

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 18.02.2011

% Judgment delivered on: 01.03.2011

WP(C) No. 296/2011

M/S ANSALDO CALDAIE BOILERS INDIA PVT. LTD. PETITIONER

Vs

UNION OF INDIA & ANOTHER RESPONDENTS

Advocates who appeared in this case:

For the Petitioner : Mr.Harish Salve and Mr.Maninder Singh, Sr.Advocates
with Mr.Rajiv Bansal, Mr.Prashant Kumar and Mr.Anurag
Sharma, Advocates.

For the respondents : Mr.B.V.Niren, Advocate for R-1/UOI
Mr.A.S.Chandhiok, ASG with Ms.Bindu Saxena and
Mr.Shailendra Swarup, Ms.Aparajita Swarup and Ms.Neha
Khattar, Advocates for R-2/NTPC

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER, J

1. The writ petitioner has approached this court under Article 226 of the Constitution of India to remedy its grievance qua respondent No.2 i.e., NTPC Ltd. (hereinafter referred to as NTPC). The grievance of the petitioner in short is its exclusion from the tendering process initiated by NTPC. The writ petitioner amongst others had tendered its bid in response to a tender floated by NTPC. By virtue of the said tender, NTPC sought bids with respect to Steam Generators package (in short 'steam generators'). NTPC by virtue of the said tender sought offers in respect of 11 units of steam generators of 660 MW in respect of its projects at

Mouda, STTP, Stage-II, Solapur STP, Nabinagar STPP, Meja TPP and Raghunathpur TPP Phase-II. Insofar as Nabinagar STTP and Meja TPP were concerned, these were projects which NTPC had routed through a joint venture, while Raghunathpur TPP Phase-II is a project of Damodar Valley Corporation Ltd.

2. The tender was issued on 23.06.2010. The bid documents in terms of tender were put on sale between 28.06.2010 to 30.07.2010. As is normally the case in such like tenders, sealed bids were invited by NTPC in two stages. At Stage-I, techno-commercial bids are received while at Stage-II price bids are to be received. In terms of the said tender, techno-commercial bids were to be received on 25.08.2010 upto 1030 hours (IST), which in turn, were to be opened on the same day at 1100 hours (IST). As regards dates in respect of the next stage in the tendering process (i.e., submission of the price bid and its opening), these were to be intimated in due course.

3. The writ petitioner here has been eliminated from the tendering process at Stage-I (i.e., at the stage of opening of techno-commercial bid) on the ground that its bid did not meet the Qualification Requirements (in short, 'QRs') stipulated in the tender.

4. At this stage, we may only notice that even though pleadings and documents filed run into several hundred pages, the issue involved falls in a narrow compass. The writ petitioner's techno-commercial bid has been

rejected by NTPC on account of its ostensible failure to comply with the provisions of Clause 7.1.1 of section I of the tender. Evidently, this decision was conveyed by the NTPC to the writ petitioner vide its letter dated 05.01.2011. The writ petitioner has alleged mala fides in the issuance of the said letter. The allegations, in sum and substance being: that the said letter has been ante-dated. This allegation rests on the date of dispatch of the said letter which, according to the writ petitioner was 10.01.2011; a date which in point of fact falls after the date of issuance of notice by the writ petitioner to NTPC i.e., 07.01.2011. The writ petitioner has sought to further strengthen its aforesaid claim, by taking the stand that the said letter, in actuality, was received by it on 13.01.2011. We would come back to this aspect of the matter a little later.

5. The fact of the matter remains that by virtue of the aforementioned letter i.e., letter dated 05.01.2011, the writ petitioner's techno-commercial bid was rejected on the ground that it did not meet the minimum requirement set forth in Item 4 of Section III of the tender documents. The necessary consequences of this was that the bank guarantee submitted by the writ petitioner towards bid security, was also returned.

6. Therefore, in order to appreciate the issue at hand we would be referring to only the relevant provisions of the tender documents (which otherwise contains multiple sections and provisions). In particular our emphasis would be on those provisions of the tender documents that pertain to QRs for the bidders.

6.1 It is important to note at this stage that it is a common case of the contestants before us, that the provision which calls for interpretation is clause 7.1.1. mentioned in Section I which is identical to clause 1.1.1 of item no.4 contained in section III of the tender documents. The common ground between parties, who appeared before us, is that the relevant clause i.e., Clause 7.1.1 of Section I is identical to Item 4 and Clause 1.1.1 of Section III.

7. With this preface the following broad facts may be noted.

7.1 As indicated above, Stage-I i.e. techno-commercial bids, in respect of steam generators (qua the projects referred to above), were invited by NTPC pursuant to issuance of tender on 23.06.2010. The entities which filed their bids in response to the invitation were four (4) in number.

These being Bharat Heavy Electrical Ltd., New Delhi (BHEL); L&T Power and MHI Boilers Private Limited, Faridabad (L&T-MHI Boilers), BGR Energy System Limited, New Delhi (BGR) and Ansaldo Caldaie Boilers India Pvt.

Ltd., Chennai i.e., the writ petitioner. The bids of the aforesaid entities were opened on 28.08.2010. The QRs stipulated, envisaged a bidder's entry into the fray through five (5) routes. The five (5) routes being : -

- (i) as a Qualified Steam Generator Manufacturer; or
- (ii) as an Indian Steam Generator manufacturer; or
- (iii) as an Indian subsidiary company of a Qualified Steam Manufacturer; or
- (iv) as an Indian joint venture company for manufacturing Super Critical Steam Generator in India between an Indian company qualified Steam Generator Manufacturer; or
- (v) as an Indian joint venture promoter holding at least 51% stake in a joint venture company for manufacturing Super Critical Steam Generator in India between an Indian company and qualified steel manufacturer.

8. It is not in dispute that none of the aforementioned parties came through Route 1 or Route 3. BHEL adopted Route 2. Route 4 found favour with L&T, MHI and the writ petitioner while, BGR took recourse to Route 5. What is also not in dispute is that Clause 1.1.1 of Item No.4 contained in section III of the tender documents was applicable irrespective of the route which bidder took recourse to, in order to be considered a Qualified Steam Generator Manufacturer (in short, 'QSGM').

8.1 As noticed by us hereinabove Clause 7.1.1 of section I is identical to Clause 1.1.1 of Item No.4 of section III of the tender documents. Therefore, it is critical to quote Clause 1.1.1 of the tender documents. For the sake of convenience, it is extracted below :-

“4.0 Qualification Requirements for Bidders:

1.0.0 The Bidder should meet the qualifying requirements of any one of the qualifying routes stipulated under clause 1.1.0 or 1.2.0 or 1.3.0 or 1.4.0 or 1.5.0. In addition, the Bidder should also meet the requirements stipulated under clause 2.0.0 & 3.0.0 together with the requirements stipulated under Section ITB.

