have clean records and therefore their bids ought not to have been accepted when the stress is on transparency. It is pointed out that if these two are to be kept out of consideration, the appellants will have to be included amongst the six short-listed bidders.

8. The learned counsel for the NHAI submitted that in terms of clause 3.5.2 the choice has to be restricted to maximum six and cannot go beyond it. It is, however, stated that action has been taken against one of the short-listed bidders, i.e. Madhucon Projects Pvt.Ltd. Learned counsel appearing for the said party stated that the action initiated is the subject matter of challenge before the Delhi High court.

“We find that at the stage of short-listing the evaluation is on the basis of points score basis on financial stability and technical capabilities.

In the peculiar facts of the case let all the eight bidders be short-listed, i.e.

1. Maytas Infra Limited Nagarjuna Construction Company Limited China Railway 18 Bureau Corporation Limited.
2. Hindustan Construction company Limited-John Laing Investments Limited.
3. Cintra Concessions De ...Infraestructuas De Transporte, S.A. Shapoorji Pallonji and Company Ltd.
4. Larsen Toubro Limited B.Seenaiah & Company Limited.
5. GVK Power and infrastructure Limited Thiess Leighton India-Oriental Structural Engineers India Private Limited.
6. Isolux Corsan Concession-Soma Enterprise Ltd.- Omaxe Infrastructures and Constructions Private Ltd.
7. GMR Infrastructure Limited-Punj Lloyd Limited

8. Madhuchon Projects Limited-Galfar Engineering and contracting S.A.O.G. sultanate of oman-Wade Adams (Middle East) Limited Dubai, UAE-SREI Infrastructure Finance Limited.”

9. By increasing the number to eight practically no prejudice will be caused to any parties. It is for the NHAI to select the best bidder for undertaking the project which is of great importance. It is on record that expansion of the number was one of the recommendations of the Committee formed by the Government.

10. We are told that clause 3.5.2 is not insisted upon in subsequent tenders, thereby making it an open field. By mere inclusion in the list of short-listed bidders, no bidder has only the right to be considered in respect of its financial and technical bids. Since the project is of some urgency it would be appropriate to make the number of the short-listed bidders eight.

11. Needless to say that if any circumstance regarding the credibility of any of the bidders has come to the notice of the NHAI it is for it to take such action. Further if the aggrieved bidder has any grievance it can be agitated before an appropriate Forum. In that regard we express no opinion.

12. The appeals are accordingly disposed of.

13. In view of the aforesaid directions it is not necessary to go into the question as to the scope and ambit of Section 33 of the Act.