



GAHC010035172021



THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WP(C) No. 1242/2021

M/s Yashnand Engineers and Contractors Pvt. Ltd.
A Company duly incorporated under the provisions
of the Companies Act, 2013 as amended,
having its registered office at 214/5, Khyati Complex,
Near Mithakhali Garden, Ellisbridge, Ahmedabad,
Gujarat - 380006 and represented by Shri Devang Shah.

.....Petitioner

-Versus-

1. The State of Assam,
represented by the Commissioner and Secretary to the
Government of Assam, Public Works (Building and NH)
Department, Dispur, Guwahati - 781006, Assam.
2. The Chief Engineer, PWD (Building), Assam,
Chandmari, Guwahati – 781003.
3. The Executive Engineer, GMC Branch Office of the Chief Engineer
PWD (Building), Assam, Chandmari, Guwahati – 781003.
4. The Senior Architect (B/M), office of the PWD (Building), Assam,
Chandmari, Guwahati - 781003.

.....Respondents

Advocates :

For the petitioner

: Mr. G.N. Sahewalla, Senior Advocate,



For the State Respondents : Mr. D. Senapati, Advocate
: Mr. D. Saikia, Advocate General, Assam
: Sri. B. Gogoi, Standing Counsel, P.W.D.
Date of Hearing : 13.08.2021
Date of Judgment : 23.09.2021

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER

The writ petition under Article 226 of the Constitution of India has been preferred by the petitioner, a company registered under the provisions of the Companies Act, 2013, assailing the decision of the Technical Bid Evaluation Committee taken in a meeting held on 16.02.2021 wherein the technical bid submitted by the petitioner in response to a Press Notice bearing no. GMC.81/2020/5 dated 02.01.2021 had been declared to be non-responsive. A further direction to the State respondent authorities is sought for to consider the technical bid submitted by the petitioner and to open its financial bid.

2. The impugned decision of the Technical Bid Evaluation Committee dated 16.02.2021 is relatable to a competitive bidding process initiated for the contract work – “Construction of New Medical College centering MMCH and Kalapahar campus along with 800 Bedded General Hospital at MMCH Campus in Guwahati” [hereinafter referred to as ‘the Contract Work’, for easy reference].

3. A Press Notice bearing no. GMC.81/2020/5 was published by the Chief Engineer, Public Works Department [P.W.D.] [Building], Assam [hereinafter also referred to as ‘the tendering authority’, at places for convenience] on 02.01.2021 inviting bids from eligible registered contractors/firms/private limited company having experience of similar nature of work for the Contract Work. In continuation of the Press Notice dated 02.01.2021, a Detail Notice Inviting Bid [‘the NIT’, for short] was published on



18.01.2021 inviting bids for the Contract Work from contractors having eligibility criteria as laid down in the Standard Bidding Document [‘the SBD’/‘the bidding document’, for short]. In the NIT, the approx. value of the work has been mentioned as Rs. 666.1351 crores and the time of completion as 36 months. The details of the bid was made available at the e-procurement portal website, www.assamtenders.gov.in and it was made mandatory for the participating bidders to enroll therein.

4. As per the original NIT, downloading of bidding document was open from 18.01.2021 to 08.02.2021. The last date of submission of bid was mentioned as upto 12-30 p.m., 08.02.2021. Online submissions of technical bid and financial bid were made mandatory. A pre-bid meeting was scheduled at 11-00 a.m. on 21.01.2021 at the office of the Chief Engineer, P.W.D.[Building], Assam. After the pre-bid meeting, held on 21.01.2021, a Corrigendum dated 06.02.2021 with a revised activity schedule, came to be published. By the revised activity schedule, the last date of submission of bid was extended upto 12-30 p.m. on 10.02.2021. The time and date of technical bid opening were mentioned as 04-30 p.m. and 10.02.2021 respectively.

5. In response to the NIT dated 18.01.2021, the petitioner participated in the said competitive bidding process considering itself to be eligible, experienced and qualified in terms of the NIT dated 18.01.2021 by submitting its bid along with all the documents asked for, within the notified time.

6. As per the activity schedule, the technical bids of the participating bidders were opened on 10.02.2021 and it was found that three nos. of bids including that of the petitioner, were received by the tendering authority for the Contract Work. The technical bids of all the three bidders were thereafter, evaluated and an evaluation report was presented before a Technical Bid Evaluation Committee headed by the Chief Engineer, P.W.D.[Building], Assam constituted for the purpose of considering the bids on merit.



7. It is the case of the petitioner that when the petitioner was waiting and expecting for a positive outcome of its technical bid, it came to learn from the official website of the respondent authorities that its technical bid had been found non-responsive. The reasons assigned for such non-responsiveness are, *firstly*, non-receipt of confirmation from the concerned authority as regards genuineness of completion certificate for single similar nature of work, and *secondly*, non-submission of necessary documentary evidence in support of the single similar nature of work as per Clause 4.5A. On 16.02.2021 itself, an Office Order of even date came to be issued by the Chief Engineer, P.W.D.[Building], Assam whereby it was informed that the financial bids for the Contract Work would be opened at 11-30 a.m. on 16.02.2021 in his office. All the members of the Technical Bid Evaluation Committee and the successful bidders in the technical bid evaluation were requested to attend the opening of the financial bids at the scheduled time.

8. Heard Mr. G.N. Sahewalla, learned Senior Counsel assisted by Mr. D. Senapati, learned counsel for the petitioner and Mr. D. Saikia, learned Advocate General, Assam assisted by Sri. B. Gogoi, learned Standing Counsel, P.W.D. for all the respondents.

9. Mr. Sahewalla has submitted that the impugned decision on the part of the Tender Bid Evaluation Committee in rejecting the bid submitted by the petitioner on 16.02.2021 is bad and arbitrary being contrary to the clauses of the bidding document [SBD]. The decision assigned as regards non-receipt of confirmation of genuineness of completion certificate for single similar nature of work from the concerned authority cannot be termed to be in conformity of the terms and conditions set forth in the bidding document. It is his submission that by no stretch, the impugned decision can be made relatable to Clause 4.5A of the bidding document.

9.1. It is also his submission that though in terms of Clause 4.3.(iii) of the bidding document the respondent authorities can seek further information on the contract works in relation to which experience certificates had been submitted by the bidder but non-receipt or delayed receipt of information from the concerned authorities have



not empowered the respondent authorities to declare a bid as non-responsive. In the case in hand, the respondent authorities had sought information from the M.P. Road Development Corporation Limited [MPRDCL], a Government of Madhya Pradesh Undertaking, without the knowledge of the petitioner after opening of the technical bids. The respondent authorities had taken the pretext of non-receipt of response by the MPRDCL to invalidate the otherwise valid bid of the petitioner. As it was not within the knowledge and control of the petitioner to persuade the MPRDCL which entity is not connected with the competitive bidding process under reference, the petitioner could not have been penalized without bringing the fact of non-receipt of response to the notice of the petitioner. There was no doubt about the genuineness of the experience certificate and in such situation, it was not open for the respondent authorities to declare the petitioner's technical bid as non-responsive.

9.2. He has further submitted that the impugned action on the part of the respondent authorities is based on extraneous considerations and an action other than bona fide. Even if an irregularity is assumed to have occurred it cannot be comprehended to have fallen within the category of essential conditions of eligibility. Submitting as above, Mr. Sahewalla has submitted that the observation that the petitioner did not submit the necessary documentary evidence in support of the single similar nature of work as per Clause 4.5A of the bidding document is clearly arbitrary and unjustified.