1.1.0 Route 1 : Qualified Steam Generator Manufacturer

1.1.1 The Bidder should have designed, engineered, manufactured/got manufactured, erected/supervised erection, commissioned/supervised commissioning of at least one (1) number of coal fired supercritical Steam Generator having rated capacity of 1500 tonnes of steam per hour or above. Further, such Steam generator should be of the type specified i.e., single pass (tower type) or two pass type using either would (inclined) or vertical plain or vertical rifled type water wall tubing, and should be in successful operation for a period of not less than one (1) year as on the date of Techno-commercial bid opening. In addition the above Steam Generator should have been provided with evaporator suitable for variable pressure operation (sub-critical and super-critical pressure ranges). The bidder should offer only the type of Steam Generator and type of water wall tubing for which he is qualified.”

9. Based on the said clause, arguments have been addressed on behalf of the writ petitioner as well as the contesting respondent i.e., NTPC. On behalf of the writ petitioner submissions were advanced by Mr.Harish Salve and Mr.Maninder Singh, Sr.Advocates assisted by Mr.Rajiv Bansal, Mr.Prashant Kumar and Mr.Anurag Sharma, Advocates while, on behalf of NTPC arguments were addressed by Mr.A.S.Chandhiok, learned Additional Solicitor General instructed by

Ms.Bindu Saxena and Mr.Shailendra Swarup, Ms.Aparajita Swarup and Ms.Neha Khattar, Advocates.

10. Mr.Salve submitted that the only ground on which the writ petitioner has been eliminated from the tendering process, is that, having come through Route 4, its collaborator and shareholder one Ansaldo Caldaie SpA, Italy (in short, 'ACS') ought to have, according to NTPC, not only designed and manufactured the Steam Generator but also the evaporator which forms part of the Steam Generator in so far as its referential plant was concerned, so as it evaluate its experience in the field.

10.1 It was contended that the writ petitioner fulfills the requirements of entering the bidding process, in as much as, it is an Indian joint venture company, in which, 73.4% of the shares are held by M/s Gammon India Ltd., while 26% shares are held by ACS. The remaining 0.6% shares are held by G.B.Engineering. It was stated, in addition, 50% of the shares of ACS are held and owned by Gammon India Ltd., a stake which was accompanied with a casting right and managerial control.

10.2. Mr.Salve went on to submit that after the bids were opened by NTPC on 25.08.2010, correspondence ensued between NTPC and the writ petitioner between September, 2010 and November, 2010 primarily, to ascertain the referential credentials of ACS. In this regard our attention

was drawn to letters dated 03.09.2010 and 25.09.2010 written by NTPC to the writ petitioner; letters dated 03.11.2010 and 09.11.2010 written by NTPC to one entity by the name of Enel Ingegneria & Innovazione SPA (in short, 'Enel'); and letters dated 05.11.2010 and 15.11.2010 written by Enel to NTPC. It is important to note at this stage that Enel is the owner of the referential plant i.e., Torrevaldaliga Nord Power Plant (in short, the TNP Plant).

10.3 According to Mr.Salve even though the exercise was contrary to the terms of the tender, information sought for was supplied to the satisfaction of the NTPC.

10.4 Elaborating on the relevant contents of the aforementioned letters, he submitted that by virtue of the letter dated 03.09.2010 information was sought in terms of the Clause 1.4.1 Item 4 of section III of the tender with regard to the writ petitioner's claim that ACS had manufactured, designed and commissioned the TNP Plant. Amongst other aspects, he submitted a pointed reference was made in the said letter to the fact that the client's certificate enclosed as Annexure to attachment 3 A-4 did not bear the signatures or stamp of its referencee i.e., Enel. The writ petitioner was thus, by this letter, called upon to submit an attachment duly stamped by Enel. Furthermore, it was pointed out by Mr. Salve that since the work at the TNP Plant was executed and commissioned by a

consortium, which inter alia consisted of ACS and another entity by the name of Babcock Hitachi Kure (in short, 'BHK'); the writ petitioner was called upon to submit the consortium agreement or other documentary evidence to establish ***“split of scope of work”*** between ACS and BHK.

10.5. The aforesaid request was reiterated by NTPC vide its letter of 25.09.2010. The reason for the same apparently was that the writ petitioner's response dated 20.09.2010 did not provide, in entirety, the information sought for, in particular the consortium agreement.

10.6 On receipt of the consortium agreement, NTPC vide its letter dated 03.11.2010 entered into direct correspondence with Enel. It was pointed to us that in view of the certificate dated 25.06.2010 issued by Enel (which was attached to the bidding document) whereby petitioner had represented that ACS had designed, engineered, manufactured, erected and commissioned at least one (1) number of coal fired supercritical Steam Generator having rated capacity of 1500 tonnes of steam per hour; NTPC sought clarification and confirmation as regards the scope of work, responsibilities and obligations undertaken as between ACS and BHK, in respect of execution of works at the TNP Plant.

10.7 Mr. Salve pointed out to us that immediately thereupon, Enel vide its letter dated 03.11.2010 provided the break-up of works as between ACS and BHK.

10.8 Mr.Salve submitted that instead of putting the enquiry to rest, NTPC at the behest of its competitor Hitachi Power Europe, GmbH (in short, HPE) sought to seek further information vide its letter dated 09.11.2010. By this communication, NTPC sought to ascertain the role assigned to each of the consortium members, who were involved in the execution of works at the TNP Plant.

10.9 In view of the query raised, Enel vide its letter dated 15.11.2010 supplied detailed information vis-a-vis break-up of works as executed by BHK and ACS in relation to the TNP plant. Particular emphasis was placed on break-up of works with respect to “pressure parts” by providing the further information under the sub-headings: Boiler Walls, Economizer, Superheaters and reheaters and Connecting Piping.

11. It was submitted that the writ petitioner sensing trouble, made a representation to the Chairman and Managing Director of NTPC vide letter dated 07.01.2011 wherein, it took pains to reiterate that NTPC should confine itself to the QRs provided in clause 7.1.1 of section I of the tender documents. In the light of the said clause 7.1.1, it was emphasized that in order to qualify as a Qualified Steam Generator Manufacture (in short, ‘QSGM’) - while, the bidder was required to have relevant experience in designing and manufacturing a Steam Generator of the kind specified, it did not necessarily require experience in manufacturing the

evaporator. The representation stressed the fact that the words used in Clause 7.1.1 of section I of the tender required bidder to “**provide**” an evaporator. The writ petitioner laid emphasis on the fact that it fulfilled the specified QRs for a QSGM in as much as in the reference plant (i.e., TNP plant) it had not only provided an evaporator but also executed the assigned works as the team leader of the consortium.

