

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

WP(C) No. 1320/2023

CM No. 3182/2023

Cav No. 707/2023

Reserved on : 24.05.2023

Pronounced on : 29.05.2023

M/s Om Infra Ltd. New Delhi

.... Petitioner/Appellant(s)

Through:- Mr. Sunil Sethi, Sr. Advocate with
Mr. Navyug Sethi, Advocate

V/s

Chenab Valley Power Projects P
Ltd and ors.

.....Respondent(s)

Through:- Mr. A.P Singh, Advocate for
Caveator/respondents

CORAM: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

BRIEF FACTS:

1. The petitioner company, through the medium of the present writ petition, is aggrieved of an order in the shape of a communication No. CVPP/C&P/Kwar/HM-PKG/2023/230 dated 19.05.2023 issued by the respondent No. 3 whereby the Techno-Commercial bid dated 21.11.2022 submitted by the petitioner-company in response to NIT dated 11.08.2022 has been declared as non-responsive besides seeking other reliefs.
2. The respondent No. 1, Chenab Valley Power Projects (P) Ltd. (CVPPPL), is a joint Venture Company between NHPC (51 %) and JKSPDC (49%) formed at the initiative of Government of J&K and

Government of India with a view to harness the vast hydro potential of river Chenab. The respondent No. 1 is fully controlled, administered and managed by the Government of Jammu and Kashmir as well as Government of India.

3. As per the stand of the petitioner, the first notice inviting tender was issued by the respondent No. 1 being a NIT No. CVPP/Contracts/kwar/HM-PKG/2020 dated 06.01.2021 whereby, online bids were invited for an international competitive bidding for Design, Procurement, Manufacture, Inspection, Shop Assembly, Testing, Painting, Transportation, Site Storage and site erection, Testing and Commissioning of Radial Gates, Vertical Gates, Stoplogs, Gantry Cranes, Transhracks, Trashrack Cleaning Machine, Steel Liner for Pressure Shafts of KWAR HE Project. As per the stand of the petitioner, the Company, in terms of the NIT dated 06.01.2021 and Bid document issued thereunder, being fully eligible and qualified, participated in the tendering process by submitting bid vide bid form on 16.08.2021 after completing of host of various requirements and formalities attending on participation in the tendering process. However, respondent no.1 without specifying any reason or justification, withdrew/cancelled the tendering process on 25.4.2022 without assigning any reason for cancellation of the tender.
4. Further case of the petitioner is that on 11.08.2022, the respondent No. 1 issued fresh tender for the same Kwar Hydro electric project for Hydro-mechanical works.

5. Further stand of the petitioner is that the Petitioner-Company being fully eligible and qualified in terms of NIT dated 11.08.2022 participated in the tendering process by submitting its bid on 21.11.2022 i.e. well within the time frame stipulated and extended for submission of tender bids. It is also submitted that as per NIT dated 11.08.2022, mode of tendering specified in clause 1(3) reads as under:-

| | | |
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| "3 | <i>Mode of Tendering</i> | <i>Online: e-Procurement system (open tender ICB Basis) Stage-I: Part-I-Qualification requirement and Techno Commercial Bid and Part-II Price Bid. Stage-II: Reserve Bidding through https://www.eprocure.gov.in/eprocure/app"</i> |
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6. Further case of the petitioner is that after submitting the bid, the respondentno.1 started techno commercial evaluation and in this process, started seeking clarification regarding qualification and technical criteria from the bidders including the Petitioner-Company. The petitioner has specifically mentioned in the petition that in the month of November, 2022 four bidders submitted their respective bids in response to NIT dated 11.08.2022.
7. Further case of the petitioner is that on 05.12.2022, the petitioner received a letter dated 05.12.2022 from respondents, whereby, the Petitioner-Company was required to submit readable/legible copies of the last 5 years annual report which was complied by the petitioner on 06.12.2022.
8. It is also the stand of the petitioner that on 13.12.2022, the respondent No. 1 sent a second clarification letter to the petitioner-company seeking clarification on qualification criteria. It is also submitted that the petitioner-company duly submitted requisite clarification and also

provided all the requisite documents to the respondent No. 1 vide letter dated 17.12.2022.

9. The further stand of the petitioner is that on 14.12.2022 one more letter was sent by the respondent no.1 to the Petitioner-Company vide letter no. CVPP/CNP/Kwar/HMPKG/2022/4551/-dated 13.12.2022 regarding the seal impression of company secretary stamp on the ground noting that the stamp is not readable in the Resolution of Board. On 16.12.2022, respondent No. 1 again sent a letter dated 16.12.2022 regarding qualification forms and attachment, which was duly replied by the petitioner-company vide letter dated 23.12.2022 and fulfilled all requirements.

10. As per the stand of the petitioner, on 22.12.2022, the respondents asked the petitioner-company to rectify the technical data sheet and the petitioner-company duly rectified the data sheet and submitted the same to the respondents vide letter dated 29.12.2022.