9.3. Elaborating on the point, Mr. Sahewalla has submitted that the respondent authorities had sought for information from the MPRDCL by a communication dated 10.02.2021 and two reminder e-mails dated 11.02.2021 and dated 12.02.2021 and the said communications neither revealed the time period by which the MPRDCL was required to furnish the information sought for nor the consequence in the event of default in furnishing the information. According to him, the date of technical evaluation, 16.02.2021 was fixed by the respondent authorities without any information to the bidders. Effectively, there was only two working days in between 11.02.2021 and 16.02.2021 for the MPRDCL to furnish the information, with 13.02.2021 and 14.02.2021 being Saturday and Sunday respectively. Giving only two



days' time to furnish information without disclosing the consequence of non-furnishing the information, is clearly arbitrary and irrational.

9.4. It is his further submission that the contention of the State respondents to the effect that the petitioner did not submit the necessary documentary evidence in support of the single similar nature of work as per Clause 4.5A is incorrect, perverse and misstatement. By referring to the experience certificates annexed to the case papers, he has submitted that the petitioner had submitted all the necessary documents along with its bid including the details about scope of work as regards civil, sanitary and water supply works and electrical works, more particularly, vide performance certificate dated 04.02.2021. He has submitted that in the said performance certificate dated 04.02.2021 issued by the MPRDCL, the details of the individual components of the works are mentioned. As per the said performance certificate dated 04.02.2021, the combined value of completed contract work was Rs. 334.98 crores, meaning thereby, the petitioner had fulfilled the qualification criterion enjoined by Clause 4.5A.(c) of the bidding document which was at Rs. 266.45 crores. It is his contention that it is not open for the respondent authorities to give a different meaning to the term 'contract value' in order to brace themselves to disqualify the petitioner's technical bid in order to eliminate it from the stage of financial bid evaluation so as to award the contract to a bidder of their choice.

9.5. It has been pleaded and submitted that in the meantime, the financial bids of the remaining two bidders were opened after rejection of the petitioner's technical bid and both of them had quoted substantially higher bid values than the petitioner. It has been contended that the impugned action has been undertaken by the respondent authorities to somehow oust the petitioner from the competition so as to facilitate the respondent authorities to award the Contract Work to one of the other two bidders at a higher price, which is against the public interest.

9.6. In support of his submissions, Mr. Sahewalla has referred to the decisions in *Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd. and others*,



reported in (1997) 1 SCC 732; *Bharat Sanchar Nigam Limited vs. Bhupender Minhas and others*, reported in (2008) 11 SCC 273; *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another*, reported in (2016) 16 SCC 818; and *Consortium of Titagarh Firema Adler S.P.A. vs. Nagpur Metro Rail Corporation Limited*, reported in (2017) 7 SCC 486.

10. Mr. Saikia, learned Advocate General has, on the other hand, raised a preliminary objection regarding maintainability of the writ petition on the ground of non-joinder of necessary parties. It is submitted by him that in the bidding process, three bidders including the petitioner, submitted their bids. The technical bids of the three participating bidders were opened on 10.02.2021. The technical bids were thereafter, evaluated and an evaluation report was prepared and presented on 16.02.2021. The Technical Bid Evaluation Committee held its meeting on 16.02.2021 and after evaluation, the technical bid of the petitioner was found non-responsive. At the same time, the technical bids of the other two participating bidders were found responsive and a decision was also taken on that day itself i.e. on 16.02.2021 to open their financial bids. The financial bids of the two technically responsive bidders were opened on 16.02.2021 and one of the said two bidders was declared as L-1 bidder. He has, thus, contended that a third party right had accrued in favour of the L-1 bidder on 16.02.2021 for having the Contract Work in its favour and, as such, both the L-1 bidder and L-2 bidder are necessary parties in the instant proceeding as it is likely to be adversely affected in the event the writ petition, with the prayers above, is allowed. Non-impleadment of the L-1 bidder and L-2 bidder as a party-respondents in the instant writ petition has made the writ petition not maintainable and the writ petition is to be dismissed on the ground of non-joinder of the necessary parties, he submits. The writ petition was filed on 22.02.2021 and in the writ petition, the petitioner has made mention about the bid values of the other two bidders and their names. It is, thus, evident that the petitioner was well aware about the successful bidder at the time of preferring the writ petition and yet, it has not brought in the successful bidder as a party-respondent.



10.1. In the above context, he has referred to the decisions in *Udit Narain Singh Malpaharia vs. Additional Member Board of Revenue, Bihar and another*, reported in AIR 1963 SC 786; *Prabodh Verma and others vs. State of Uttar Pradesh and others*, reported in (1984) 4 SCC 251; *Ranjan Kumar and others vs. State of Bihar and others*, reported in (2014) 16 SCC 187; and *Afcons Infrastructure Limited (supra)*.

10.2. After raising the above preliminary issue regarding maintainability, Mr. Saikia has referred to the relevant clauses in the bidding document. He has submitted that Clause 4.5 of the bidding document has prescribed the Qualification Criteria. Laying stress on Clause 4.5A.(c) of the bidding document, he has submitted that a bidder has to satisfy the qualification criterion prescribed therein. A bidder in order to satisfy the qualification criterion mentioned in Clause 4.5A.(c), was to submit requisite documentary evidence regarding satisfactory completion [not less than 90% of contract value] of at least one similar work of multi-storied RCC Hospital and Medical College Project of value not less than amounting to Rs. 266.45 crores. Though the petitioner had submitted a number of documents regarding work experience along with its bid, none of them except one contract work executed under the MPRDCL had been projected to have fulfilled the said qualification criterion. In support of the said contract work under the MPRDCL the petitioner had submitted a performance certificate dated 04.02.2021. On perusal of the same after opening of the technical bid on 10.02.2021, the Technical Bid Evaluation Committee found a number of deficiencies in the said performance certificate and accordingly, it was decided by the Committee to request the MPRDCL to confirm as regards its genuineness and also to provide the detailed scope of work in terms of Clause 4.3.(iii) of the bidding document. To that effect, a letter dated 10.02.2021 and two e-mails dated 11.02.2021 and 12.02.2021 were sent to the MPRDCL with the request to furnish the reply urgently. When no reply was received till 16.02.2021, that is, the date of sitting of the Technical Bid Evaluation Committee, the Committee after threadbare discussion, had got no option but to reject the technical bid of the petitioner for lack of satisfactory documents/information relating to single similar nature of work to be compliant of the qualification criterion laid down in Clause 4.5A.(c). It is his submission that the decision to declare the bid



as a non-responsive one was taken in consonance with the terms and conditions of the bidding document.

10.3. Objecting to the allegations of arbitrariness and irrationality, learned Advocate General has submitted that Clause 4.5A.(c) is specific to the point that to qualify, a bidder must have satisfactorily completed [not less than 90% of contract value] as a prime contractor or as a permitted sub-contractor at least one similar work of multi-storied RCC Hospital and Medical College Project of value not less than amounting to Rs. 266.45 crores. But the petitioner appears to have completed its largest single similar work where the Tendered Cost was Rs. 234.62 crores and the Project Allocated Cost [PAC] was Rs. 248.01 crores, which were much lesser than Rs. 266.45 crores.