11.1 It is at this juncture, Mr. Salve contended (which is after the writ petitioner’s representation on 07.01.2011 had been put in post) that, NTPC dispatched the impugned letter dated 05.01.2011 - communicating its decision to eliminate the writ petitioner from the tendering process.

11.2 As noticed above, Mr. Salve pointed out the relevant documents to show that the impugned letter dated 05.01.2011 was dispatched on 10.01.2011 which was received by the writ petitioner only on 13.01.2011.

11.3. Based on the terms of the tender documents as also the correspondence exchanged with relevant parties, it was submitted that NTPC could not have come to the conclusion that the writ petitioner’s bid did not meet the stipulated QRs, as it had not manufactured the evaporator of the reference plant.

11.4 To drive home the point, reference was made to the fact that under Route 5, a bidder could make a valid offer in terms of clause 7.1.1 of section 1 of the tender even if, the evaporator of the reference Steam

Generator was not designed for variable pressure operations. It would suffice if the reference Steam Generator was designed for constant pressure provided that the bidder had an on-going licence agreement, as on date of techno-commercial bid: for design, manufacture, sale, use etc. of a variable pressure super-critical Steam Generator available in sub-critical and supercritical ranges. In such an eventuality, the bidder under the terms of the tender was required to furnish a deed of joint undertaking executed between bidder/the supercritical Steam Generator manufacturer and its technology owner/the licensor, so that they could be held jointly and severally liable to NTPC, for the successful performance of the tendered Steam Generator.

11.4 It was contended that the fact that, the writ petitioner had applied via Route 4 was known to NTPC. In so far as the fact that the writ petitioner proposed to provide an evaporator through a third party along with the Steam Generator - was also a fact in the knowledge of NTPC. In this regard reference was made by Mr. Salve to its attachment 3A-4 to the bid documents and letter dated 12.04.2010 issued by Siemens AG in its capacity as technology owner/licensor of the evaporator.

11.5 It is pertinent to note that, in the course of arguments, Mr. Salve attributed, the attempts made at eliminating the writ petitioner from the tendering process, to the former Chairman of NTPC, Mr.T.Sankaralingam

who, according to the writ petitioner, was working with BGR, a competitor of the writ petitioner. According to Mr. Salve, the queries raised (to which reference is already made by us) by NTPC in respect of the writ petitioner's bid were inspired by its competitor BGR and HPE. For this purpose, Mr. Salve referred to the averments made in paragraph 17 of the rejoinder :-

“That it is further submitted that, the former Chairman of NTPC is working for BGR who is a competitive bidder, and it seems he has been using his influence in the NTPC, to get the petitioner (who is an authentic and qualified bidder) out of the fray. It is surprising that the competition HPE has full knowledge of all the correspondence made by NTPC. In fact is surprising that a letter is received by NTPC on 5.11.2010, on the same day, the competitor gets to know about it, and sends another baseless letter with false allegations to contradict the letter send by ENEL. Again ENEL writes a letter on 15.11.2010 and it is made known to the competitor. On the same day the competitor sends another letter to NTPC attempting to substantitate the false averments made by it. NTPC never disclosed this letter to the petitioner.”

12. On the other hand, Mr.Chandhiok, learned Additional Solicitor General sought to contend that the writ petitioner's bid had been correctly rejected by NTPC. In support of his contentions, Mr.Chandhiok placed reliance upon the documents filed by the writ petitioner, in particular the attachment to the bid, being attachment 3A-4. The said attachment details out the experience of the bidder in manufacturing Steam Generators. Relying upon the said attachment, Mr.Chandhiok sought to demonstrate that under paragraph 1.2.0 of the said

attachment, the bidder had claimed that its joint venture partner, ACS had not only manufactured and erected the TNP plant i.e., a Steam Generator but also made a representation that the evaporator provided in the said TNP plant which was designed for variable pressure, had been manufactured by ACS. In this regard, a specific reference was made to Clause 2.06.00. Mr.Chandhiok laid stress on the fact that in the attachment, wherever specific information was sought as to the type of Steam Generator the bidder had manufactured in the past - the bidder had answered in the affirmative, in respect of each one of the parameters indicated therein, and in particular, in respect of information sought vis-a-vis the evaporator. Mr.Chandhiok emphasized the fact that the format of the attachment required the bidder to furnish "additional data" in case its answer was in the negative. Insofar as the specifications qua the evaporator were concerned, our attention was drawn to the following portion of the attachment; which is extracted verbatim (with the portions scored as found in the annexure filed) for the sake of convenience:-

"M/s ANSALDO CALDAIE SpA (qualified Steam Generator Manufacturer) have designed, engineered, manufactured/~~get—manufactured,~~ erected/~~supervised erection,~~ commissioned/~~supervised commissioning~~ of (i) at least one (1) number of coal fired supercritical Steam Generator having rated capacity of 1500 tonnes of steam per hour or above. Further this Steam generator is of the type specified, i.e. single pass (tower type) or two pass type using either spiral wound (inclined) or vertical plain or vertical rifled type water wall tubing, and are in successful operation for a period of not less than one (1) year as on the date of Techno commercial bid opening.

Further, it is confirmed that reference Steam Generator is provided with evaporator suitable for variable pressure operation (sub-critical and super-critical pressure ranges). Also, we confirm that offered steam generator is of the same type & same type of water wall tubing for which reference of Steam Generator has been furnished below. The details are as follows:

S.No.	Item Description	Station-1
1.00.00	Name of the reference station and its location	Torrevaldaliga North P.S. Torrevaldaliga, Italy
1.01.00	Name, address, Fax No. and Tel. No. of Owner of station Web site address	Enel Ingegneria e Innovazione SpA Via Carducci 1/3 20123 Milano (Italy) Tel. No. +39 02 2301 51 Fax No. +39 02 2301 5433 ww.enel.it
1.01.01		
1.02.00	Name and Designation of the responsible person in Owner's organization	Mr. Roberto Tomasi Executive Vice President Thermal Plants Development and Construction Business Area
1.02.01		
1.01.02	No. of units & capacity (Gross) of each unit in MW	1x660 MW
1.01.03	No. of steam generator sets supplied by us for reference the station	3 x 660 MW
1.01.04	Contract No. & Date #	I.AA.3.1.179.1 dt. Dec. 28, 2004
1.01.05	Starting date of Project	December 28, 2004
1.01.06	Scheduled date of Commissioning	March 5, 2009
1.01.07	Actual date of Commissioning	March 5, 2009