11. The petitioner also stated that on 18.01.2023, the respondents sent a letter for clarification regarding form 4-B (current contract commitment) and on 23.01.2023, the petitioner-company replied to the letter dated 18.01.2023 and clarified about methodology used to calculate. On 24.01.2023, the respondents sent another letter regarding TRCM form. The petitioner-company submitted necessary reply and provided Form 14. On 25.01.2023 another letter was sent by the respondents vide letter No. CVPP/CNP/Kwar/HM-PKG/2023/4745 dated 25.01.2023 regarding amendment in the General Technical Specification. The petitioner further submitted that the petitioner-

company replied to the aforesaid communication on the same day and complied with the instructions.

12. Further case of the petitioner is that on 15.02.2023, the respondents sent a letter dated 15.02.2023, and asked the petitioner regarding amendment and the petitioner-company also complied with the terms. On 20.02.2023, the respondents asked for form 4-B, GST and O&M from the petitioner-company and the petitioner-company submitted its reply vide letter dated 21.02.2023.

13. The specific case of the petitioner is that on 27.04.2023, the petitioner-company sent a letter informing the respondents regarding updation of Bid capacity and annual turnover. As per the record, the petitioner-company sent one more letter informing the respondents about updation of Bid capacity and annual turnover. On 10.05.2023, another letter was sent by the petitioner-company to the respondents for clarification on Bid Capacity.

14. Further stand of the petitioner is that in spite of the fact that the petitioner company was in continuous touch with the respondents by virtue of the aforesaid communications mentioned in the preceding paragraphs, yet the respondents by virtue of impugned order/communication dated 19.05.2023 have rejected the Techno-Commercial Bid of the petitioner being non-responsive, and that too without assigning any reason.

15. Feeling aggrieved of the same, the petitioner through the medium of the present petition has called in question the aforesaid order/communication dated 19.05.2023 by virtue of which the Techno-

Commercial Bid of the petitioner has been rejected being non-responsive.

16. The petitioner, through the medium of the present petition has sought the following reliefs:-

“a) An appropriate writ, order or direction in the nature of writ of certiorari quashing order in the shape of communication no. CVPP/C&P/Kwar/HM-PKG/ 2023 /230 dated 19.05.2023 issued by respondent no.3 whereby the Techno-Commercial bid dated 21.11.2022 submitted by the petitioner-company in response to NIT No. CVPP/C&P/KWAR/HM-PKG dated 11.08.2022 has been declared non-responsive, being totally illegal, non-speaking, reasonless, in utter and blatant contravention of clause 30.1 of the bid document viz; Instructions to bidders and in blatant violation of the law laid down by the Hon’ble Supreme Court of India;

b) An appropriate writ, order or direction in the nature of writ of mandamus commanding the respondents to declare the Techno-commercial bid dated 21.11.2022 submitted by the petitioner in response to NIT No.CVPP/C&P/KWAR/HM-PKG dated 11.08.2022 as "responsive" and consider the Price bid submitted by the petitioner-company and if the Price bid submitted by the Petitioner-Company and if the price bid of the petitioner-company is found lowest, the award the contract for Design, Procurement, Manufacture, Inspection, Shop Assembly, Testing, Painting, Transportation, Site Storage & site erection, Testing & Commissioning of Radial Gates, Vertical Gates, Stoplogs, Gantry Cranes, Transhracks, Trashrack Cleaning Machine, Steel Liner for Pressure Shafts of KWAR HE Project in reference to NIT No.CYPP /C&P /KWAR/HM-PKG dated11.08.2022 in favour of the petitioner”

17. The case was listed before this Court on 23.05.2023 and on the said date, it has been brought to the notice of the Court by Mr. Sunil Sethi, learned senior counsel appearing for the petitioner that he has been supplied a copy of communication No CVPP/C&P/Kwar/HM-PKG/2023/251 dated 23.05.2023, wherein the reasons for the rejection of the petitioner’s bid have been spelled out and accordingly, he sought just one day’s time to file a supplementary affidavit by laying challenge to the communication/order. Accordingly, the supplementary affidavit

in terms of order dated 23.05.2023 was filed by the petitioner and the matter was heard at length on 24.05.2023 and reserved for judgment. However, Mr. D.S Rawat, Sr. Manager (Civil) CVPPL, Jammu who was present in person on the aforesaid date, has made a statement at the Bar that whatever position exists on that day i.e. 24.05.2023 shall be maintained till the judgment is pronounced in the case and further continuance of the interim order will be subject to the final outcome of the writ petition.

18. According to the petitioner, no reasons were assigned by the respondents while rejecting the case of the petitioner's bid being non-responsive vide communication dated 19.05.2023. The respondents subsequently issued another communication dated 23.05.2023, wherein, the detailed deliberations arrived at by the respondents have been supplied to the petitioner through the medium of the aforesaid communication forming Annexure-A.

19. The petitioner, accordingly, has filed the supplementary affidavit in which the petitioner has taken a specific stand that the reasons which have been spelled out in the aforesaid communication dated 23.05.2023 are deficient and contrary to the tender bid documents. The said affidavit was taken on record by this Court by virtue of order dated 24.05.2023.