10.4. In response to the above letter dated 10.02.2021 and e-mails dated 11.02.2021 and 12.02.2021, a reply was received from the MPRDCL only on 26.02.2021 along with a modified performance certificate dated 25.02.2021. On receipt of the modified performance certificate dated 25.02.2021, the same was compared with the previous performance certificate dated 04.02.2021. Upon comparison of the said two performance certificates for the same contract work, a number of discrepancies were again found by the respondent authorities and in that connection, he has referred to the statements made in paragraph 12 of the affidavit-in-opposition filed on behalf of the respondent no. 2. According to him, the discrepancies had further vindicated the stand of the tendering authority taken with regard to disqualification of the petitioner's technical bid.

10.5. It is the further contention on behalf of the State respondents that the documents annexed with the bid of the petitioner reflected that there were delays and in some cases, inordinate delays on the part of the petitioner to execute even smaller contract works of different sizes or values. By referring to the documents annexed to the writ petition, he has submitted that it is a pointer towards not satisfactory performance with regard to the periods of completion on the part of the petitioner in executing contract works and the said aspect can be taken note of by the tendering authority at



the time of taking a decision with regard to qualification or disqualification of a bid submitted by a bidder. It is his submission that in view of Clause 4.9 of the bidding document, it was well within the ambit and authority of the tendering authority to disqualify the technical bid of the petitioner to take note of such facts, which are very relevant from the point of view of the tendering authority.

10.6. Learned Advocate General has contended that the decision-making process of the tendering authority as regards acceptance or rejection of a bid taken in respect of a contract work pursuant to a competitive bidding process undertaken is not to be lightly interfered with as the law is settled that interference is permissible only if the decision-making process is found to be arbitrary or irrational or mala fide. The bidding document is prepared by the tendering authority with the help of experts by taking into accounts the requirements of the contract work/project in question. In the case in hand, it is a specialized project for construction of a Medical College and Hospital with 800 bed capacity and the past performance of a bidder in similar nature of work is the most vital and relevant aspect. The element of public interest is very much present behind the decision and any interference at the instance of an unsuccessful bidder regarding interpretation of the terms and conditions of the bidding document is not called for except in exceptional circumstances. As no exceptional circumstances have been made out by the petitioner here, this writ petition deserves to be dismissed also on merits, if not on the preliminary issue.

10.7. To buttress his submissions, learned Advocate General has referred to the decisions in *Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium and others)*, reported in (2016) 8 SCC 622; *Afcons Infrastructure Limited (supra)*; *Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and others*, reported in (2019) 14 SCC 81; and *Silppi Constructions Contractors vs. Union of India and another*, reported in (2020) 16 SCC 489.

11. In reply, Mr. Sahewalla has submitted that the aspect of alleged delay in executing the contract works, as contended on behalf of the State respondents, is not



a ground taken earlier. By referring to the documents annexed to the writ petition to which the learned Advocate General has referred to, he has submitted that there was nothing to indicate in those documents that there was any remark of poor performance by the employers of those works. Rather the performance reports indicated about good/very good/outstanding performance. The delay, if any, in absence of any remark cannot be attributed to the petitioner merely for the reason that in some of the cases, the dates of completion of the contract works were beyond the stipulated dates of completion. No penalty was levied in any of the cases, he submits. It is not open for the State respondents to make addition of grounds of rejection to supplement its previous grounds. In this connection, he has referred to the decisions in *Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chennai and others*, reported in (2005) 7 SCC 627; *Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others*, reported in (2013) 10 SCC 95; *State of Punjab vs. Bandeep Singh and others*, reported in (2016) 1 SCC 724; and *T.P. Senkumar, IPS vs. Union of India and others*, reported in (2017) 6 SCC 801. In all these decisions, it has been observed that every decision of an administrative or executive nature must contain the reasons which led the authority in taking such decision and it is not permissible for the authority thereafter to take resort to any other additional reasons.

11.1. With regard to the preliminary issue raised on the ground of non-joinder of parties, he has referred to the decision in *Silppi Constructions Contractors* (supra). It is his submission that in the present writ petition, the petitioner has challenged the decision of the tendering authority in declaring the petitioner's technical bid as non-responsive and as such, there is no requirement to make the other bidders party-respondents in the instant writ proceeding. He has contended that the writ petition is maintainable in the absence of the other two participating bidders.

12. I have considered the rival submissions advanced by the learned counsel for the parties and also perused the materials brought on record by the parties through their respective pleadings. I have also considered the decisions cited by the learned counsel



for the parties in support of their contentions and the written submissions submitted by them.

13. The competitive bidding process has been initiated by the Press Notice dated 02.01.2021, followed by a Detail Notice Inviting Bid [the NIT], for the contract work – 'Construction of New Medical College Centering MMCH and Kalapahar campus along with 800 Bedded General Hospital at MMCH Campus in Guwahati' [the Contract Work]. The approximate value of the Contract Work is Rs. 666.1351 crores and the time of completion is 36 months. Bids were invited for the Contract Work from contractors having qualification criteria as laid down in the Standard Bidding Document [SBD]. As per the NIT, contractors/bidders had to submit the technical bid and the financial bid online. Initially, the last date of submission of bid was mentioned as up to 12-30 p.m., 08.02.2021. Apart from the above, a hard copy of the technical bid submitted online, was also to be submitted on 08.02.2021 up to 12-30 p.m. for evaluation purpose. As per the activity schedule provided in the NIT, a pre-bid meeting was scheduled on 21.01.2021.

14. The pre-bid meeting was held, as scheduled, on 21.01.2021 in the office of the respondent no. 2 i.e. the Chief Engineer, P.W.D. [Building], Assam. Queries from the intending bidders were received both through e-mail and in person. The queries were discussed and deliberated upon and resolutions were worked out. Clause 4.5A of the SBD/bidding document had been modified. The minutes of the pre-bid meeting were accordingly uploaded in the concerned website. On 06.02.2021, a Corrigendum came to be issued by publishing the modification made in the SBD/bidding document and Bill of Quantities [BOQ]. By the said Corrigendum, the last date of submission of bid was extended up to 12-30 p.m., 10.02.2021. It was further notified that the technical bids would be opened at 04-30 p.m. on 10.02.2021 and the date of opening of financial bids would be notified later.

15. In response to the NIT, three bidders submitted their bids viz. (a) M/s Yashnand Engineers and Contractors Pvt. Ltd. – the petitioner; (b) M/s Larsen & Toubro Ltd.;



and (c) M/s NCC Ltd. The technical bids were opened at 04-45 p.m. on 10.02.2021 in the office of respondent no. 2. Thereafter, the technical bids of all the three bidders were evaluated in reference to the requisite documents/information furnished by the bidders for fulfilment of the qualification criteria. After completion of the evaluation process of the technical bids for the Contract Work, an evaluation report was prepared and presented before the Technical Bid Evaluation Committee for consideration of the technical bids on merits.

16. A meeting of the Technical Bid Evaluation Committee was held on 16.02.2021. The Committee after scrutiny of the bids and discussion, had declared the bid of the petitioner to be non-responsive. As per the minutes of the Technical Bid Evaluation Committee, the bid was non-responsive as confirmation of genuineness of the completion certificate for single similar nature of work from the concerned authority was not received till that date and the petitioner had not submitted the necessary documentary evidence in support of the single similar nature of work as per Clause 4.5A of the bidding document. The minutes of the Technical Bid Evaluation Committee had further recorded that the technical bids of the other two bidders i.e. M/s Larsen & Toubro Ltd. and M/s NCC Ltd. had been found responsive for opening of their financial bids for the Contract Work. An office order came to be issued by the respondent no. 2 on 16.02.2021 whereby it was informed that the financial bids for the Contract Work would be opened at 11-30 hours on 16.02.2021 in the office of the respondent no. 2. All the members of the Evaluation Committee as well as the successful bidders in the technical bid evaluation stage were requested to attend the meeting for opening of the financial bids at the scheduled time. By the said office order, the two bidders viz. M/s Larsen & Toubro Ltd. and M/s NCC Ltd. were notified to be present at the time of opening of the financial bids.