1.01.08	A) Date of Commencement of successful operation	March 5, 2009
	B) Date of commencement of successful commercial operation	June 22, 2009
1.01.09	Whether the Plant is coal fired	Yes/ ~~No~~ * (bituminous coal)
1.01.10	Scope of work executed by us for the aforesaid Steam Generator includes the following	
	a) Designed	Yes/ ~~No~~ *
	b) Engineered	Yes/ ~~No~~ *
	c) *Manufactured/ ~~got manufactured~~	Yes/ ~~No~~ *
	d) *Erection/* ~~Supervised erection/*Acted as Advisor for erection~~	Yes/ ~~No~~ *
	e) Commissioned/ ~~Supervised commissioning/*Acted as Advisor for commissioning~~	Yes/ ~~No~~ *
	f) Whether the plant is in successful operation for a period of one (1) year (minimum) as on date of techno-commercial bid opening	Yes/ ~~No~~ *

(* in case the bidder has acted as advisor for erection/commissioning of reference Steam Generator, bidder shall furnish necessary documents/certificate from client in support of such activity and enclose the same at Annexure.... to this Attachment)

2.06.00	Type of Steam Generator	
	(i) Single pass (tower type)	Yes/ ~~No~~ *
	(ii) One through type	Yes/ ~~No~~ *
	(iii) Evaporator	Yes/ ~~No~~ *

	designed for variable pressure operation (sub- critical and super critical pressure range)	
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12.1 Mr.Chandhiok also laid stress on that portion of the attachment which evidently indicated that ACS had, as a matter of fact, manufactured a Steam Generator in the past (the reference is clearly to TNP plant) which was designed for an evaporator having constant pressure. In this regard once again for the sake of convenience relevant portion is extracted verbatim with the scored out portion :-

~~“TO BE FILLED IN BY THE BIDDER WHO IS SEEKING QUALIFICATION AS PER CLAUSE 1.1.1, ITEM 4 OF BDS READ IN CONJUNCTION WITH NOTE 6 TO CLAUSE 1.0.0, ITEM 4 OF BDS (I.E. IF THE ANSWER TO SUB CLAUSE 2.06.00 (III) TO CLAUSE 1.1.0. ABOVE IS “NO”.~~

1.5.0 We, confirm that M/s. ANSALDO CALAIE S.D.A. (Qualified Steam Generator Manufacturer) meets all the requirement as per 1.1.1 of BDS except that the evaporator indicated in the reference steam generator is not designed for variable pressure operation and is designed for constant pressure (Universal Pressure) operation only and seeking qualification along with the original technology owner (Licensor) from which he has an ongoing license agreement (which covers technology transfer), as on the date of Techno-commercial bid opening, for design, manufacture, sell, use, service of once through variable pressure supercritical steam generator technology (with evaporator suitable for variable pressure operation in sub-critical and supercritical pressure ranges).

Further we confirm that original technology owner (Licensor) had experience of providing variable pressure design steam generator technology for at least one (1) no. of coal fired supercritical steam generator technology for at least one (1) no. of coal fired supercritical steam generator for a 1500 T/hr or higher capacity using either spiral wound (inclined) or vertical plain or vertical rifed type water wall tubing with the evaporator suitable for variable pressure operation in sub-critical and super-critical pressure ranges and which should be in successful operation for a period of not less than one (1) year as on the date of techno commercial bid opening. The detail of Licensor and his experience detail are as follows :-

S.No.	Item Description	Station-I
1.	Detail of Technology Owner (Licensor)	
1.01.00	Name of the original technology owner (Licensor)	SIEMENS AG
1.02.00	Address, Email ID & Tel. No.	EF ES EN, Freyeslebenstr.1, 91058, Eriangen Ph.+49 9131 18-6234
1.03.00	Name and Designation of the Responsible person in the Organization	Dr. Joachim Franke
1.04.00	Licensing agreement for max. Capacity rating of Steam Generator (in MW)	660 MW
1.05.00	Date of Start of Licensing agreement	Year 1995
1.06.00	Date of end of Licensing agreement	Year 2019
1.07.00	Whether scope of licensing agreement covers for design, manufacture, sell, use, service of once through variable pressure supercritical steam generator technology (with evaporator suitable for variable pressure operation in sub-critical and supercritical pressure ranges).	
1.08.00	Copy of relevant portion of Licensing agreement attached at Annexure ____	
II.	Details of experience of Technology owner (Licensor)	
1.01.00	Name of the reference station and its location	Torrevaldaliga North P.S. Torrevaldaliga, Italy
1.02.00	Client Name and its address, Fax. NO. & Tel. No., email ID	
1.03.00	Actual date of completion/date of commencement of successful operation	
1.04.00	Whether the plant is coal fired	
1.05.00	Scope of work executed by us	

	for the aforesaid Steam Generator includes the following : (i) Designed (ii) Engineered (iii) Whether the plant is in successful operation for a period of one(1) year (Minimum) as on date of techno commercial bid opening	Yes*/No* Yes*/No* Yes*/No*
1.06.00	i) Supercritical Steam Generator ii). Steam Generator steam flow capacity at Superheater Outlet (T/Hr.)	Yes*/No*
1.07.00	Type of Steam Generator i). Single pass (tower type) or two pass type ii). Once through type iii). Evaporator designed for variable pressure operation (sub-critical and super critical pressure range)	Yes*/No* Yes*/No* Yes*/No*
1.08.00	Type of Water, wall tubes (spiral wound/inclined or vertical plain or vertical rifled) i). Type of firing (Coal)	Yes*/No*
1.09.00	Certificate from the owner of the reference plant that the aforesaid Steam Generator is in successful operation for a period of not less than one (1) year as on date of techno-commercial bid opening and caused no serious problem in past, is furnished alongwith bid at Annexure ____.	
1.10.00	Joint Deed of Undertakings with coal fired steam generator set manufacturer as per performae enclosed in Section-VII (Forms & Procedures) is furnished alongwith the bid at Anneuxre ____.	

Notes:

1. Wherever the term Coal Fired is appearing above, "coal" shall be deemed to also include bituminous Coal/Sub Bituminous Coal/Brown Coal/Lignite.