ARGUMENTS ON BEHALF OF THE PETITIONER

20. Mr. Sunil Sethi, learned senior counsel along with Mr. Navyug Sethi, Advocate appearing on behalf of the petitioner has vehemently argued

that the order/communication impugned in the instant petition dated 19.05.2023 declaring the Techno-Commercial Bid of the petitioner company as non-responsive by the respondents is in utter violation and contravention of Clause 30.1 of the Bid Documents i.e. Instructions to Bidders. Learned senior counsel has also referred Clause 30.1 for reference of this Court which is reproduced as under:-

"30.1 However, the bidder(s) who wish to seek reasons for such decision of cancellation,/rejection, shall be informed of the same by the employer unless its disclosure could be expected to affect the sovereignty and integrity of India...."

21.The specific case of the petitioner is that the impugned communication does not in any manner disclose the reasons as to why the Techno Commercial Bid of the petitioner has been found to be non-responsive notwithstanding the fact that the petitioner company fulfilled all the eligibility requirements and conditions. Since no reasons were assigned in the aforesaid communication, the petitioner has prayed for quashment of the same.

22.Mr. Sethi further submitted that the communication impugned is also vitiated on the ground that the same has been issued in flagrant violation of principles of natural justice. The specific case of the petitioner is that before declaring the Techno Commercial Bid of the petitioner-company being non-responsive, a duty was cast upon the respondents to afford a reasonable opportunity of being heard to the petitioner-company with a view to show cause as to why Techno Commercial Bid is rejected. Since no reasons have been assigned, accordingly, as per learned senior counsel for the petitioner, the

communication/order impugned cannot sustain the test of law. Learned senior counsel further submits that no opportunity at all has been granted to the petitioner by the respondents while passing the impugned order/communication.

23. Learned senior counsel after relying upon the judgments passed by the Apex Court has laid emphasis that an authority in making an order in exercise of quasi judicial function must record reasons in support of the order it makes and the principles which have been enunciated by the Hon'ble Supreme Court in various authoritative pronouncements have not been followed by the respondents while issuing the order impugned. He further submits that the Techno Commercial Bid of the petitioner-company by no set of circumstances can be declared as non-responsive when the petitioner-company fully meets the eligibility criteria as per the terms and conditions of the NIT. Learned counsel has given the bid capacity calculation in para (G) of the instant writ petition without GST and with GST. As per the terms and conditions of the tender document, it is apparently clear that the bid capacity should not be less than INR 3036.30 million and as per the stand of the petitioner, the respondents have wrongly and erroneously evaluated the Techno Commercial Bid of the petitioner-company and rejected the same by declaring as non-responsive and that too without assigning any reason. Thus, as per the petitioner, the order impugned is ex-facie illegal, arbitrary and violative of the rights guaranteed to the petitioner.

24. Learned senior counsel has taken a specific stand in the supplementary affidavit that the reasons which have been spelled out while rejecting

the Techno Commercial Bid in the subsequent communication/order dated 23.05.2023 are deficient and contrary to the tender bid documents. Although the aforesaid communication dated 23.05.2023 has not been called in question, yet the petitioner has placed the same on record by way of supplementary affidavit in which a specific stand has been taken by the petitioner that the reasons are in flagrant violation of the terms and conditions of the tender bid documents. The petitioner submits that the respondents have pressed into service 03 reasons for rejecting the Techno-Commercial Bid of the petitioner-company which are summarized as under:-

- a) The petitioner-company applied a different formula of calculations for working out its capacity to bid in 2021 when NIT for the contract in question was first issued (though it was subsequently cancelled/withdrawn).
- b) The petitioner-company has applied the criteria different from the criteria which has been applied by other bidders.
- c) The petitioner-company has placed reliance upon the works executed in the financial year 2022-23 also, which is not acceptable to the respondents as it refers to the period of last date of filing of the tender bids.

25.He further submits that all the aforesaid three reasons given by the respondents in rejecting the Techno-Commercial Bid of the petitioner are not legally sustainable *inter alia* on various grounds:-

- i) The petitioner-Company having adopted a particular criteria in 2021 to project his eligibility does not necessarily mean that he has to follow the same formula in subsequent years also. It is submitted that if the Petitioner-Company is making calculations on the basis of formula which is acceptable as per the Tender document (Instructions to Bidders) and is not violative of the same. The Petitioner Company has worked out his eligibility as per the calculations made on the basis of tender documents (Instructions to Bidders) and has not infringed any condition thereof and as such the calculations made by the Petitioner-Company are legally tenable. It is further submitted that the respondents are illegally putting the Petitioner-Company to a situation where they want GST to be deducted from the current works executed by the Petitioner-Company whereas retaining the same in the works already executed by the Petitioner-Company. This is not legally permissible as per the tender document (Instructions to Bidders) and also amounts to changing the rules of the game to the detriment of the petitioner-company. The formulas and calculations, though already indicated in the afore-titled writ petition by

the Petitioner-Company, are reproduced herein below for ease of reference of this Hon'ble Court:

BID CAPACITY CALCULATION WITH GST

Available Bid Capacity=2.0 x AXN-B = (2.0 x 3239.20 x 3.58) -18541.60 =Rs.4651.12Million

Where; A=Maximum value of Works executed in any one year during last 3years = Rs.2892.15 Million (FY2021-22) **Maximum value of Works executed in anyone year with GST @ 12% = Rs.3239.20 Crore**

N=Number of years prescribed for completion of the subject contract package = 43 months = 43/12 Years = 3.58Years (As per ITB)

B=Value of existing commitments (as on bids submission date) and ongoing works to be completed in next "N" years with GST =Rs.18541.60Million

If the GST amount is not added in Annual Turnover then the bid capacity available considering the existing commitment without GST asunder:

BID CAPACITY CALCULATION WITHOUT

GST

**Available Bid capacity=2.0xAxN-
B=(2,0x2892.15x3.58)-7039.20
=Rs.3668.59Million**

Where; A=Maximum value of Works executed in anyone year during last 3 years **without GST** =Rs. 2892.15 Million (FY2021-22)

N=Number of years prescribed for completion of the subject contract package =43 months = 43/12 Years = 3.58Years (As per ITB)

B=Value of existing commitments (as on bid submission date) and ongoing works to be completed in next "N" years **without GST** =Rs.17039.20Million

- ii) That as per the above calculations in both the situations whether GST is added or not added, the

Petitioner-Company gets selected. However, the respondents want to selectively apply the GST to one type of work and not apply to the other type of work. More specifically the respondents want the GST to be added for works "Form4B" (Value of existing commitments) whereas they do not want GST to be added for works "Form-4A" i.e. maximum value of works executed in any one year during the last three years. This is creating a lopsided picture and cannot really determine the capacity to work as is the requirement of the Tender document (Instructions to Bidders).

iii) That the reason for rejection of the Techno-Commercial Bid of the Petitioner-Company by the respondents on the ground that the other bidders have followed a different pattern/formula is not again tenable inasmuch as the only way Petitioner-Company can be defeated by showing that the formula adopted by the Petitioner is not in consonance with the Tender document (Instructions to Bidders). The wrong formula followed by other bidders cannot be a ground for negating the rights of the Petitioner-Company and for rejecting its Techno-Commercial Bid.

- iv) That so far as the claim of the respondents in the reasons communicated to the Petitioner-Company after filing of the writ petition, that the Petitioner-Company has sought benefit of the works which have been concluded on the date of submission of its bids in reference to NIT dated 11.08.2022, it is profitable to refer to clause 10.3.B.4 which deals with the situation and specifically mentions that the relevant period for consideration of the bid capacity is the opening of the Technical bid as well as price bid, since the price bid has to be opened later in time, therefore, the bid capacity of a bidder at the time of opening of price bid has to be considered. Be that as it may, the bidding having not been concluded as the price bid has not been opened yet, therefore, the eligibility has to be seen on the date of opening of the price Bid, and in terms of condition referred herein above, any bidder can improve and prove his bidding capacity upto the date of opening of its price bid and the main purport of the eligibility condition is to check the capacity of the bidder to successfully execute the contract. That being the situation, the Petitioner-Company in any case is qualified in all the situations. The Techno-commercial bid of the Petitioner-Company has been

wrongly and erroneously' rejected by the respondents.

- v) That the projected plea of the respondents with respect to the jurisdiction of this Hon'ble Court of judicial review in the contracts matters is no more *res integra* inasmuch the Hon'ble Supreme Court of India in catena of judgments has held that judicial review in contract matters is permissible at least to check whether the terms and conditions of the bid documents (Instructions to Bidders) are followed properly or not. The present case is not a case of factual dispute between the parties. Rather facts have not been disputed at all. The requirement of the bid capacity is admitted, the techno-commercial bid submitted by the Petitioner-Company is also admitted and the works executed by the Petitioner are also admitted, but it is only a question of interpretation of the bid documents and terms and conditions of the NIT, which falls within the scope of judicial review.
- vi) That surprisingly, the illegality of the respondents does not stop here. The petitioner in order to expose the illegality and irregularity committed by the respondents, seeks to place on record a communication dated 19" May, 2023 which has

been sent one of the bidders namely M/s PES Engineers Pvt. Ltd. in which despite accepting its Techno-Commercial Bid, the respondents are still asking the said bidder to submit qualification documents. This goes to the root of the whole process and smacks of arbitrariness resorted to by the respondents and clearly establishes that the respondents are working with a preconceived mind and notion as they were not having the complete documents of the bidder who has been declared responsive as regards its Techno-Commercial Bid.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

26. Mr. A.P Singh, learned counsel appearing as Caveator has been heard at length and, accordingly, Caveat stands discharged. He has filed objections, which have also been taken on record to the aforesaid petition.