17. Aggrieved by and dissatisfied with such declaration of non-responsiveness of its technical bid the petitioner submitted a letter to the respondent no. 1 i.e. the Commissioner and Special Secretary to the Government of Assam, P.W.D. [Building & NH] on 16.02.2021 ventilating its grievances. It was contended that the procedure



adopted by the Technical Bid Evaluation Committee was arbitrary and the technical bid of the petitioner was rejected on flimsy and frivolous grounds. It was further contended that the necessary documentary evidence as required under Clause 4.5A had been duly submitted for single similar nature of work. The petitioner was also aggrieved by the immediate opening of the financial bids on 16.02.2021 and the consequent declaration of L-1 bidder and L-2 bidder on the portal. The petitioner had, thereby, called for necessary and immediate direction to the Technical Bid Evaluation Committee to review their evaluation of the petitioner's technical bid after receipt of confirmation of the completion certificate. On 17.02.2021, a legal notice was also served upon the respondent authorities in that regard.

18. From the rival submissions of the parties, it appears that the qualification criterion with regard to single similar nature of work is the prime bone of contention. As per Clause 4.3 of the SBD, a bidder with its bid had to submit, inter-alia, the information and documents in relation to experience in works of a similar nature and size for each of the last five years, and details of works underway or contractually committed; and clients who can be contacted for further information on those contracts. Clause 4.5 has catalogued 'the Qualification Criteria'. Clause 4.5A thereof has prescribed that each bidder in its name should have the qualification in the last five years as referred to in the Appendix to qualify for award of the Contract Work. The qualification criterion contained in Clause 4.5A.(c) in the original SBD is extracted herein below for ready reference :-

4.5A.(c) :- Satisfactorily completed (not less than 90% of contract value), as a prime contractor (or as a nominated sub-contractor, where the sub-contractor involved in execution of all main items of work described in the bid document, provided further that all other qualification criteria, are satisfied) at least one similar work of multi-storied RCC Hospital and Medical College Project of value not less than amounting to (1) Civil, Sanitary & Water supply work and Electrical works including all ancillary works of Rs. 266.45 Crore (Rupees two



hundred sixty six crore and forty five lakh) only which is approximately 40% of the bid value (updated value) during last 5 years i.e. upto 31.03.2020 under Central Govt./State Govt. Organization/Semi Govt./PSU within the country.

The qualification criterion contained in modified Clause 4.5A.(c), as per the minutes of the pre-bid meeting, is also extracted herein below for ready reference :-

4.5A.(c) :- Satisfactorily completed (not less than 90% of contract value), as a prime contractor (or as a nominated sub-contractor, where the sub-contractor involved in execution of all main items of work described in the bid document, provided further that all other qualification criteria, are satisfied) at least one similar work of multi-storied RCC Hospital and/or Medical College Project of value not less than amounting to (1) Civil, Sanitary & Water supply work and Electrical works including all ancillary works of Rs. 266.45 Crore (Rupees two hundred sixty six crore and forty five lakh) only which is approximately 40% of the bid value (updated value) during last 5 years i.e. upto 31-03-2020 under Central Govt./State Govt. Organization/Semi Govt./PSU within the country.

19. In order to show fulfillment of the 'Qualification Criteria' laid down in Clause 4.5 of the SBD/bidding document, the petitioner has stated that it had submitted the details of the experience in executing similar works over the last five years along with the necessary documents/certificates with its bid, along with a chart. The said chart is also appended as Annexure-V to the writ petition. From the said chart, it is noticed that the petitioner has identified 10 (ten) nos. of contract works executed for different authorities during the last five years. It is further noticed that out of the said 10 (ten) nos. of contract works, the contract values of 9 (nine) nos. of contract works are mentioned as Rs. 52.98 crores, Rs. 58.13 crores, Rs. 73.36 crores, Rs. 76.62 crores, Rs. 89.95 crores, Rs. 99.84 crores, Rs. 111.16 crores, Rs. 155.32 crores and Rs. 183.90



crores respectively. Prima facie none of these 9 (nine) contract works meets the eligibility criterion laid down in Clause 4.5A.(c). It is the work executed for the M.P. Road Development Corporation Ltd. [MPRDCL] which the petitioner has emphasized in relation to the qualification criterion mentioned in Clause 4.5A.(c) of the bidding document. The said work executed for the MPRDCL was in respect of the contract work of '*Construction of New Medical Colleges and up-gradation of Hospitals at Vidisha, [M.P.] 1. Civil, Sanitary, Plumbing, Internal Electrical, Electric Low Voltage Systems, Fire Fighting, Fire Alarm System, External Water Supply, External Drainage, STP, PTP, Road, Horticulture, Street Light, Electric Sub-station, HVAC including IBMS, Lift, Medical Gas Pipeline System, Solar Water Heating System, etc.*' [hereinafter referred to as 'the subject-work', for easy reference]. According to the petitioner, the experience it has gained by executing the subject-work has made it eligible and qualified for the Contract Work, which the tendering authority has disputed by contending that the qualification criterion set forth in Clause 4.5A.(c) is not satisfied by the petitioner with the experience gained from the subject-work.

20. In view of such rival contentions, it has become necessary to have a closer look at the performance certificate dated 04.02.2021, issued by the MPRDCL, in relation to the subject-work. The performance certificate dated 04.02.2021 has been annexed to the writ petition and the same is available at page nos. 70-71 of the case papers. For ready reference, the said performance certificate dated 04.02.2021 is quoted herein below :-

CIN : U45203MP2004SGC016758

**M.P. Road Development Corporation Ltd.
(M.P. State Highway Authority)**

(Govt. of M.P. Undertaking)

45-A, Arera Hills, Bhopal-462011

Phone : 0755-2597290/2765205 Fax : 0755-2572643, Website : mprdc.gov.in

Letter no. 13265/Build/Vidisha Medical College/2021

Bhopal dated 04.02.2021

PERFORMANCE CERTIFICATE



1.	Name of work/Project & Location	Construction of New Medical Colleges and up-gradation of Hospitals at Vidisha, Madhya Pradesh	
2.	Agreement No.	Agreement No. – 214/2016	
3.	Name of Contractor	YASHNAND ENGINEERS & CONTRACTORS PVT. LTD.	
4.	PAC Rs.	248.01 Cr.	
5.	Tendered Cost Rs.	234.62 Cr.	
6.	Gross Amount up to date payment done Rs. (Final Bill in under payment processes.)	334.98 Cr.	
7.	Gross Amount of work done up to 31.03.2020 Rs.	313.69 Cr.	
8.	Total Work done up to 31.03.2020 (in %)	92.80%	
9.	Date of Start	18/01/2016	
10.	Date of Completion	25/08/2020	
11.	i)	Stipulated Date of Completion (as mentioned in work order)	17/01/2018
	ii)	Actual Date of Completion	25/08/2020
	iii)	Whether case of levy of compensation for delay has been decided or not	Decided
	iv)	If decided, amount of compensation levied for delayed completion, if any.	No.
12.	Work Components [Please tick (√) in relevant box]		
a)	RCC Framed Structure	√	
b)	Finishing Works	√	
c)	Water Supply and sanitary installation works	√	
d)	External development and Drainage	√	
e)	Internal & External Electrification, Electrical Sub Station, HT Line, LT Line, Transformer and DG set Works.	√	
f)	Firefighting & Fire Alarm Works	√	
g)	LV Works	√	
h)	Lifts	√	
i)	Medical Gas Pipe Line (MGPS) Works	√	
j)	ETP, STP, WTP, RO and Pump Works	√	
k)	CCTV Works	√	
l)	Dedicated PA Systems	√	
13.	No. of Storeys (Basement + G.F. + 6 Floor)	8	
14.	Performance Report*		
	1) Quality of Work	Very Good	
	2) Financial Soundness	Very Good	
	3) Technical Proficiency	Very Good	
	4) Resourcefulness	Very Good	
	5) General Behaviour	Outstanding	