~~1.6.0. Deed of Joint Undertaking (DJU) executed by us, Qualified Steam Generator Manufacture, alongwith subsidiaries of Holding Company (Qualified Steam Generator Manufacturer)/*JC promoter in JV Company and Technology Owner (Licensor) of Qualified Steam Generator Manufacturer as per clause 1.2.2 and/or Note No.4 and/or note no.5 for clause no.1.0.0. of BDS is enclosed at Annexure ____ to this attachment.~~

* Bidder to strike out whichever is not applicable."

12.2 Mr.Chandhiok based on the aforesaid extract submitted that it was quite clear that the writ petitioner had represented on its own that the TNP plant was designed with an evaporator suitable for constant pressure and not what was required i.e., Variable Pressure. Therefore, it was contended that in terms of Note 5(iii) the writ petitioner was mandatorily required to furnish a deed of joint undertaking executed by the bidder and the technology owner/licensor having the requisite experience in designing, manufacturing, sale, use and servicing of variable pressure supercritical steam generator (with evaporator suitable for variable pressure operation in sub-critical and supercritical pressure ranges). Since the writ petitioner had not done so it could be that the writ petitioner had fulfilled the conditions of the tender. For the sake of convenience, the relevant portion of Note 5(iii) is extracted hereinbelow :-

“(5) Steam Generator Manufacturer with Technology Tie-up for Variable Pressure Design

In case a supercritical Steam Generator manufacturer meets all the requirements as specified in clause no.7.1.1. above except that the evaporator in the reference steam generator is not designed for variable pressure operation and is designed for

constant pressure (Universal Pressure) operation only, in such case, the supercritical Steam Generator manufacturer shall be considered to be qualified, provided that such supercritical steam generator manufacturer has an ongoing license agreement (which covers technology transfer), as on the date of Techno-commercial bid opening, with the original Technology Owner (Licensor) for design, manufacture, sell, use, service of once through variable pressure supercritical steam generator technology (with evaporator suitable for variable pressure operation in sub-critical and supercritical pressure ranges)

(iii) In such an event, the bidder shall furnish a Deed of Joint Undertaking executed between the Bidder and the supercritical steam generator manufacturer (as the case may be) and its Technology Owner (Licensor), as per the format enclosed in the Bidding Documents towards the Bidder and the licensor being jointly and severally liable to the Employer for successful performance of the Steam Generator along with an extended warranty of at least one (1) year over and above what is required as per tender documents.”

12.3 As regards the allegations that queries were raised by NTPC at the behest of the competitor, Mr.Chandhiok submitted that these assertions, in particular those with respect to the involvement of Mr.T.Sankaralingam, the Ex-Chairman of NTPC (presently employed with BGR) were made, for the first time, in the rejoinder filed by the writ petitioner. Therefore, in these circumstances, they could not be taken note of, for the simple reason that NTPC had no occasion to rebut the same. In any event, Mr.Chandhiok submitted that a careful reading of

the information supplied by the writ petitioner along with its bid, which was scrutinized by committee of experts, brought to fore issues which required NTPC to seek clarification from the writ petitioner. Mr.Chandhiok submitted that in so far as NTPC was concerned it had carried out the evaluation of bid including that of the writ petitioner in a fair and transparent manner. To support his assertion, learned ASG drew our attention to the letter dated 09.11.2010 issued by NTPC to Enel, wherein the relevant extract of the letter received from HPE (one of the competitor's of the writ petitioner) dated 05.11.2010 was reproduced. As a matter of fact, it was pointed out by Mr.Chandhiok that a copy of the said letter dated 09.11.2010 was marked to the writ petitioner as well. The allegation of the writ petitioner that the letter was received from HPE on the same date on which NTPC had received a communication from Enel i.e., 05.11.2010, may perhaps have been a sheer co-incidence, according to Mr. Chandhiok. The fact remained according to Mr. Chandhiok, that NTPC had disclosed to the writ petitioner, the receipt of letter from HPE. In any event, since relevant contents of the letter of HPE were forwarded to both Enel and the writ petitioner, it could not be contended that NTPC was acting malafidely, at the behest of competitors of the writ petitioners.

12.4 On the main aspect of the matter Mr.Chandhiok submitted that, in order to be categorised as a QSGM under clause 7.1.1 of section I of the tender, the bidder had to have designed, manufactured, erected and commissioned a Steam Generator of requisite specifications as indicated in the said clause. This would necessarily mean that the Steam Generator would include an evaporator designed and manufactured by the bidder, for it to be declared as a QSGM in terms of clause 7.1.1. In other words, the contention made on behalf of writ petitioner that merely because a part of the steam generator (in this case the evaporator) was manufactured by another entity, would not render it ineligible to be classified as a QSGM, was untenable. According to Mr.Chandhiok, a plain reading of the clause 7.1.1 (which was identical to clause 1.1.1 of Item 4 of section III of the tender), did not countenance such a submission. It was contended by Mr. Chandhiok that the evaporator was vital to Steam Generator and hence, the requirement that - only such person could be declared a QSGM who, had not only the requisite experience in designing, engineering, manufacturing, erecting and commissioning a steam generator of the requisite specifications, but also every vital part of it, which included the evaporator.

13. We have heard the learned counsel for the parties at length and also perused the documents placed on record. We also had the occasion

of briefly looking at the two (2) files submitted for our perusal by NTPC, in relation to the tender in issue.

13.1 A perusal of the documents would show that the writ petitioner is an Indian Company registered under the Companies Act, 1956. The writ petitioner is a joint venture between Gammon India Ltd. and ACS. As noticed hereinabove, M/s Gammon India Limited holds 73.4% shares in the writ petitioner. The remaining equity is split between ACS and G.B.Engineering. Former holds 26% shares in the writ petitioner, while latter holds 0.6% of the equity. This aspect of writ petitioner's claim is not disputed by NTPC. We may only point out that NTPC does dispute the writ petitioner's claim (on account of the fact that this information does not form part of its bid documents) that Gammon India Ltd. owns 50% of the equity in ACS along with its claimed casting right and control over the management of ACS.