27. The respondents have taken a specific stand that as per terms and conditions of NIT being Clause No. 10.3.B.4 of NIT, one of the essential requirement i.e. qualification criteria in order to be techno commercially responsive was the Bid Capacity of the bidder at the time of opening of bids (technical as well as price bid) not being less than INR 3036.30 million equivalent to US \$ 39.01 million. The aforementioned clause is reproduced herein under as:

“Bid Capacity

The available Bid Capacity of the bidder at the time of opening of Bids, (technical as well as price bid) calculated as under should not be less than INR 3036.30 million or equivalent US \$ 39.01 Million. Available Bid Capacity= 2.0 x AxN-B,

Where;

A = Maximum value of works executed in any one year during last 3 years.

N = Number of years prescribed for completion of the subject contract package.

B= Value of existing commitments (as on bid submission date) and ongoing works to be completed in the next 'N' years (43/12).

Bid capacity shall be the qualification criteria and shall be submitted at the time of submission of bid and the bid capacity shall also be assessed at the time of opening of price bids. The Bidder shall submit documentary evidence together with a certificate from its statutory auditors for establishing Bid capacity, which shall not be older than 3 months from the last date of submission of bid and opening of price bids.

Notes:

(i) For conversion to US\$, the exchange rate (s) prevailing on the last date of bid submission shall be considered.

(ii) The Eligibility Form-4A& 4B be duly filled up and certified by CA/CMA/Public Certified Accountant in this regard.”

28. The specific case of the respondents is that the petitioner while submitting his online Bid vide bid form dated 21.11.2022, and filled the qualification form/eligibility form 4A and 4B duly certified by Chartered Accountant, wherein, component A being the maximum value of works executed in any one year during the last 3 years was shown to be **INR 2892.20 million**, inclusive of GST and qualification

form 4B showed the component B being the value of existing commitments and ongoing works as **INR 17039.20 million** exclusive of GST.

29. Further stand of the respondents is that with regard to the methodology adopted for calculating the value of component B in the aforementioned Bid form-B, a response/clarification was sought from the petitioner and the petitioner was also apprised about the different methodology adopted by the company in the earlier NIT dated 06.01.2021 and the clarification was sought regarding the change. In response, the petitioner submitted its reply on 23.01.2023 indicating that for the purpose of present work they have excluded the value of GST and O&M cost.

30. The respondents further submit that dissatisfied with the vague and unclear reply of the petitioner, once again, vide letter dated 20.02.2023 informed the petitioner regarding the need to clarify the bid capacity as entered in form 4B strictly in tune with tender provisions, as there did not arise any occasion to submit the current commitments on account of adjustment of GST and O&M cost to which vide letter dated 21.02.2023, the petitioner replied again on same terms as stated in the previous communications.

31. The respondents further submitted that the Tender Evaluation Committee, during the process of the evaluation of Bid Capacity found out that vide letter dated 10.05.2023, the calculation and documents submitted by the petitioner were in contradiction to the calculation and documents submitted by the bidder at the time of the submission of bid

which were misleading as false calculation and submissions were made by the petitioner to establish its Bid Capacity as per the NIT in the letter dated 10.05.2023 and CA certificate reflected the component A being INR 2892.20 million exclusive of GST.

32.As per the stand of the respondents, the petitioner had tried to play mischief while submitting his Bid as he did not have the Bid Capacity as required under the terms & conditions of the NIT. Learned counsel for the respondents has vehemently argued that the relief which is sought in the present petition is not available to the petitioner in the light of the fact that the petitioner having been found ineligible as per the expert Tender Evaluation Committee comprising of five different Head of Departments of different fields of the company being Group General Manager (Cost Engineering Department) General Manager (Contracts and Procurement), General Manager I/C Kwar HE Project, General Manager (Finance) and General Manager (Design HM), cannot seek indulgence of the Court in exercise of its power of judicial review to interfere or second guess the assessment made by the Committee. He further submits that it shall not be in public interest to exercise judicial review in a commercial matter even if an error in the assessment or prejudice to the tenderer is made out.

33.Learned counsel further submits that the petitioner has not come to this Court with clean hands as he has not apprised this Court regarding the change in calculation and submissions made by it when clarification was sought by the respondents time and again and thus, played mischief to stall the tendering process undertaken by the respondents

which is a Hydro Power Company developing Pioneer Projects and Projects having National Importance involving huge impact on the public exchequer. He further submits that in case the interim relief as prayed for is granted to the petitioner, it would lead to escalation of cost worth 2.5 crores approximately per day, which is against the public interest and almost everyday's delay to conclude the tendering process would lead to a financial burden on the UT of Jammu and Kashmir (having 49% share) and NHPC, a Government of India enterprise (having 51% share).

34. Learned counsel for the respondents further pleaded that the construction activities of the project will result in direct and indirect employment to around 2500 persons and will contribute in over all socio-economic development of the Union Territory of J&K.

LEGAL ANALYSIS

35. Heard learned counsel for the parties at length and perused the record.

36. With the consent of learned counsel for the petitioner and caveator representing the respondents, the case is taken up for final disposal.

Admit.