This Certificate is issued on the request of M/s Yashnand Engineers & Contractors Pvt. Ltd. for Tender purpose only.

(Yogendra Gahole)
Chief Engineer (Building)
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It is submitted by the parties at the bar that PAC stands for Project Allocated Cost.

21. From the performance certificate dated 04.02.2021, it transpires that the PAC for the subject-work was Rs. 248.01 crores and the Tendered Cost was Rs. 234.62 crores. It further transpires that the gross amount upto date payment done was Rs. 334.98 crores and as on 04.02.2021, the final bill was in the process for payment. The gross amount of work done upto 31.03.2020 was Rs. 313.69 crores and it amounted to 92.80% of the total work. It is noticed that the date of start of the subject-work was 18.01.2016 and the date of completion was 25.08.2020. As per the work order issued for the subject-work, the stipulated date of completion was 17.01.2018.

22. It can be iterated that the submissions of the parties have centered around the above figures and parameters of the subject-work vis-à-vis Clause 4.5A.(c) of the SBD. Admittedly, the subject-work is reflected as new medical colleges and up-gradation of hospitals and the MPRDCL is a Government of Madhya Pradesh Undertaking. After opening of the technical bid of the petitioner on 10.02.2021 and upon perusal of the performance certificate dated 04.02.2021, the tendering authority was stated to be of the view that the detailed scope of the subject-work was not mentioned therein. The tendering authority appeared to have taken a view that in order to ascertain the credentials of the petitioner as the contractor as regards its ability and capacity to perform such similar work under the P.W.D. a confirmation about the genuineness of the performance certificate and the detailed scope of the subject-work would be necessary from the MPRDCL which was the employer for the subject-work. It was in such situation, the tendering authority stated to have written to the MPRDCL on 10.02.2021 as well as by e-mails on 11.02.2021 and 12.02.2021. Though no time period was mentioned in those communications, it was, however, asserted that the confirmation and supply of the detailed scope of the subject-work were urgently required at an early date by e-mail, followed by a post copy. The MPRDCL was requested to sent its reply to two e-mail accounts, mentioned in those communications,



of the respondent no. 2. As has been mentioned above, the evaluation report was prepared by 16.02.2021 on the basis of the tender papers received from the participating bidders after opening of the technical bids on 10.02.2021 and the same was placed before the Tender Bid Evaluation Committee on 16.02.2021. Admittedly, no response from the MPRDCL was received till 16.02.2021. It is not the case of the petitioner that the MPRDCL did not receive the above three communications (supra) during the period from 10.02.2021 to 16.02.2021. It is the contention of the petitioner that during the period from 10.02.2021 to 16.02.2021, there were only two working days and such short duration is wholly inadequate to forward a reply.

23. On reverting back to the performance certificate dated 04.02.2021, it is found that the MPRDCL had mentioned the name of the subject-work as '*Construction of New Medical Colleges and Up-gradation of Hospitals at Vidisha, Madhya Pradesh*'. The Tendered Cost was Rs. 234.62 crores. The work components at serial no. 12 of the performance certificate were marked with tick [√] marks in the relevant boxes. For example, there is a tick [√] mark against RCC Framed Structure. One could reasonably guess therefrom that the subject-work included the work component of RCC Framed Structure, without any further details.

24. In paragraph 8 of the affidavit-in-opposition, the respondent no. 2 has contended that during evaluation when it examined the performance certificate dated 04.02.2021 concomitantly with Clause 4.5A of the SBD, it noticed the following discrepancies :-

- (i) Name of the project is Plural such as "Medical Colleges", "Upgradation of Hospitals" that does indicate there may be more than one no. of projects.
- (ii) Tendered cost mentioned for the project was Rs. 234.62 crore & Project Allocated Cost (PAC) value mentioned in the certificate was Rs. 248.01 crore, whereas as per bid requirement, the same should be of value of Rs. 266.45 crore.



- (iii) But, as mentioned in the completion certificate, the gross amount up-to-date payment done was Rs. 334.98 crore & final bill was still under process with gross amount of work done upto 31st March, 2020 as Rs. 313.69 crore, with percentage of progress 92.8%. But, arithmetically 92.8% of Rs. 334.98 crore comes to 310.86 crore instead of Rs. 313.69. Further, the certificate was neither authenticated by any statutory auditor nor supported by documents like certified copy of passed bill. The Performance Certificate indicated that there was a probable enhancement of the project cost; for which the documentary evidence like project enhancement document in favour of the bidder was not attached with the bid."

25. It has been averred that observing such discrepancies in the performance certificate dated 04.02.2021, the communications dated 10.02.2021, 11.02.2021 and 12.02.2021 were made to the MPRDCL. According to the Technical Bid Evaluation Committee, the documentary evidence in the form of the said performance certificate dated 04.02.2021, furnished by the petitioner, in support of 'similar nature of work' lacked in vital information and, thus, could not be considered as sufficient evidence for the purpose of establishing responsiveness of the technical bid. They also doubted the genuineness of the information contained therein in view of deficiencies in respect of vital information and it was well within their authority to ask for confirmation and to call for further information in terms of Clause 4.3.(iii) of the SBD/bidding document. It has been contended by the petitioner that a perusal of the performance certificate dated 04.02.2021 clearly indicates that the same is a single work and not multiple works, as alleged. Moreover, it was not assigned as a specific ground of rejection in the impugned decision dated 16.02.2021. It is further contended by the petitioner that the eligibility criterion contained in Clause 4.5A.(c) has not stipulated that the value should be 'Tendered Cost' or it should be 'actual contract value', which is the cost at which the work had been executed. It is the contention of the petitioner that it is the actual executed contract value which is to be considered, not the initial bid value at which the contract-work was awarded. Regarding the allegation about percentage of progress to the extent of 92.8%, the petitioner has asserted that the said calculation



is incorrect and its calculation adopted for work done percentage-wise as 92.8% [=313.69/337.99*100] is correct. It is also contended that since confirmation and information were sought from the MPRDCL by the tendering authority it was not open for the tendering authority to penalize the petitioner for non-receipt of confirmation and information by rejecting its technical bid.