13.2 Continuing with the narrative, on 23.06.2010 NTPC had invited global bids for Steam Generators for its various projects, as noticed hereinabove. The tender documents were available for sale between 28.06.2010 and 28.07.2010. Admittedly, the writ petitioner filed its bid dated 18.08.2010 with NTPC on 25.08.2010. In so far as the bid documents are concerned, they are divided into seven sections. These being as follows :-

- (i). Section I – Invitation for Bids(IFB)
- (ii). Section II – Instructions to Bidder (ITB)
- (iii). Section III – Bid Data Sheet (BDS)
- (iv). Section IV – General Conditions of Contract (GCC)
- (v). Section V – Special Conditions of Contract (SCC)
- (vi). Section VI – Technical Specification (TS)
- (vii). Section VII – Forms and Procedures (FP)

13.3 For our purposes what is relevant are Sections I to III. As noticed above, the tendering was to take place in two stages. Stage-I mandated submission of techno-commercial bid, while Stage-II mandated submission of price bid. Clause 2 of the IFB broadly describes the scope of work. Similarly, Clause 22 of the ITB lays down the parameters for evaluation of the techno-commercial bid. Under Clause 23 of the ITB, after due scrutiny, NTPC is required to ascertain as to whether the bidders had submitted a responsive Stage-I (techno-commercial) bid. The purpose being to ascertain and satisfy itself as to whether bidder is qualified to perform the contract at hand. It is only after the employer i.e., NTPC has made such an evaluation that the bidder can proceed to Stage-II. As per Clause 25.1(b)(ii), the employer/NTPC is required to convey to the bidder, if found suitable, to submit Stage-II (price) bid or conversely in the event the bid is found unsuitable, to convey the grounds on which the bid is rejected. The grounds of rejection appear to be broadly two. First, where the bid is found to be substantially non-

responsive. Second, where the bidder fails to meet the minimum QRs, set forth in the bidding documents. In case of such an eventuality, the employer/NTPC is obliged to return the bid security.

13.4. Under clause 26 of the ITB procedure is prescribed for evaluating Stage-II (price) bid. Since those aspects are not in issue, we do not propose to dilate on the provisions relatable to Stage-II (price) bid. Importantly, for our purposes what is crucial is Clause 7 of the IFB which lays down the QRs for a bidder. A bare perusal of the opening part of Clause 7 of the IFB would show that it provides for routes which are available to a bidder to participate in the tender process.

“7. Qualifying Requirements for Bidder

7.1.0 The Bidder should meet the qualifying requirements of any one of the qualifying routes stipulated under clause 7.1.0 or 7.2.0 or 7.3.0 or 7.4.0 or 7.5.0. In addition, the Bidder should also meet the requirements stipulated under clause 7.6.0 & 7.7.0 together with the requirements stipulated under section ITB.” (emphasis is ours)

13.5. The bidder could thus follow any of the routes stipulated in Clause 7.1.0 (Route 1), 7.2.0(Route 2), 7.3.0(Route 3), 7.4.0(Route 4), 7.5.0(Route 5).

13.6 In the present case, it is not disputed that the attributes of a QSGM, as provided in Clause 7.1.1 in relation to Route 1, are common to all other routes. It is also not disputed that Section III of the bidding documents, which is the Bid Data Sheet (BDS) contains a similar provision under Item

4 in Clause 1.1.0 (Route 1) which is identical to clause 7.1.1 of the IFB. It is also not in dispute that the writ petitioner had applied under Route 4 and hence, the eligibility criteria for being declared a QSGM as provided in clause 1.1.1 under Item 4 of the BDS or that contained under Clause 7.1.1 of the IFB would be applicable to the writ petitioner. This also clear on a plain reading of “**Notes for Clause 1.0.0**” which provides as follows:-

“Notes for clause 1.0.0

(1) Definitions

(ii) “Qualified Steam Generator Manufacturer” means a manufacturer meeting requirements stipulated at 1.1.1”

13.7. In these circumstances, it would suffice if we quote one or the other clause. Since clause 1.1.1 is quoted in the earlier part of our judgment, for the sake of convenience Clause 7.1.1 is extracted hereinbelow:-

“7.1.1 The Bidder should have designed, engineered, manufactured got manufactured, erected/supervised erection, commissioned/supervised commissioning of at least one (1) number of coal fired supercritical Steam Generator having rated capacity of 1500 tonnes of steam per hour or above. Further, such Steam generator should be of the type specified, i.e. single pass (tower type) or two pass type using either spiral wound (inclined) or vertical plain or vertical rifled type water wall tubing, and should be in successful operation for a period of not less than above Steam Generator should have been provided with evaporator suitable for variable pressure operation (sub-

critical and supercritical pressure ranges). The bidder shall offer only the type of Steam Generator and type of water wall tubing for which he is qualified.”

13.8 As noted above, it is not disputed that the writ petitioner was eligible to bid via Route 4 on the strength of credentials of ACS which holds 26% stake in it, as is the requirement of the bid documents (see Clause 1.4.1 of Item 4 of the BDS). Writ petitioner’s claim that it met the requirements of a QSGM under Clause 1.1.1 of BDS which, as indicated above, is identical to Clause 7.1.1 of IFB is decidedly based on ACS experience qua the TNP plant. An examination of documentation furnished by writ petitioner and/or the owner of the TNP Plant, Enel, is indicative of the fact that the work at the TNP Plant was executed by a consortium which included BHK with ACS as the leader of the consortium. It appears that the writ petitioner had submitted three (3) documents: (i). an undated client certificate from Enel which is the owner of TNP plant; (ii). a certificate from Enel dated 25.06.2010 which, encloses an attachment 3A-4; and (iii). a letter from Siemens AG dated 12.04.2010. It appears that since the writ petitioner had scored out the portion contained immediately above clause 1.5.0 of the attachment 3A-4 (see paragraph 12.1 above), and given the fact that the Deed of Joint Undertaking of the technology owner (i.e., Siemens AG) was not

furnished, NTPC proceeded to examine whether the petitioner complied with the QRs stipulated in Clause 7.1.1 of the IFB/clause 1.1.1. of the BDS.

13.9 This examination resulted in issuance of letter dated 03.09.2010. With the issuance of the said letter correspondence ensued, to which reference has been made hereinabove, by us. Clarifications were sought by NTPC as regards the scope of work entrusted to ACS and BHK in respect of the reference plant i.e., TNP plant. NTPC in its own wisdom appears to have written directly to the owner of the plant Enel vide its letter dated 03.11.2010. Enel furnished a break up of work executed by each member of the consortium vis-à-vis the TNP plant vide its letter dated 05.11.2010. Not being satisfied with the information supplied, in particular, with respect to certain critical parts of the Steam Generator, such as, the 'pressure parts'; it once again wrote to Enel vide its letter dated 09.11.2010. What is crucial at this juncture, is that on 05.11.2010 NTPC had received a letter from HPE. By this letter HPE had sought to convey its credential with respect to the TNP plant. In this letter, HPE claimed that BHK was the technical leader for the TNP plant, and that critical aspects of engineering, concerning pressure parts, were worked upon by HPE in conjunction with BHK. It is apparent from the letter of NTPC dated 09.11.2010 that, HPE's letter of 05.11.2010 had triggered the queries raised therein. Enel responded to aforementioned letter of NTPC

vide its letter dated 15.11.2010. In the said letter Enel quite clearly indicated as follows:-

“Subject: Torrevaldaliga Nord Power Plant
Contract No.I.AA.3.1.179.1 dated Dec. 28, 2004 – ATI Ansaldo Caldaie
– 3 x 660 MW Coal fired boilers, ultra-supercritical Benson Once-Through type

With a reference to your fax/email dated November 9th, 2010, Ref. No.:01/CS-9575/9571/0370/0360/3568-102(R)-2-PRA, with particular regard to paragraph 4.0, we inform you as follows :-

“(i)It has been done by each party for its own Scope of work; It has to be understood that the parties were contractually jointly liable.