37. From the bare perusal of the terms and conditions of NIT being Clause No. 10.3.B.4 of NIT, one of the essential requirement i.e. qualification criteria in order to be "**Techno commercially responsive**" was the Bid Capacity of the bidder at the time of opening of bids (technical as well as price bid) not less than **INR 3036.30 million**.

38. From the record and pleadings, it is manifestly clear that the petitioner while submitting online bid form dated 21.11.2022 submitted its bid and filled the qualification form/eligibility form 4A and 4B duly certified by Chartered Accountant, wherein component A being the maximum value of works executed in any one year during the last 3 years was shown to be **INR 2892.20 million**, inclusive of GST and qualification form 4B showed the component B being the value of existing commitments and ongoing works as **INR 17039.20 million** exclusive of GST.

39. As per clause 10.3.B.4, the available bid capacity of the bidder at the time of opening of the bids (Technical as well as Price Bid) calculated should not be less than INR 3036.30 million or equivalent US \$ 39.01 million but admittedly, in the present case, the bid capacity of the bidder has fallen short of the aforesaid figure and rightly so, the respondents have held the petitioner's **Techno Commercial Bid being non-responsive**. The Bid Capacity which is specified in the aforesaid Clause shall be the qualification criteria and was required to be submitted at the time of submission of the bid and the Bid Capacity was also required to be assessed at the time of opening of the price bid. The bidder was required to submit the documentary evidence together with the certificate from the statutory auditors for establishing bid capacity which shall not be older than 3 months from the last date of submission of bid and opening of price bids.

40. It has also come to fore that the Tender Evaluation Committee during the process of evaluation of the bid capacity found out that the

calculation and document submitted by the petitioner were in contradiction to the calculation and document submitted by the bidder at the time of submission of bid and were misleading as false calculations and submissions were made by the petitioner to establish its Bid Capacity as per the NIT. This aspect of the matter has not been rebutted or replied by the petitioner and in absence of the same, the decision of the Tender Evaluation Committee cannot be faulted/rejected.

41. The CA certificate reflected the component A being INR 2892.20 million exclusive of GST, thus, making it clear that the petitioner had tried to play mischief while submitting his bid and did not have the Bid Capacity as required under the terms and conditions of the NIT.

42. The respondents with a view to fortify their claim have also placed on record the copy of the supplementary Tender Evaluation Committee report dated 18.05.2023 along with the reply. The deliberations of the Committee are reproduced as under:-

“Committee has gone through the submissions of M/s OM Infra Ltd. Vide letters dt. 27.04.2023, 03.05.2023 and 10.05.2023 by M/s OM Infra Ltd. and submits as under:

i) According to tender conditions, Bid Capacity is to be calculated on the basis of “Maximum Value of works executed in any one year during last three years” (Cl. 10.3.B.4 of NIT). Further, the bidder shall submit documentary evidence with a certificate from its statutory auditors for establishing bid capacity, which shall not be older than three months from the last date of submission of bid and opening of price bids. The cut-off date for submission of bid was 22.11.2022 (online) i.e. before closure of FY 2022-23. Accordingly, bid capacity was submitted by the bidder on the basis of “Value of works executed during last three years ending FY 2021-22” and the same has been considered during evaluation of bid capacity by the TEC in its earlier recommendation dt. 17.04.2023.

In terms of letter dated 27.04.2023, bidder has now updated the bid capacity by taking into consideration “Value of works executed during FY 2022-23 (including figures of work executed after the last date of bid submission i.e. 22.11,2022)”. Further vide letter dated 03.05.2023, the bidder has reiterated their earlier stand in terms of letter dt. 27.04.2023 stating further that they will submit the revised Bid Capacity calculation certificate from statutory auditor.

However, there is no provision in the tender documents which provides for consideration of Value of works executed after bid submission date for calculating the bid capacity. Hence the submission made for the FY-2022-23 cannot be considered for the evaluation of bid capacity submitted by M/s OM Infra Ltd.

ii) In furtherance to their letter dt. 03.05.2023, M/s OM Infra Ltd. vide their letter dt. 10.05.2023 has submitted CA certificate for the updated bid capacity based on value of work executed during FY 2020-21, FY 2021-22 and FY 2022-23 and submissions regarding GST. In the said certificate, the CA has mentioned that the furnished information has been verified by them from the audited Balance Sheet of the Company of respective years and the same is exclusive of GST and any kind of taxes (Annexure —D)

Incidentally, the bidder has also submitted Bid Capacity along with CA certificate based on value of work executed during FY 2019-20, 2020-21 & FY 2021-22 at the time of submission of bids. In the said certificate, the CA has mentioned that the furnished information has been verified by us from the audited Balance Sheet of the Company of respective years, It has also been stated in the certificate that the Project Cost is inclusive of GST (Annexure -E).

It was observed that the calculation and documents (certified by CA) submitted by the bidder vide letter dated 10.05.2023 are in contradiction to the submission made at the time of submission of bids, hence the documents provided vide letter dated 10.05.2023 cannot be considered for the calculation of bid capacity.

Now, ‘TEC after detailed deliberations is of the opinion that the bidder has already given sufficient opportunity by seeking number of clarification on Bid Capacity from time to time and also given reasonable time to establish its bid capacity but the bidder did not provide the documentary evidence which establish the available bid capacity as per NIP conditions and hence the bid capacity submitted by the bidder does not meet the criteria as laid down under NIT Clause no. 10.3.B.4 for Bid Capacity.

1.3.2 In addition to above, clarification has been sought by C&P Division

from M/s Texmaco Rail & Engineering Ltd. vide letter dated 01.05.2023 with respect to the observation raised by Finance Division vide note dated 20.04.2023 regarding Arbitration/ litigation cases as per clause no. 10.2 (f) of NIT. In response, M/s Texmaco Rail & Engineering Ltd, has submitted the information as per clause no.10.2(f) of NIT vide their letter dated 02. 05, 2023 email on 03.05.2023 (Annexure-F).

Further, regarding status of documents/ information submitted by the bidders in terms of cl no. 11 of NIT, it has been reiterated that any shortcomings/ inadequate information in the submissions made by the bidders were noted which required clarifications/ submission of documents, the same were received from all the bidders and the same has been already been deliberated under Para 9 of TEC report dated 17.04.2023. All the bidders-have submitted the requisite documents as stipulated under cl no. 11 of NIT.

4 RECOMMENDATION OF TEC

Considering the deliberation of TEC under Para 1.3, M/s OM Infra Ltd: still does not meet the: qualification criteria for Bid Capacity as stipulated in clause no. 10.3.B.4 of NIT. Further, suggestions of Finance during concurrence of earlier TEC Report dt. 17.04.2023 have been duly addressed by C&P Division.

Therefore, TEC reiterates its earlier recommendation in terms of Para 13 of its report dt. 17.04.2023 for approval of Managing Director.”

43. Thus, in the light of the aforesaid deliberations of the Tender Evaluation Committee mentioned supra, the petitioner-company did not meet the qualification criteria for bid capacity as stipulated in Clause 10.3.B.4 of NIT and has rightly been held as non-responsive.

44. The next question which arises for consideration in the present case is with regard to the methodology adopted by the petitioner in which the petitioner has excluded the value of GST and O&M cost component-B in the bid form 4B.

45. A response was sought from the petitioner and the petitioner was also informed about the different methodology adopted in the earlier NIT dated 06.01.2021 to which the petitioner replied indicating that for the

purpose of the present work, the petitioner has excluded value of GST and O&M cost. Consequently, the record reveals that the petitioner was directed to clarify the Bid Capacity as entered in form 4 B as per the terms and conditions of the Tender Document. Thereafter, the petitioner updated the Bid Capacity by taking into consideration the value of the works executed during the Financial Year, 2022-23 including the figures of the work executed after the last date of bid submission i.e. 22.11.2022. However, as per Tender Provision, the cut-off date for submission of bid was 22.11.2022 (online) i.e. before closure of Financial Year 2022-23.

46. I have gone through the terms and conditions of the Tender Provisions and there is no provision in the Tender Document which provides for consideration of value of the works executed after the bid submission date for calculating the Bid Capacity. In absence of any such provision in the tender document, the stand of the petitioner to add the value of the works executed for the FY 2022-23 after the last date of submission of bid i.e. 22.11.2022 could not be considered along with evaluation of the Bid Capacity.

47. Therefore, the decision of the expert Tender Evaluation Committee comprising five different Head of Departments of different fields being experts in the field of the company has rightly found the petitioner ineligible.

48. This Court in exercise of its power of **judicial review** cannot review the said decision in a commercial matter even if an error in the assessment or prejudice to the tenderer is made out as held by the three

judge Supreme Court ruling in *M/s Galaxy Transport Agencies Vs. New JK Roadways, 2020 SCC Online SC 1035*. The Apex Court has held that the author of the tender document is best person to understand and appreciate its requirements, and thus its interpretation should not be second-guessed by a Court in judicial review proceedings. The constitutional Courts having no expertise in the matter cannot appreciate the terminology used in the tender documents unless there is *malafide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

49. The essence of law laid down by the Hon'ble Supreme Court in various authoritative pronouncements leads to the irresistible conclusion that the Court should give way to the opinion of the experts in matters concerning tenders involving technical evaluation by the Technical Evaluation Committee unless the decision is totally arbitrary or unreasonable. Thus, this Court cannot act as a Court of appeal over the decision taken by the appropriate authority as the authority floating the tender is the best judge of its requirements and therefore, the interference of the Court should be minimal.

50. In the present case, the Tender Evaluation Committee has assigned the reasons for rejecting the bid of the petitioner-company as non-responsive after appreciating all the material facts on record and after giving an opportunity of being heard to the petitioner-company by assigning reasons which cannot be faulted. The law has been stretched even to an extent that if two interpretations are possible, then the interpretation of the author must be accepted and the Courts will step to

interfere to prevent arbitrariness, irrationality, bias, mala-fide or perversity and in the instant case, there is no such foundation or pleading by the petitioner as such, in absence of that, the decision of the respondents cannot be faulted.

51. Tenders are floated and offers are invited for highly complex technical subjects which 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 is also taken to ensure objectivity. Bidders' expertise and technical capability/capacity must be assessed by the experts. Where a decision is taken in consonance with the terms and conditions of the tender document and subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. The principle that is applied to scan and understand an ordinary instrument relatable to the contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills.

52. Having said so, this Court does not find any fault with respect to the deliberations arrived by the Technical Evaluation Committed to reject the Techno-Commercial Bid of the petitioner being non-responsive.

53. There is a paradigm shift in the approach of the Courts, especially Constitutional Courts, in matters involving staying of tendering process undertaken for the welfare of public. Whether the tender pertains to an infrastructure project or any other project of public importance, the

approach of the Court recently has been to relegate the parties to seek damages for wrongful exclusion even in case the Court finds total arbitrariness. The Court must refrain from granting injunction/stay even in cases where arbitrariness is established. This aspect of the matter has been laid down by the Hon'ble Supreme Court in case titled **M/s N.G Projects Ltd. vs. M/s Vinod Kumar Jain and ors; 2022 (6) SCC 127**, the operative portion of which is reproduced as under:-

“23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon “such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

54. The Hon'ble Apex Court has sounded word of caution in another judgment passed *in Silppi Constructions Contractors V. Union of India; 2019 SCC Online SC 1133* wherein it was held that the Courts must realize their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical

issues, the Courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain.

55. As laid down in the judgments cited above, the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. It was held as under:-

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of 12 2019 (6) SCALE 70 restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

56. Reliance is also placed on *National High Speed Rail Corpn. Ltd. Vs. Montecarlo Ltd*; 2022 SCC OnLine SC 111, wherein it has been held that:-

“Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner’s notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved.”

57. Recently, in 2023, the Supreme Court in the case of *Tata Motors Limited v The Brihan Mumbai Electric Supply & Transport Undertaking (Best) And Ors.* [Civil Appeal No.3897 of 2023 (arising out of SLP(C) NO. 15708 OF 2022)] has made some relevant observations resonating the principles of judicial restraint in contractual matters. The relevant paragraphs are: -

48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not

interfere where such interference will cause unnecessary loss to the public exchequer.

52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in Association of Registration Plates v. Union of India and Others, reported in (2005) 1 SCC 679.

58. In the present case, the petitioner participated in the tender process, fully conscious of the conditions of the NIT which expressly in the unequivocal terms requires as per 10.3.B.4, the available Bid Capacity of the bidder at the time of opening of the bids, (technical as well as price bid) calculated which should not be less than INR 3036.30 million to be techno commercially responsive and having fallen short of that, the challenge is not maintainable.
59. The petitioner is seeking to challenge the rejection of the bid by advancing its own interpretation of tender conditions which is not permissible under law. This Court cannot sit in appeal over the merit of the terms and conditions of the tender or the Evaluation Committee which determination ought to be left to the experts in the field. The decision in the present case has already been taken by the Tender Evaluation Committee having experts in the field and this Court does not have the expertise to correct the administrative decision as that would amount to review without the necessary expertise rendering it fallible.
60. The law has been settled by the Apex Court in various authoritative pronouncements that judicial review of administrative action is intended

to prevent arbitrariness, irrationality, unreasonableness, bias and malafide. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind;

- a) A contract is a commercial transaction
- b) Evaluating tenders and awarding contracts are essentially commercial functions.
- c) Principles of equity and natural justice stay at a distance.

If the decision relating to award of contract is bonafide and is in public interest, Courts will not, in exercise of powers of judicial review interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

61. Before interfering in tender or contractual matter in exercise of power of judicial review, the Court can examine the process adopted or whether the decision made by the authority is malafide or intended to favour someone. Secondly, if the process adopted or the decision made is so arbitrary and irrational, then the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached. The instant case does not fall in the aforesaid exception as the record does not reveal any arbitrariness which warrants interference by this Court, especially in a matter involving such a commercial project of national importance, in which judicial restraint is advised.

62. Thus, in the light of the aforesaid legal position, judicial interference in the matters concerning contractual matters must be minimal especially in case where there is propensity of negative impact on the public exchequer. In the present case, judicial interference is not warranted as there is no arbitrariness or *malafide* being perpetuated or pleaded. Therefore, this Court adopts an approach of judicial restraint in the instant case considering the public interest and financial implications involved on the public exchequer.

CONCLUSION:

63. In the light of the aforesaid legal position discussed hereinabove coupled with the peculiar facts and circumstances of the case, the present petition is devoid of any merit, deserves dismissal and accordingly, the same is dismissed for the reasons stated herein above.

(Wasim Sadiq Nargal)
Judge

JAMMU
29.05.2023
Tarun

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|--------------------------------------|-----|
| Whether the judgment is reportable ? | Yes |
| Whether the judgment is speaking ? | Yes |