26. During the course of hearing, learned Advocate General has, by referring to the other performance/completion certificates submitted with the technical bid of the petitioner which are annexed to the writ petition at page nos. 72-91, submitted that from a bare perusal of those it is evident that the petitioner had failed to complete those contract works within the stipulated dates of completion and invariably, the actual dates of completion were much after the stipulated dates of completion. It has been contended on the basis of Clause 4.9 of the SBD/bidding document that even if a bidder meets the qualifying criteria, he can be disqualified if record of poor performance such as improper completion of contract, inordinate delays in completion, etc. are noticed. The said contention has been objected by the learned Senior Counsel for the petitioner by submitting that the same was not a ground for rejection of the petitioner's technical bid nor it was pleaded in the pleadings. It is his contention that a new ground cannot be taken afterwards and has referred to the decisions mentioned above.

27. At this stage, it would be apposite to refer to the scope of judicial review in respect of a tender process which has been laid down by the Hon'ble Supreme Court of India in some of the decisions, mentioned above, cited by the learned counsel for the parties.

27.1. In *Asia Foundation & Construction Ltd.* (supra), referred by the petitioner, it has been observed that though the judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has



been exercised for any collateral purpose. It is also observed that it is not justified in interfering with the award by going into different clauses of the bid document. The fact of escalation of cost on account of delay in executing a project is a relevant factor.

27.2. In *Bharat Sanchar Nigam Limited* (supra), referred to by the petitioner, the decisions in *Directorate of Education vs. Educomp Datamatics Ltd.*, (2004) 4 SCC 19 and *Tata Cellular vs. Union of India*, (1994) 6 SCC 651, have been referred wherein it has been held that the Courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism but there are inherent limitations on the exercise of the power of judicial review in such matters. The terms of the invitation to tender cannot be opened to judicial scrutiny because the invitation to tender is in the realm of contract. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made because the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible. The Government must have a free hand in setting the terms of the tender and must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

27.3. In *Consortium of Titagarh Firema Adler S.P.A.* (supra), referred by the petitioner, the decision in *Tata Cellular* (supra) has been referred to apart from other decisions to observe that the modern trend is judicial restraint on administrative action and the role of the Court is only to review the manner in which the decision has been taken. An administrative decision can be tested by the application of *Wednesbury* principle of reasonableness to see whether it is free from arbitrariness not affected by bias or actuated by mala fides. If the decision relating to award of contract is bona fide and is



in public interest, the Court will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

27.4. In *Central Coalfields Limited* (supra), the Hon'ble Supreme Court of India by quoting from the decisions in *Ramana Dayaram Shetty vs. International Airport Authority of India*, (1979) 3 SCC 489 and *G.J. Fernandez vs. State of Karnataka*, (1990) 2 SCC 480, has gone to observe that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduced to silence any part of the document and make it all together inapplicable. It has reaffirmed that the tendering authority issuing the tender, has the right to enforce the terms of the tender. If a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. The Court will not countenance interference with the decision of the employer at the behest of an unsuccessful bidder in respect of a technical or procedural violation. After considering a host of decisions as regards contours of judicial review in relation to tender process, it has been held that the issue of acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned. However, the decision-making process can be subject to judicial review. The decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision that no responsible authority acting reasonably and in accordance with relevant law could have reached.

27.5. The decisions in *Afcons Infrastructure Limited* (supra) and *Silppi Constructions Contractors* (supra) have been referred to and relied on by both the parties.

27.6. In *Afcons Infrastructure Limited* (supra), bids were invited for a contract work by the Nagpur Metro Rail Corporation Limited [the NMRCL] for the Nagpur Metro Rail Project. The decision in *Central Coalfields Limited* (supra) has been referred to observe



that in relation to a tender process, the Constitutional Courts can interfere a decision as regards acceptance or rejection of the bid of a bidder if the decision is perverse. The Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. A mere disagreement with the decision-making process or the decision of the administrative authority is not a reason for a Constitutional Court to interfere. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The Constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

27.7. In *Silppi Constructions Contractors* (supra), the respondents issued notice inviting tenders for two works. The technical bids of the petitioner therein i.e. Silppi Constructors Contractors were rejected by the tendering authorities. The petitioner filed a writ petition challenging the same. The main ground raised was that no reasons were given either while rejecting its tender or the appeals. In the counter filed to the writ petition the stand taken by the respondents was that the petitioner's tenders were rejected since the petitioner did not satisfy the eligibility criteria for submission of the bid. It has been held therein that the Court should normally refrain from interfering in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. The Court does not sit like a court of appeal over the appropriate authority. The authority which floats the contract of 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. It has been reiterated that the decisions taken with regard to tender processes are administrative decisions and such decisions are in the realm of contract. While rejecting the tender a person or authority inviting the tenders is not required to



give reasons even if it be a State within the meaning of Article 12 of the Constitution of India. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State could come to a grinding halt. The State must be given sufficient leeway in this regard. The tendering authority is entitled to give reasons in the counter to the writ petition.

27.8. The decision in *Caretel Infotech Limited* (supra) has been referred to by the respondents' side to emphasize as regards the extent to which scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India is permissible. It has been held therein to the effect that normally, the parties would be governed by their contracts and the tender terms. In view of Government and public sector enterprises venturing into economic activities, the Supreme Court of India has found it appropriate to build in certain checks and balances of fairness in procedure. Observing that the window has been opened too wide by challenging every small or big tender nowadays in writ proceedings almost as a matter of routine, it has been cautioned that an unnecessary and close scrutiny of minute details, contrary to the view of the tendering authority, has made awarding of contracts by Government and public sector enterprise a cumbersome exercise, with long drawn out litigation at the threshold. By making a comparison with the promptness and efficiency levels in respect of private contracts it has been observed that such close scrutiny has tended to make the tenders of the public sector a non-competitive exercise to the great disadvantage to the Government and the public sector. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit.

28. Reverting back once again to the facts of the case in hand, it could be seen that opportunity was provided to a prospective bidder to seek any clarification on the bidding document by writing to the respondent no. 2 prior to the scheduled pre-bid meeting. The respondent no. 2 was to respond to any such request for clarification and such clarification was required to be intimated to all purchasers of the bidding



document. The purpose of the pre-bid meeting was to clarify issues and to answer questions on any matter that might be raised at that stage. In the minutes of the pre-bid meeting held on 21.01.2021 for the Contract Work, the tendering authority mentioned that a lot of queries were received from the prospective bidders and all those queries were deliberated upon in the pre-bid meeting and thereafter, resolutions taken were intimated to all the prospective bidders by uploading the same in the website. It is not the case of the petitioner that they had sought any clarification with regard to any of the clauses of the bidding document and clarifications were not given. In such view of the matter, one has to proceed on the premise that the petitioner had accepted all the terms and conditions of the bidding document and proceeded to submit its bid. It is not also the case of the petitioner, that the terms and conditions set in the bidding document/SBD were made keeping in mind the qualifications of certain other bidders and in order to deprive the petitioner. The petitioner has not alleged about any discriminatory treatment qua the terms and conditions specified in the bidding document.