(ii)Under Italian law, the Temporary Association of Companies does not assign to any party the role of technical leader of the consortium.

(iii)Ansaldo Caldaie developed design and engineering for each supply in its own scope. Considering your request of clarifications, we hereto attach a detailed break-up of works executed by Ansaldo Caldaie, the Consortium Leader, and Babcock Hitachi Kure (BHK).”

13.10 Insofar as the “**pressure parts**” were concerned, the break-up of works between BHK and ACS was provided; which reads as follows:-

“TORREVALDALIGA NORD POWER PLANT
ANSALDO CALDAIE – BHK TEMPORARY ASSOCIATION OF COMPANIES
BREAK-UP OF WORKS

	BHK	ANSALDO CALDAIE
Project Management Leadership		X
Design and engineering (*)	X	X
Pressure parts		
Boiler Walls - Furnance - Convection pass	X	X
Economizer		X
Superheaters and reheaters: SH2, SH3,RH2	X	
SH1, RH1		X
Connecting piping	X	X

13.11 Curiously, BGR shot off a letter dated 15.11.2010 in continuation of HPE's earlier letter dated 05.11.2010. With this letter, a technical paper presented at Power Gen. Europe 2011 titled **"Design and Operation Experience of the First 600° C Boiler in Europe, Torrevaldaliga Nord 660 MW – a Step towards a 700° C Advanced USC Boiler"** was enclosed. The thrust of the communication being that BHK and HPE were the ones primarily involved in the execution of works at the TNP plant.

13.12 The internal files of NTPC seem to indicate that NTPC referred the matter for legal opinion to the Law Officer of the Union of India. After receiving the legal opinion on the issue as to whether the ACS met the QRs under Clause 1.4.0 of Item 4 of the BDS, it concluded that the ACS did not meet the experience criteria.

13.13 The record of NTPC is indicative of the fact that it was the representation of the writ petitioner dated 12.12.2010, which propelled NTPC to re-examine the matter. The representation of 12.12.2010 was followed by a second representation dated 16.12.2010. Consequently, NTPC once again approached the law officers of Union Of India for legal opinion. Suffice it to say, the Law Officers opined that ACS could not be categorized as QSGM under clause 1.1.1 of the BDS.

13.14 Consequently, the writ petitioner was excluded from the tendering process. From amongst the bidders, following three were cleared for
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Stage-II (price) bid i.e., BHEL, L&T-MHI and BGR. Resultantly, the clarification meetings were held only with the aforementioned three bidders.

13.15 Thereafter, amendments to the bidding documents were finalized. The matter was put up before the competent authority in the NTPC for approval.

13.16 As noticed it is in the aforesaid circumstances that NTPC sent intimations to the three successful bidders of Stage-I to proceed to Stage-II (price) bid, even while the writ petitioner was informed about the rejection of its bid. These decisions were taken simultaneously by NTPC, on 05.01.2011. The record supplied to us does not seem to suggest that the decision to reject the writ petitioner's bid was ante-dated. Therefore, notwithstanding the allegation of the writ petitioner that letter dated 05.01.2011 conveying the rejection of its techno-commercial bid (i.e., stage-I) was dispatched on 10.01.2011 – the decision by itself was not ante dated. The record shows that the decision with regard to successful bidders of Stage-I as well as the rejection of the writ petitioner's bid was taken on 05.01.2011. Therefore, it is not as if writ petitioner's representation of 07.01.2011 triggered rejection letter dated 05.01.2011.

14. The other allegation of the writ petitioner that, Mr.T.Sankaralingam's association with BGR had hand in the queries being

triggered, is also not borne out from the record. The record shows that NTPC had formed a committee to evaluate the bids. Information supplied with bid documents, in particular attachment 3A-4 could quite possibly have triggered these queries. The fact that letters were received from HPE/BGR on 05.11.2010 and 15.11.2010 respectively, which was the very day, responses were received from Enel may seem a little curious, but that by itself does not vitiate the process in as much no fault can be found with NTPC as recipient of information. In our view no definitive material is available with us to come to the conclusion that these letters were inspired by Officers of NTPC to exclude the writ petitioner from tendering process or that Mr. T. Sankaralingam had a hand in it. We are in the age of commercial espionage, it cannot be ruled out that information flowed to the competitor from an insider. Where the insider is located or what is his identity is anybody's guess at this stage. However, suspicion cannot be made a basis for arriving at such a conclusion. As observed above by us, the timings may seem curious, but no definitive conclusion can be reached in this regard based on the material available. This view is fortified by the actions taken by NTPC at its end on receipt of information from writ petitioner's competitor. In the letter dated 09.11.2010 NTPC categorically conveyed to Enel the extract of letter dated 05.11.2010 issued by HPE. A copy of this letter was also sent to the writ petitioner.

Therefore, as observed by us above, we cannot find fault with NTPC for using the information received by it (even if it was from a competitor of the writ petitioner) to seek clarification from the owner of the TNP plant, i.e. Enel. In our view no mala fides can be attributed to NTPC in that regard. Allegations in this regard, as rightly submitted by learned ASG are made by the writ petitioner in the rejoinder, and hence, afforded no opportunity to NTPC to rebut this aspect of the matter. What cannot be lost sight of is the fact that Mr. T. Sankaralingam is not a party to the present proceedings. Allegations are personal in nature. Mr. T. Sankaralingam ought to have had an opportunity to rebut the allegations. He cannot be condemned unheard. We, therefore, do not consider it fit to take cognizance of these allegations made by the writ petitioner. The argument at best can be termed as an argument of prejudice.

15. This brings us to the heart of the matter, which is, whether ACS could be construed as a QSGM in terms of Clause 7.1.1 of the IFB or Clause 1.1.1 of Item 4 of BDS. A close reading of the relevant part of the aforementioned Clause would show that bidder should have designed, engineered, manufactured (could also get manufactured), erected/supervised erection, commissioned/supervised commissioning of at least one (1) number of coal fired supercritical Steam Generator having rated capacity of 1500 tonnes of steam per hour or above.

15.1. Furthermore, such Steam Generator should be of the type specified: (1) single pass (tower type) or two pass type using either spiral wound (inclined) or vertical plain or vertical rifled type water wall tubing, and should be in successful operation for a period of not less than one(1) year as on the date of techno-commercial bid opening.

15.2 In addition to the above, the Steam Generator **should have** been **provided** with an evaporator suitable for variable pressure operation (sub-critical and super-critical pressure ranges). Interpretation put on this part of the clause by the writ petitioner is that, in so far as the evaporator is concerned, ACS would not stand disqualified from being declared a QSGM, if it otherwise had the experience of designing, engineering and manufacturing a Steam Generator of the requisite specification as provided in Clause 7.1.1 or its equivalent Clause in BDS only because the evaporator in the TNP plant was provided by a separate entity. It is important to note that in so far as the evaporator installed in the TNP Plant is concerned, the writ petitioner concedes only to the fact that certain parts of it and not the entire evaporator as is suggested, was manufactured by its other consortium partner i.e., BHK.

15.3 Furthermore, the fact that the writ petitioner had wrongly scored out a portion of the attachment 3A-4 ought not to have, according to the writ petitioner, put NTPC in doubt on this aspect in respect of the current

tender since it had provided the particulars of the technology partners i.e., Siemens AG.

15.4 Therefore, the argument was that while as a whole the reference Steam Generator i.e., TNP plant had been designed, engineered and manufactured by a consortium of which ACS was the leader, the fact that certain parts of the evaporator had been manufactured by BHK/HPE would not make ACS ineligible as a QSGM.

15.5 As against this, Mr.Chandhiok argued to the contrary. He stressed upon the fact that the evaporator being a crucial part of the Steam Generator, it was quite apparent on a plain reading of the relevant clause of the bid documents that ACS would be eligible as a QSGM only if it had also designed, engineered and manufactured the evaporator.

15.6 We may only note at this stage that the writ petitioner's filling up of the bid documents in particular the attachment 3A-4 was less than happy, but what cannot be lost sight of is that there was no attempt on the part of writ petitioner to mislead NTPC as regards the fact that it was offering an evaporator manufactured by a third party in so far the current tender was concerned. From the extracts which are culled out by us hereinabove, it is quite clear that NTPC was quite aware of the fact that the Siemens AG was the technology owner/licensor of the evaporator which was offered by the writ petitioner in its bid.

15.7 Therefore, this brings us to the question as to whether interpretation placed by the writ petitioner ought to be accepted or not? In our view it is trite law that interpretation is required to be made; whether of contract, document or a statute, only if, there is an ambiguity as to the intent of the parties. Intent has to be construed from the words used in the contract. It is only when the language of a document is ambiguous, should the tools of interpretation be brought into play to gather the intent of the parties. In doing so one should read the document as a whole and not in fragmented parts.

15.8 The word **“provide”** used in clause 7.1.1 of the IFB/clause I.I.I. of the BDS leaves us no wiser as to the intent of parties. In plain English, the word **“provide”** would mean supply or furnish (see Concise Oxford Dictionary 9th Edition page 1102). Would it then mean that ACS will stand disqualified as a QSGM if in the reference plant (i.e., the TNP plant), the evaporator was supplied by say BHK. In our view, this interpretation cannot be laid on the said clause, given the manner in which it is structured, especially when it is read in conjunction with other similar clauses (read routes) of the tender. To cite an example, under Route 5, a bidder can qualify as a QSGM if he had in the past had experience of manufacturing a Steam Generator of requisite specification with an evaporator of constant pressure provided it undertook to supply one with

a variable pressure, and in addition furnished a joint deed of undertaking of the owner and/or licensor of such technology. Therefore, on a comparison of QRs for a QSGM (which are common to all five Routes) it appears that in so far as the NTPC was concerned, it was quite prepared to accept a bidder as a QSGM if the evaporator supplied had the backing of the technology owner and/or the licensor of the evaporator.

15.9 In the present case, a consortium appears to have designed and manufactured the TNP Plant of which ACS was the leader. The fact that certain parts of the evaporator (we will assume that they are crucial) were designed and manufactured by BHK would not, on this account alone, disentitle ACS from being categorized as a QSGM, because in our opinion, a reading of the document does not reflect that such was the intent of parties. If NTPC is prepared to accept a joint deed of undertaking of a technology licensor for a Steam Generator with a Variable Pressure evaporator when the referential plant was designed with an evaporator suitable for constant pressure – we see no reason why the word “**provide**” used in clause 7.1.1 of IFB/clause 1.1.1 of BDS cannot be interpreted to mean that parties did not intend to exclude a person from being categorized as a QSGM only because the evaporator provided in the referential plant was supplied by a third party.

15.10 We are thus unable to persuade ourselves to concur with the interpretation placed on clause 7.1.1 of IFB /clause 1.1.1 of the BDS by the NTPC, which is, that ACS was not a QSGM as it did not have the relevant experience of designing, engineering or manufacturing an evaporator. As a matter of fact the said clause also seems to indicate that it would suffice if the QSGM had only designed and engineered a Steam Generator and sub contracted the work of manufacturing the Steam Generator to another entity. This is quite evident on a plain reading of the expression *“got manufactured”* appearing in the main clause. To us it seems quite odd that NTPC would accept in respect of the current tender a Steam Generator manufactured by a third party but would seek elimination of the bidder on the ground that it cannot be categorized as a QSGM, since in the referential plant the evaporator was supplied by a third party. If this was the requirement in the contemplation of NTPC at the time when the tender was first floated it certainly does not seem to have transcended in the provisions incorporated in the tender. We should not be understood as having said that NTPC is bound to go ahead with tender if it otherwise does not suit its purpose; given the value of the investment.

16. The NTPC, however, cannot based on the present tender, exclude the writ petitioner from the tendering process for the reasons articulated before us.

17. Having come to the aforesaid conclusion, we are of the view the letter dated 05.01.2011 whereby, the writ petitioner's bid has been rejected deserves to be quashed. It is ordered accordingly. Consequently, NTPC will allow the writ petitioner, in accordance with the terms of the bid documents, not only to proceed to the next stage i.e., Stage-II (price bid) but also permit it to participate in the technical discussions qua the tendering process.

18. For the foregoing reasons, the writ petition is allowed. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J.

SANJAY KISHAN KAUL, J.

March 01, 2011
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