29. There is no ambiguity in Clause 4.5A.(c) that the bidder has to fulfill the qualification criterion of executing 'one similar work of multi-storied RCC Hospital and/or Medical College Project'. A look in the performance certificate dated 04.02.2021 has demonstrated that the MPRDCL had mentioned the name of the work/project and location as 'Construction of New Medical Colleges and Up-gradation of Hospitals at Vidisha, Madhya Pradesh'. Thus, it cannot be said that the contention raised in paragraph 8 (i) of the affidavit-in-opposition to the effect that there was no indication about a single project of Medical College and Up-gradation of Hospital or multiple projects of medical colleges and up-gradation of hospitals or in multiples is irrelevant, far fetched and out of context. The tendering authority has insisted in Clause 4.5A.(c) from the bidder, either as a prime contractor or as a sub-contractor, satisfactory completion [not less than 90% of contract value] of at least 'one similar work of multi-storied RCC Hospital and/or Medical College Project' of Rs. 266.45 crores which is approximately 40% of the bid value i.e. Rs. 666.1351 crores during last five years i.e. up to 31.03.2020. It, thus, means that such similar work had to be executed between



the period from 01.04.2015 to 31.03.2020. The subject-work is found to have been completed during the period from 18.01.2016 to 25.08.2020. Considering the fact that the approximate value of the Contract Work has been fixed at Rs. 666.1351 crores the tendering authority has set the benchmark at Rs. 266.45 crores, which is approximately 40% of Rs. 666.1351 crores, so that it can assure itself about the past performance, experience and credentials of the bidder to execute a public project of such nature where money from the coffers of the State are to be spent.

30. It is the stand of the tendering authority, through its affidavit-in-opposition, that the tendered cost for the subject-work was Rs. 234.62 crores which is lesser than the figure set forth in the qualification criterion in Clause 4.5A.(c) at Rs. 266.45 crores. The tendering authority has insisted that the meaning ascribed by the term 'contract value' in Clause 4.5A.(c) in the SBD/bidding document can only be equated with the term 'tendered cost' appearing in the performance certificate dated 04.02.2021 and no other meaning can be comprehended for the term 'contract value'. While the petitioner has sought to contend that the term 'contract value' has to be the value/cost at which the subject-work was executed the same has been vehemently objected by the State respondents. It prima facie appears from the performance certificate dated 04.02.2021 that the gross amount of work done up to Rs. 313.69 crores is greater than the tendered cost of Rs. 234.62 crores. As per the version of the tendering authority the performance certificate indicated about enhancement of the project cost. The communication dated 12.06.2018, annexed as Annexure-C to the additional affidavit of the petitioner, goes to indicate that there was enhancement in the project cost for the subject-work i.e. the construction of Vidisha Medical College, with no corresponding enhancement in the scope of work and the same is clearly indicative of escalation in the cost with time. The said fact is also apparent from a communication dated 18.01.2016 of the MPRDCL made to the petitioner and the relevant part of the said communication is extracted herein below :-

MADHYA PRADESH ROAD DEVELOPMENT CORPORATION LTD.
(Govt. of M.P. Undertaking)

45-A, Arera Hills, Bhopal - 462 011, Madhya Pradesh



Tel.: (O) 0755-2765205, 2527202 - 299 (PRL Line) Fax: +91-755-2572643
Website: www.mprdc.nic.in

No. 16053/MPRDC/Procu./WO/Medical College/272/2015

Date 18.01.2016

To,

M/s Yashnand Engineers & Contractors

214/5, Khyati Complex, Mithakhali, Ellisbridge,

Ahmedabad – 382006 Gujarat

Tel: 079 – 23240202, Mob: 09824001024

E-mail: yashnandengineer@yahoo.co.in

Fax No: 079-23244186

Sub: Agreement for Construction of New Medical College and up-gradation of Hospital at Vidisha {PAC Rs. 248.01 Crores} (Online Tender No. 379).
Ref: LoA No. 14760/MPRDC/Procu./LoA/Medical College/272/2015, Date 26/12/2015.

Your tender for the aforesaid work has been accepted by MPRDC vide letter under reference. The agreement has been signed on 18th January, 2016. The details of Agreement are as follows:

1. Agreement No. : 214/2016
2. PAC : Rs. 248.01 Crores
3. Quoted Rate : @5.40% (Five point four zero percent) below PAC
4. Stipulated Period of Contract : 24 (Twenty Four) Months (including rainy season)

(Narendra Kumar)
Chief Engineer
(Procurement)

31. By Clause 8 of the bidding documents, a bidder has been asked to examine carefully all instructions, conditions of contract, contract data, forms, terms and technical specifications, bill of quantities, forms Appendix and drawings. It has been mentioned that failure to comply with the requirements of the bidding document shall be at the bidder's own risk. It has been made clear that pursuant to Clause 26 thereof, bids which are not substantially responsive to the requirements of the bidding documents shall be rejected. Clause 26 has provided the provision regarding examination of bids and determination of responsiveness. It is the tendering authority who, during the detailed evaluation of the technical bids, was to determine whether each bid met the eligibility criteria. A bid had to be substantially responsive to the requirements regarding qualification criteria as laid down in Clause 3 and Clause 4 of



the bidding document. In a competitive bidding process, it is the terms and conditions of the bidding document which decide the outcome of a bid in the bidding process.

32. The parties have not pointed out any definition of the term 'contract value' from the bidding document so as to facilitate this Court in arriving at a clear view. It is the tendering authority who has authored the bidding document and, as such, it is in the best position to interpret and define the term 'contract value' in reference to which the qualification criterion set forth in Clause 4.5A.(c) of the bidding document/SBD is to be understood. It has become a settled position of law, more particularly, with regard to a tender process that if two interpretations with regard to a term appearing in the bidding document which is technical in nature, are possible then the interpretation of the author of the bidding document/tendering authority is to be respected. The Court is to refrain from making its own interpretation of such term and thereafter, substitute its interpretation for such term with the interpretation given by the author of the bidding document/tendering authority with the assumption as if it is exercising any appellate jurisdiction, unless the interpretation given by the author of the bidding document/tendering authority is so absurd and irrational that no prudent and reasonable person is likely to arrive at such an interpretation.

33. What has emerged from the document dated 18.01.2016, extracted in paragraph 30 above, the Project Allocated Cost [PAC] for the subject-work i.e. 'Construction of New Medical Colleges and Up-gradation of Hospital at Vidisha' was Rs. 248.01 crores. The petitioner submitted its bid for the subject-work at a bid value below 5.40% of the PAC. The subject-work was awarded to the petitioner at its said quoted bid value which was Rs. 234.62 crores, meaning thereby, it had tendered to execute the subject-work at Rs. 234.62 crores. Both these two figures for the subject-work, that is, PAC at Rs. 248.01 crores and the tendered cost at Rs. 234.62 crores were lesser than Rs. 266.45 crores, which is approximately 40% of the bid value for the Contract Work, that is, "Construction of New Medical College centering MMCH and Kalapahar campus along with 800 bedded General Hospital at MMCH Campus in Guwahati". Though the petitioner herein has sought to interpret and equate the term 'contract value' with the



final value at which the subject-work which has been executed sans the escalation made therein and the final bill for the subject-work which has been raised, this Court is not persuaded to reach such a view as it has found that the term 'contract value' is more synonymous with the term 'tendered cost', as has been insisted by the author of the bidding document/tendering authority. This Court has not found such interpretation of the term made by the author of the bidding document/tendering authority arbitrary, irrational and unreasonable in any manner.

34. In the considered view of this Court, a bidder like the petitioner cannot compel its own interpretation of the term 'contract value' to be foisted unilaterally on the author of the bidding document/tendering authority. It is also not open for a bidder to demand before the Court to compel the author of the bidding document/tendering authority to accept its interpretation of the term 'contract value'. This Court has, thus, refrained itself to make any endeavour to give its own interpretation to the term 'contract value', appearing in Clause 4.5A(c), especially not at the instance of a bidder participating in the competitive bidding process, giving a go-by the interpretation ascribed to the term by the author of the bidding document/tendering authority who has authored it with the assistance of the experts in the field, by taking into purview its requirements and its experience in the field. In such view of the matter, the prime contention advanced on behalf of the petitioner is found not acceptable by this Court. The ground of rejection regarding lack of necessary documentary evidence in support of single similar nature of work is not found arbitrary, unlawful, irrational or mala fide on the touchstone of Article 14 of the Constitution of India.

35. The matter of responsiveness of a bid is to be determined on the basis of the bid submitted by the bidder at the time of its submission and the tendering authority can determine the bid's responsiveness or otherwise on the basis of the materials/documents submitted with the bid. There is no obligation cast on the tendering authority to call for any further information or clarification or document from any other source, though it may call for the same in its own discretion. In the case in hand, the tendering authority finding certain discrepancies in respect of the



performance certificate dated 04.02.2021 had asked for certain clarification or information from the MPRDCL on an urgent basis. That fact of calling such clarification or information by itself had not made it binding for the tendering authority to wait for such clarification or information. The decision to proceed with the bidding process on 16.02.2021 cannot be held to be arbitrary or illegal when there are other bidders whose technical bids were found responsive. It is pertinent to note that the petitioner has neither raised any whisper as regards the eligibility, qualification or capacity of the other two participating bidders nor has contended that their technical bids and/or financial bids were not responsive to the bidding document in any manner. Considering the nature of the Contract Work which is worth at least of Rs. 666.1351 crores, the qualification criterion set forth in Clause 4.5A.(c) the bidding document is to be held as an essential condition which is to be satisfied by a bidder at the time of submission of bid. If the information/documents furnished by a bidder are found not sufficient to arrive at a satisfactory conclusion with regard to fulfillment of the qualification criterion/criteria by such bidder the tendering authority is not obligated to give any further time to furnish additional information/documents to supplement the deficient information/documents already provided at the time of submission of the bid. Consequently, the contention of the petitioner that the tendering authority ought to have waited for the response from the MPRDCL cannot be countenanced.

36. Ultimately, the clarification or information, sought for by the tendering authority, came from the MPRDCL on 25.02.2021 which was too late in the day to walk the road again from the stage of technical bid evaluation as by that time, there has been emergence of the successful bidder. In such view of the matter, any further dilation on the performance certificate dated 04.02.2021 vis-à-vis the performance certificate dated 25.02.2021 is not necessary in which respect the contention has been advanced by the State respondents that the facts and figures in the said two performance certificates are found at variance with each other, as averred in paragraph 12 of the affidavit-in-opposition.



37. The petitioner has also raised absence of public interest behind the impugned decision of the petitioner's disqualification at the technical bid evaluation stage by contending that the bid values quoted by the other two participating bidders were higher than the bid value quoted by the petitioner for the Contract Work. The contention is made without, however, impleading the other two participating bidders as party-respondents in the writ petition. In this connection, it would be apposite to refer to the decision in *Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others, (1999) 1 SCC 492*, wherein the elements of public interest have been discussed in the following manner :-

“10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

The decision in *Raunaq International Ltd. (supra)* has further observed that a mere difference in the prices offered by tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in a commercial transaction. Before making any intervention in a commercial transaction involving a project, the Court shall also require to take into consideration that by such intervention the proposed project may considerably be delayed thus, escalating the cost far more than any saving. Unless the Court is satisfied that there is a substantial amount of



public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 of the Constitution of India in disputes between rival tenderers. The decision has further gone to observe in the following manner :-

“16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee’s special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work – which is as much in public interest as a low price. The court should not to substitute its own decision for the decision of an expert evaluation committee.”

In view of non-compliant nature of its technical bid with regard to the essential qualification criterion which is primarily in relation to past experience, for the reasons discussed above, this Court, taking a cue from the above observations, has not found any merit in the petitioner’s contention about public interest for the simple reason that the said qualification criterion with regard to past experience is intricately connected with public interest as the Contract Work is a public project of importance in the health-care sector.

38. On the preliminary issue, a number of decisions have been referred to on the issue of non-joinder of necessary party. The law is settled that a necessary party is one without whom no order can be made effectively and as such, no further dilation is required on that aspect. As the petitioner has not impleaded the other two participating bidders as party-respondents in this writ petition it is not open for the



petitioner to argue regarding price differences in the bid value quoted by the petitioner vis-à-vis the bid values quoted by the other two participating bidders, in their absence and behind their backs. Relying on the decision in *Silppi Constructions Contractors* (supra), the petitioner has sought to advance its case by stating that it is only assailing the rejection of its technical bid. In *Silppi Constructions Contractors* (supra) also, the petitioner was only challenging the rejection of its technical bid. It has been held therein that at that stage the other tenderers were not necessary parties. The Hon'ble Supreme Court has held that the writ petition was maintainable even in the absence of other tenderers because till that stage there was no successful tenderer. At the same time, it has held that who are the necessary parties would depend upon the facts of its case. It has also been held that the position might be otherwise if a tenderer challenges a bid awarded to another or challenges the rejection of its bid at a later stage. It, thus, appears that the observation regarding the other tenderers not being necessary parties, was made with regard to the particular fact situation obtaining in that case.

39. The competitive bidding process had begun in the case in hand with the submission of the bids by the three participating bidders with two barriers - technical bid evaluation stage and financial bid evaluation stage – to cross for them to emerge as the successful bidder by one of them. The petitioner was stopped by the tendering authority at the first barrier, that is, at the technical bid evaluation stage and the other two participants were allowed to remain in the race who eventually also crossed the next barrier, that is, the financial bid evaluation stage. After the stage of financial bid evaluation was over, rankings L-1 and L-2 were given to them. It was the L-1 bidder who had emerged as the successful bidder. The petitioner also had the knowledge who had reached the last stage in the bidding process. After emergence of the successful bidder the only thing left to be completed by the tendering authority is the award of the Contract Work as per the terms of the bidding document. At that stage, the petitioner decided to challenge by this writ petition his disqualification made by the tendering authority at the stage of technical bid evaluation. In *Afcons Infrastructure Limited* (supra), the original petitioner approached the High Court when its bid was



disqualified at the technical bid opening stage. The writ petition was allowed and the High Court had the opinion that the eligible bidders were not entitled to be either impleaded by the ineligible bidder or were not entitled to be heard. The Hon'ble Supreme Court has observed that the view of the High Court was not appropriate view to take in matters like that. One of the reasons is that there could be occasions where an eligible bidder would bring to the notice of the owner or employer of the project that the ineligible bidder was ineligible for additional reasons or reasons that were not within the contemplation of the owner or employer of the project. Taking note of the aforesaid views expressed in *Afcons Infrastructure Limited* (supra) and *Silppi Constructions Contractors* (supra) and also of the fact situation obtaining in the case in hand where there has been identification of the successful bidder when the writ petition was filed, I find force in the submission made on behalf of the State respondents that the petitioner ought to have made the successful bidder a party-respondent in the writ petition. In such view of the matter, this Court is also of the considered view that the writ petition has suffered for non-joinder of the necessary party.

40. In view of the discussion made above and for the reasons stated therein, this Court has found no reason to interfere with the decision taken by the Technical Bid Evaluation Committee on 16.02.2021 with regard to disqualification of the technical bid of the petitioner. Consequently, the writ petition being devoid of merit, stands dismissed. The interim order stands recalled. The respondent authorities will be at liberty to proceed further with the competitive bidding process under reference. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant