

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on : 21.03.2011
Judgment delivered on: 08.04.2011

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WP(C) No. 265/2011

ROKOSALIE ANGAMI

..... PETITIONER

Vs

UOI & ORS.

..... RESPONDENT

Advocates who appeared in this case:

For the petitioner	:	Mr.K.K.Rai, Sr.Advocate with Mr.Bankey Bihari, Advocate
For the Respondents 1 & 2/UOI	:	Mr.Jatan Singh & Mr.Kunal Kahol, Advocates
For the Respondent No.3.	:	Mr.Jayant Bhushan, Sr.Advocate with Mr.Edward Belho, Mr.Stephen Yanthan and Mr.Gautam Talukkar, Advocates
For the Respondent No.4	:	Mr.Ajay Verma, Advocate.

CORAM :-

HON'BLE MR.JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. The petitioner has come to court being aggrieved by the fact that even though he was declared a successful bidder at the meeting of the Tender Evaluation Committee (in short 'TEC') constituted by the respondents 1 to 3 (in short official respondents) held on 29.10.2010, the letter of acceptance (in short 'LOA') and the work order has not been awarded to him.

2. But before we proceed further it would be necessary to refer to certain aspects, post institution of the writ petition in this court. The captioned writ petition was moved on 14.1.2011 along with an interlocutory application, when we directed that all actions taken by the official respondents would be subject to the final outcome of the petition. Crucially, this order had to be passed as we were informed on that day that, the official respondents had already issued a LOA to respondent no.4. It is important

to bear in mind that, at the stage the writ petition was filed, the petitioner was not perhaps clearly aware of the fact as to whether or not, work had been awarded to respondent No.4. Respondent no. 4, incidentally, is the very same person whose bid had been declared non-responsive by the official respondents at very same meeting of the TEC which has been referred to above by us i.e. 29.10.2010. The petitioner had come to the court placing his apprehensions in the forefront, which were that he had come to know on 12.1.2011 that even though respondent No.4's bid was declared non-responsive, the official respondents, were on the verge of awarding the contract to it i.e. respondent no.4.

2.1 It is in these circumstances, that the prayers in the writ petition perhaps veered around the petitioner seeking the following reliefs broadly:-

2.2 The official respondents should be restrained from awarding the contract to respondent no.4; that the court should call for the record pertaining to award of the said contract; and lastly, respondents should be directed to complete the bid of the petitioner, in accordance with law, by treating the bid of the petitioner as responsive.

2.3 Continuing with our narrative as to what transpired on 14.1.2011 and thereafter; on 14.1.2011 appearance was entered on behalf of respondents 1 to 3 by advocates based on service of an advance copy of writ petition. Since accommodation was sought, opportunity was granted to them, to file a detailed affidavit, in response to averments made in the writ petition. The writ petition was posted for hearing on 02.02.2011. The official respondents, however, were directed to make available records for our scrutiny.

3.1 Despite, opportunity being granted counter affidavits were not filed. Thus on 02.02.2011, a further opportunity was granted to the parties to complete the pleadings. The matter was posted for hearing on 15.02.2011.

3.2 On 15.02.2011, a detailed order was passed by us, as we were informed that respondents 1 to 3 had proceeded to issue an intimation of notice to proceed with work in favour of respondent no. 4, vide communication dated 20.01.2011. The said interim order was passed by us after broadly considering the following: First, TEC had declared petitioner L-1; second, respondent no. 4's bid was found to be non-responsive, in view of absence of its failure to mention offer price in the "form of bid"; and lastly, but for the fact that respondent no. 4 had not mentioned the offer price in the form of bid, it was otherwise the lowest bidder if price were to be calculated as per the Bill of Quantities (hereinafter referred to as 'BOQ').

4. With these facts staring us in the face we came to the conclusion that the matter required deeper consideration and hence, restrained respondent no.4 from proceeding further with the work assigned to it. However, given the fact that the difference in the bid tendered by the petitioner and the price calculated as per the details referred to in BOQ by respondent no.4 was nearly Rs 6 crores (which was incidently one of the factors, we are told persuaded respondent no.2 to review decision taken by the TEC on 29.10.2010), we directed the petitioner to file an undertaking by way of affidavit that he would be willing to work the contract at the price referred to in the BOQ by respondent no.4 if, his status as L-1 was retained.

4.1 We may note that such an affidavit pursuant to directions issued on 15.2.2011 has been filed by the petitioner in the form of an affidavit dated 19.2.2011.

4.2 We had also issued directions to the respondent no.3 by the very same order to carry out measurements of work, if any, executed by respondent no.4 pursuant to the notice to produce communication issued in its favour.

4.3 The matter was thereafter posted on 25.2.2011, when respondent no.4 entered appearance and sought a week's time to file a counter affidavit. Since respondent no.3 had not complied with a direction issued on 15.2.2011, further time was granted to

place an affidavit on record. The matter was posted for hearing on 21.3.2011. On the said date respondent no.3 moved an interlocutory application to place certain additional facts on record. In the said application, a reference was also made with regard to the progress made by respondent no.4 qua the work, after notice to proceed to work was issued in its favour. It is pertinent to note that, apart from furnishing a performance security in the form of a bank guarantee, respondent no.4 had taken the following steps:-

- (i) it had set up three camps for execution of the work which, as per respondent no. 3, is only an “*initial establishment*”; and
- (ii) reportedly placed orders for procuring machineries (the details of which admittedly respondent no.3 had not received till generation of report, i.e. 23.2.2011).

4.4 After considering the contents of the said interlocutory application, moved by respondent no.3, we allowed the same.

5. With this prefatory note we would like to note the background in which the grievance raised by the petitioner before us has arisen.

5.1 Respondent nos. 1 to 3 (hereinafter referred to as official respondents) issued a Notice Inviting Tender (in short ‘NIT’) on 08.07.2010 for construction of following work:-

- (i) ***Widening to 2-lane on NH-61(new NH-2) from KM 40/000 to 72/400 in the State of Nagaland (Job No.61-NG-2010-11-60) (hereinafter referred to as the ‘works’).***

5.2 NIT was issued by way of an advertisement in various dailies, which was titled “National Competitive Bidding”.

5.3 The NIT pegged the value of the works at Rs 75,78,50,142.00. It was also indicated in the NIT that the bidders were to furnish a bid security equivalent to 1% of value of work amounting to Rs 75,78,501.00. The cost of tender documents was set at

Rs 1,50,000.00. The time frame provided in the NIT was 36 months. NIT also indicated that the bid documents could be procured from the office of respondent no.3, in Kohima, between 26.07.2010 and 20.08.2010, on payment of the cost of tender documents, as indicated hereinabove. The bids as per the NIT were to be accompanied by the bid security amount, as mentioned above. The bids were to be delivered to the Superintending Engineer PWD(NH), NH Circle-I, Kohima on or before 20.08.2010. It was clearly indicated in the NIT that the bid shall be opened on 25.08.2010 in the office of the Chief Engineer (P-8) Ministry of Road Transport & Highways, Government of India, Transport Bhawan, Parliament Street, New Delhi, **in the presence of the bidders.** A provision was also made for a pre-bid meeting to be held on 04.08.2010, in the office of the Chief Engineer PWD(NH), Nagaland Kohima, to enable bidders to seek clarifications, if any required, before opening of the bid.

5.4 Bid documents are compendiously referred as “Invitation For Bids” (hereinafter referred to as ‘IFB’). The IFB is divided into five sections. Section 1 pertains to instructions to bidders (in short ‘ITB’); Section 2 pertains to qualification, information and other forms; Section 3 relates to conditions of contract ; Section 4 deals with contract data; and lastly, Section 5 adverts to technical specifications. As per the IFB, the bidders were required to submit their bid in two parts: part 1 was to be the technical bid, while part 2 was the financial bid. Only if the bidder qualified on technical parameters would the financial bid be opened and valued.

5.5 There is no dispute in the instant case that initially five (5) bidders had participated in the tendering process under what is referred to as the two cover system (which is essentially submission of bids in part 2 as indicated hereinabove).

5.6 The technical bids of these bidders were opened by the TEC in the presence of the representatives of the bidders on 23.08.2010, at New Delhi. It is while examining the technical bids certain discrepancies were noted in the bid documents. The

discrepancy evidently pertained to the bid documents. The Nagaland State PWD, had issued, as bid documents pre-qualification documents, prescribed for works costing Rs 100 crores and above, whereas what was required to be issued were post qualification documents meant for works costing less than Rs 100 crores; which are generally referred to as standard bid documents (in short 'SBD'). This corrective measure was directed to be taken, by the TEC, by recommending re-issuance of bid documents to all five (5) bidders strictly as per the SBD. This was done.

5.7 Accordingly, the five (5) bidders in the fray were asked to re-submit modified technical bids excluding bid security, which they had already filed, with an option to modify the financial bid, if they so chose. The five (5) bidders were asked to re-submit their bids keeping in mind that the last date of re-submission was 22.10.2010. The five (5) bidders responded once again. The said bids were opened on 25.10.2010. The TEC evaluated the technical bids in its meeting held on 27.10.2010. Out of the five (5) bidders, three (3) bidders were found eligible in respect of the technical parameters stipulated by the official respondents. The petitioner was one, among the three (3) bidders who had been declared as technically responsive; these being: (i) M/s T.Tachu & Co & Vilelie Khamo(JV), (ii) M/s DRA Vascon (JV) (i.e., the petitioner) and; (iii) Menakshi Infrastructurse Pvt. Ltd., private (i.e., respondent no.4).

5.8 In view of this circumstance, on 29.10.2010 the TEC, in the presence of the representatives of three (3) technically responsive bidders, opened their respective financial bids. It is not in dispute that the TEC on opening financial bid found that insofar as the respondent no.4 was concerned, it had failed to mention the offer price in part 1 of the form of bid enclosed with its financial bid. Given this circumstance, the TEC declared the financial bid of respondent no.4 "non-responsive". Consequently, TEC had no option but to proceed to consider the financial bids of M/s T.Tachu & Co & Vilelie Khamo (JV) and that of the petitioner – as these were the only bids which

were responsive. Decidedly, a comparative statement was generated at this meeting of TEC. It is important to note what the comparative statement indicated, as these documents were generated contemporaneously when bids were opened and announced; this document being crucial, the contents of the said document for the sake of convenience are culled out hereinbelow:-

S.No.	Name of Bidder	Offer Price (Rs.)	Rebate, if any (%)	Net Offer Price (Rs.)	Signature of Bidder(s)/ Representative
1	M/s T.Tachu & Co and Vilelie Khamo (JV)	757850139.00	NIL	Rs 757850139.00	Sig
2.	M/s DRA & VASCON (JV)	677751684.00	NIL	Rs 67,77,51684.00	Sig./29/10/10 Sig./29/10/10
2	M/s Meenakshi Infrastructure Pvt. Ltd.				Amount of bid not indicated in form of bid. Sig./29/10/10

Sig./29/10/10

(~~Prem Lata Kaushik~~)

~~Addl. Financial Advisor~~

MoRTH

Member

Sig.

(S.C.Mondal)

Regional Officer

M/o RT & H, Guwahati

Member

Sig./29/10/10

(Verinder Kaul)

Superintending Engineer

M/o RT&H

Member

Sig.

(K.Rhetso)

Superintending Engineer (NH)

Nagaland PWD

Member

Sig.

(Peter Solo)

Chief Engineer (NH)

Nagaland PWD

Member

Sig./29/10/10

(Satish Kumar)

Chief Engineer (P-8)

M/o RT&H

Chairman

6. What followed thereafter are matters in respect of which the petitioner has not only a grievance but has also raised serious issues pertaining to the non-transparent manner in which the official respondents proceeded to reverse its decision. Decidedly, on a comparative evaluation of the financial bids found responsive; the petitioner having quoted the lowest price for the works tendered, was declared L-1.

6.1 It is on this point that the official respondents have given their version of the events which, the petitioner has denied. The official respondents submitted before us that (a stand which is taken in their counter affidavit) they had received a

representation from respondent no.4 to effect that even though in the form of bid it had not mentioned the offer price, the price for the works was referred to in the BOQ.

6.2 It requires to be noticed that the BOQ details out the rates against the each quantity of sub-work envisaged under the tender.

6.3 It is also pertinent to note, at this stage, that even though the official respondents in their affidavit referred to the purported representation/application of respondent no.4 which supposedly propelled them to revisit the matter; there is neither a reference to any particulars, such as, date etc. of any such representation nor is the supposed representation appended to the counter affidavit. Curiously, a common counter affidavit has been filed on behalf of respondents 1 to 3; which incidently has been affirmed by the Superintending Engineer PWD Nagaland Kohima. Respondents 1 and 2 are the Union of India which is sued through the Secretary to the Government of India (GOI), Ministry of Road and Surface Transport, while respondent 3 is the Chief Engineer (P-8), Ministry of Road Transport and Highways. We would have thought that separate counter affidavits would have been filed since there would have been facts which perhaps would have emerged from the files of respondents 1 and 2. However, as noticed above, the Superintending Engineer of the State Government has filed an affidavit both on behalf of respondent no.3 and as well as on behalf of respondent nos. 1 and 2.

6.4 Continuing with the narrative, the official respondents have taken the stand that on the very day i.e., 29.10.2010, the TEC (based on this ghost representation) re-examined the matter and documented its findings in a note; which reads as under:-

“In connection with award of the work mentioned above, technical bid of following bidders were found responsive

- (i) M/s T.Tachu & Co. & Vilelie Khamo (JV)*
- (ii) M/s DRA – Vascon (JV)*
- (iii) M/s Meenakshi Infrastructure Pvt. Ltd.*

Financial bid of above three bidders were opened on 29.10.2010 in the Chamber of CE (P-9) at 10.00 hrs in the presence of evaluation committee members and representatives of bidders who choose to attend. Details offer price was announce one by one and recorded in the evaluation sheet placed at Annexure I.

It was observed that one bidder namely M/s Meenakshi Infrastructure Pvt. Ltd has not mentioned the offer price in para 1 of the FORM OF BID enclosed with the financial bid, which construe that the bidder offers to execute the works described therein and remedy any defects therein the conformity with the conditions of Contract, Specifications, Drawings, Bill of Quantities and Addenda for the offered sum(s). In absence of offered sum (s), the financial bid of above bidder was considered as non responsive though the bidder happens to be lowest as per priced BOQ. In view of above, the evaluation committee recommended arithmetical check to be carried out for the financial bids of bidders at Sl no (i) and (ii) above.”

(emphasis is ours)

7. A perusal of the aforementioned note would show that TEC somehow noticed the fact that even though they had declared respondent no.4 non-responsive since it had failed to mention the offer price in the form of bid, it was L-1 as per price indicated in the BOQ. Notwithstanding this fact, TEC recommended carrying out of arithmetical checks in respect of financial bid submitted by M/s T.Tachu & Co. & Vilelie Khamo (JV) and the petitioner.

8. The matter according to the official respondents did not rest there as a note on the file was generated by the DG (RD). The said note, which is hand written, is extracted hereinbelow for the sake of convenience as it is otherwise crucial to the controversy at hand:-

“As per the priced BOQ of M/s Meenakshi Infrastructure Pvt., the price of the work is Rs 61.76 crores which is about Rs 6 crores lower than the next bidder’s price of Rs 67.77 crores. However, in the Form of Bid in the offer clause, he has left it blank. If this is considered a ‘a no offer’ his

bid has to be declared 'non-responsive', and the contract was to be awarded to the next bidder at a higher price. Otherwise, he has to be asked to confirm that the price given in the BOQ is the amount offered. This may involve a slight departure from the bid condition that a non-responsive bid cannot be made responsive subsequently.

AS&FA may kindly advise the course of action.

Sd/-

AS&FA

29.10.10

(emphasis is ours)

8.1 As is evident on a reading of the note, the advice of AS&FA was sought. Consequently, the matter was escalated to the finance wing. The finance wing after noting that the price quoted as per the BOQ by respondent no.4 was less by Rs 6 crores as compared to what the petitioner had offered, advised that the opinion of the Ministry of Law be sought in the matter.

8.2 It is not disputed that official respondents have not sought the opinion of the Ministry of Law.

8.3 Long and short of this exercise was that the matter was escalated further, and the approval of the Secretary to the GOI, Ministry of Road, Transport and Highways was sought. The note sheet of 24.11.2010 indicates that the Secretary, Road, Transport and Highways had given his approval to the recommendation of the finance wing, wherein the failure of respondent no.4 to mention the offer price in the form of bid, was dubbed as an inadvertent mistake. It was, however, proposed that the matter be put once again before the TEC for evaluation of the financial bid of respondent no.4.

8.4 The TEC, it appears, once again met on 29.11.2010 and approved the bid of respondent no.4. The TEC made recommendations that the work be awarded to respondent no.4. Based on the above, a LOA was issued in favour of respondent no.4 on 10.12.2010.

8.5 As noticed by us hereinabove, this is one of the reasons that we had passed a limited interim order in the first instance on 14.01.2011. It is only on 15.2.2011 we elaborated on the scope of interim order after we were informed that in the interregnum, the official respondents had taken further steps in the matter by not only signing a contract but had also issued, on 20.01.2011, a notice to proceed with work in favour of respondent No.4.

9. In the aforesaid background, submissions were made on behalf of petitioner by Mr.K.K.Rai, Sr.Advocate assisted by Mr.Bankey Bihari, Advocate. Respondents 1 & 2 were represented by Mr.Jatan Singh, Advocate, while respondent no.3 was represented by Mr.Jayant Bhushan, Sr.Advocate assisted by Mr.Edward Belho and others. Respondent no.4 was represented by Mr.Ajay Verma, Advocate.

9.1 Mr.Rai on behalf of petitioner laid, in particular, emphasis on three clauses of ITB. These being: Clauses 23.6, 26.2 and 26.3. It was submitted by Mr.Rai that the combined reading of these clauses would show that on opening of the financial bid(s) only those bids which were found responsive, in accordance with clause 23.4 (iv), were to be opened, while the rest had to be returned. It was further submitted that once bids found responsive were opened, TEC was obliged to announce the bid price, which included the bid amount quoted in each bid; any discounts offered; bid modification and withdrawals – at such opening of the bid(s). The said clause i.e., 23.6, according to Mr.Rai, mandated that any bid price or discount which was not read out or accounted could not be included in the bid evaluation.

9.2 Mr.Rai further submitted that in terms of clause 26.3, if a financial bid was not found to be responsive, it was required to be rejected by the employer and could not be made subsequently responsive by correction or withdrawal of a non-conforming deviation or reservation. Mr.Rai submitted that in the present case admittedly, on TEC opening the financial bids, it was found, and accordingly announced, that the

offer price was not mentioned by respondent no.4 in the form of bid. Resultantly, the financial bid of respondent no.4 was declared non-responsive. The TEC having declared the bid of respondent no. 4 financially non responsive, and thereafter having found petitioner's bid the lowest, it rightly declared the petitioner as the successful bidder.

9.3 It was contended by Mr.Rai that the stand taken by the official respondents that, there was a representation made to them which propelled them to closely examine the bid documents of respondent no.4, was a ploy adopted by the official respondents to somehow slip-in respondent no.4 when, it had been ousted by the TEC in the first instance.

9.4 It was Mr.Rai's categorical assertion that there was no announcement of the BOQ price at the meeting of the TEC, held on 29.10.2010, in the presence of the representatives of the three (3) bidders, which included those of respondent no.4 and the petitioner.

9.5 Mr.Rai thus contended that the entire exercise, which the official respondents have conducted is to only somehow resurrect respondent no.4. According to the learned counsel the exercise has been carried out by the official respondents in a malafide manner behind petitioner's back and can thus have no sanctity in law. It was Mr. Rai's say that the petitioner, at no stage, was informed of the steps the official respondents had taken, while taking the call to review its decision of declaring the petitioner as L-1. Mr.Rai thus prayed for setting aside the decision taken by the official respondents to award the work to respondent no.4

10. As against this, on behalf of respondent no.3, Mr. Bhushan argued that the declaration of the petitioner as non-responsive by the TEC in the first instance at its meeting held on 29.10.2010 was based on a misconception of the provisions of ITB. It was his submission that the bid price was the price which was ascertainable from the

rates and quantities given in the BOQ. In other words, it was his submission that the offer price being ascertainable on perusal of the BOQ, it could not have been said that there was no offer price and hence, the declaration of respondent's 4 bid as non-responsive, was a mistake. According to Mr.Bhushan the bid could have been declared non-responsive only if it was not "substantially responsive". According to him in ascertaining what was a substantially responsive bid one would have to keep in mind the provisions of Clause 26.1 and 26.2 of ITB. In support of his submissions, Mr.Bhushan also drew our attention to Clause 12.1(i) and (ii) of ITB as also Clause 13.1 of the ITB.

10.1 The purpose of drawing our attention was to demonstrate that the contract for the whole work was dependent on the "priced bill of quantities" submitted by the bidder. Therefore, according to the learned counsel since there was an ascertainable offer price available, the bid of respondent no.4 could not have been declared non-responsive and it was only this error which was corrected by the official respondents as was demonstrable from the official records appended to the affidavit and the reply filed by them.

10.2 Mr.Bhushan also contended that the arguments of the petitioner that the official respondents had tried to slip-in respondent no.4 through the back door was baseless. For this purpose, he meticulously took us through the file notings appended to the counter affidavit. It was Mr.Bhushan's contention, that the file notings would show that, on the very same day i.e., 29.10.2010, the TEC had noticed the fact that respondent no.4 was the lowest bidder as per the priced bill of quantities, and since there was no hiatus, it was evident that there was no cover up as alleged or at all. Mr.Bhushan thus contended that the writ petition ought to be dismissed.

11. Mr.Jatan Singh, appearing for respondent no.1 supported the stand taken by Mr.Bhushan.

11.1 We must, however, point out at this stage that when we had put to the learned counsel whether any representation had been received from respondent no.4 to the effect that the priced BOQ had not been referred to by the TEC while declaring him non-responsive, Mr.Jatan Singh tried to handover to us, during the course of the hearing, a fax purportedly issued by respondent no.4 to the official respondents on 29.10.2010. When asked as to why the said document had not been filed, the learned counsel was unable to give us any cogent reason as to why the official respondents had failed to file the said document.

11.2 It was also brought to the notice of Mr.Jatan Singh that while averments had been made in the counter affidavit to the effect that a representation had been received from respondent no.4 by the official respondents, there were no particulars of the purported document mentioned in the counter affidavit. Mr.Jatan Singh was once again unable to give us any cogent answer as to why this crucial fact was not mentioned in the counter affidavit.

11.3 We may only notice, at this stage, that the document which was sought to be handed over to us was a fax bearing the time of receipt as 5.30 pm in the evening. We were not made any wiser by the learned counsel as to when thereafter the TEC met and generated a note dated 29.10.2010 on which heavy reliance was placed by Mr.Bhushan to suggest that TEC had contemporaneously noticed the fact that priced BOQ of respondent no.4 was lower than that of the petitioner.

12. On behalf of affected party i.e., respondent no.4, Mr.Verma addressed arguments which largely replicated the stand taken by the official respondents.

12.1. Mr.Verma emphasized the point that the total offer price was available in the priced BOQ and since the evaluation of the financial bids had to be on the basis of priced BOQ, it could not be said that the respondent no.4 was non-responsive. Mr.Verma thus stressed that the subsequent decision of the TEC only reviewed its own

decision after reconsideration of the material already on record. It was submitted that this court, therefore, ought not to interfere in the award of contract in favour of respondent no.4 at the behest of the petitioner herein.

13. We have heard learned counsel for the parties and perused the pleadings as well as the documents filed before us. On consideration of submissions made and the documents filed, according to us, the controversy revolves around the following three issues:-

- (i) Did the failure of respondent no.4 in not mentioning the offer price in the form of bid result in a situation that there was no offer in the eyes of law, which the official respondents could have accepted?
- (ii) What is it, that transpired, at the meeting of the TEC on 29.10.2010?
- (iii) Did the official respondents display fairness-in-action towards the petitioner in reviewing its earlier decision of declaring him L-1?

13.1 In order to answer the first issue we would have to briefly advert to the tender documents. Since the genesis of the controversy is the form of bid we would like to extract the relevant paragraph, which reads as follows:-

“We offer to execute the Works described above and remedy any defects therein in conformity with the conditions of Contract, specifications, drawing, Bill of Quantities and Addenda for the sum(s) of_____

2. We undertake, if our Bid is accepted, to commence the Works as soon as is reasonably possible after the receipt of the Engineer’s notice to commence, and to complete the whole of the Works comprised in the Contract within the time stated in the document.

3. We agree to abide by this Bid for the period of 120 days from the date fixed for receiving the same, and it shall remain binding upon us and may be accepted at any time before the expiration of that period.

4. *Unless and until a formal Agreement is prepared and executed this Bid, together with your written acceptance thereof, shall constitute a binding contract between us.*

5. *We understand that you are not bound to accept the lowest or any tender you may receive.*

6. *We accept the appointment of Shri_____as the Dispute Review Expert.*

Meenakshi Infrastructure Pvt. Ltd._____Sign and seal

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(emphasis is ours)

13.2 It is to be noticed that even though the form of bid, as filed by the respondent no.4, at the foot of the page contains the signatures of the authorized representative of respondent no.4, there were no details provided either in paragraph 1 or in paragraph 6.

13.3 Importantly, we do not have the original record before us as the same was not filed.

13.4 We would assume that the form of bid filed by the respondent no.4 is an office copy. Since it is not disputed that paragraph 1 was left blank, we would consider the implication of the same. A close perusal of the wording of the paragraph 1 would show that the bidder seeks to offer, to execute the works in issue and also “***remedy any defects***” in the works, in conformity with the conditions of the contract, specifications, drawings, Bill of Quantities and Addenda for a sum indicated therein. Therefore, crucially the offer price in paragraph 1 of the form of bid would appear as a lumpsum figure which would include the price at which not only the bidder offered to execute the work but also most crucially agree to “***remedy any defects***”.

13.5 The argument of the learned counsels for the respondents that bid price which was ascertainable from the priced BOQ would bind respondent no.4 with respect to all

that is mentioned in paragraph 1 i.e., not only the work in issue but also the obligation to remedy the defects is, clearly not made out. During the course of arguments, Mr.Bhushan had also submitted that clause 27 of ITB itself gave an indication that in case there were arithmetical errors (i.e., discrepancies in the rates given in the financial bids i.e., BOQ, etc.)the official respondents were empowered to correct the same. In other words, the argument advanced was that instead of paragraph 1 being left blank (as was the situation in the instant case), if a figure other than the one which emerged on multiplying the rates and the quantities given in the BOQ came up then, the total bid price for the contract would be taken to be that which was the result of the product of the rates and quantities found mentioned in the BOQ. Thus, according to Mr.Bhushan the fact that nothing was mentioned in paragraph 1 of the form of bid would make no difference as, ultimately in the evaluation of the final bid, what had to be looked at was the priced BOQ. To buttress his arguments, he has also, as noticed hereinabove by us, referred to Clause 13.1 of the ITB which provides as follows:-

*“**Bid Prices** – The contract shall be for the whole works as described in Sub-Clause 1.1, based on the priced Bill of Quantities submitted by the Bidder.”*

13.6 We are unable to appreciate this line of argument. The reason for this is two fold. A reading of Clause 13.1 would show that the bid price had to be “***based on the priced Bill of Quantities***”. It was not necessarily the offer price. This is evident on bare reading of paragraph 1 of the form bid which is so configured so as to include in the offer price not only the initial value of the works but also the obligation to carry out at the same price the corrective measures, that is, remedial action qua the defect in works, if any. Therefore, while the offer price is “***based***” on priced BOQ, it cannot be said that it is the bid price. Because if this submission were to be accepted then we would have to read the expression “based on” in clause 13.1 of the ITB as “equivalent to”. Such substitution is impermissible, especially in respect of unambiguous words

and expressions. Therefore, in law, there was no valid offer by the respondent no.4 which could have been accepted by respondent 1 to 3. This anxiety also found expression in the hand written note dated 29.10.2010 of one of the officers. In the said note he indicated in no uncertain terms that the failure of respondent no.4 in leaving paragraph 1 of the form of bid blank had resulted in a “no offer” and hence, the bid was declared non-responsive.

13.7. In our view, this was the correct position in law.

13.8 This brings us to the second issue as to what transpired at the meeting of TEC held on 29.10.2010. It is not disputed that the TEC opened the financial bids of the three (3) bidders in the presence of representatives of the bidders on 29.10.2010. The comparative chart (which is extracted hereinabove) clearly shows that the columns in the comparative statement pertaining to: “offer price”, “rebate, if any” and “Net Offer Price” - had been left blank by respondent no.4. However, the column which pertained to: “*signatures of bidders/representatives in hand*”, had a note appended by the representative of respondent no.4 to the effect “*amount of bid not indicated in form of bid*”. The representative of respondent no.4 for the reasons best known to him, did not chose to write that the price had been mentioned by respondent no.4 in the BOQ, which according to us would have been the natural response of a person placed in such like situation. The stand taken by the official respondents that on the same date i.e., 29.10.2010, the TEC had noticed this aspect of the matter, which is, that respondent no.4 was the lowest bidder, if the priced BOQ was taken into account, is something that in the given circumstances we find difficult to accept.

13.9 The reason for this is as follows: even though the official respondents took the stand that the review took place on account of the representation sent by respondent no.4; the said representation for some curious reason was not put on record. Furthermore, even though we had directed the official respondents on the very first

date of hearing i.e., 14.1.2011 to place the original records before us, once again, for reasons best known, the court was not given access to the original records. The counsels representing official respondents chose to argue the matter based on the copies of file notings appended along with counter affidavit. In our opinion, this was not sufficient in view of serious doubts that the petitioner had raised as regards the sanctity of the record. Only to be noticed, petitioner's rejoinder refers to a RTI application which he had filed on 17.01.2011, in respect of which, no reply has been received by him. Since this aspect has been referred to in the rejoinder, we have not taken the same into account, as even otherwise remedies were available to the petitioner to seek answers; though the time frame may have been short. The fact however remains, the photocopy of the record produced before us, does not instill confidence in us that the sanctity of the record was maintained. Given the circumstances we are not even sure whether the entire record was produced or only a selected portion was photocopied and placed for our perusal.

14. We are, therefore, not in a position to agree with the official respondents, based on the record produced before us, that the TEC note of 29.10.2010 was contemporaneously made out.

15. This brings us to the last issue, which is whether official respondents had displayed fairness in action while reviewing its decision taken on 29.10.2010; whereby petitioner was declared L-1. We have in detail referred to the events which transpired as per the stand taken by the respondent from 29.10.2010 till 29.11.2010 when, the TEC finally reviewed its decision to declare respondent no.4 as L-1.

15.1 The entire course of events, as noticed by us hereinabove would show that the petitioner at no stage was kept in the picture. Had not the petitioner come to court expressing his apprehensions, he would not have known that the respondents had reversed the decision made in his favour. The review of the decision taken on

29.10.2010 by the TEC was made without even the basic modicum of civility adopted, in such like situations, of communicating the reversal of its decision, to the petitioner. The approach of the official respondents, to say the least, to an outsider, such as the petitioner, would seem like a cloak and dagger affair. The entire purpose of inserting a clause such as 23.6 and 26.3 in the ITB is to infuse transparency in matters involving huge financial stakes while distributing State largesse. The official respondents' failure to take petitioner into confidence reeks of lack of fairness in action. In our view, the observations of the Supreme Court in the case of Mahabir Auto Stores & Ors. vs Indian Oil Corporation & Ors. (1990) 3 SCC 752 being apposite on this aspect, are extracted hereinbelow:

*“.....Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa v. State of Tamil Nadu and Anr.*, : (1974)ILLJ172SC ; *Maneka Gandhi v. Union of India and Anr.*, : [1976]102ITR1(SC) ; *Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors.*, : (1981)ILLJ103SC ; *R.D. Shetty v. International Airport Authority of India and Ors.*, : 1979CriLJ905 and also *Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay*, : [1989]2SCR751 . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play,*

natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.....

..... Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any straight jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, -in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not being taken into confidence....”. (emphasis is ours)

15.2 Tested on the touchstone of the principle of fairness in action; we are persuaded to come to the conclusion that the decision to enter into an agreement with respondent no.4; and that of issuing communication dated 20.01.2011, in favour of respondent no.4 asking him to proceed to work, was completely illegal. The reversal of the decision taken by TEC on 29.10.2010 declaring petitioner as L-1, without taking him into confidence, is unsustainable in law.

15.3 Considering, the entire circumstances, we are constrained to quash the decision taken by the official respondents to award the work to respondent no.4. We have already noticed hereinabove, that the petitioner pursuant to our order dated 15.02.2011 has filed an undertaking on 17.02.2011 in the form of an affidavit to execute the work at the price offered by respondent no.4. We have taken notice of the same. The official respondents are thus free to consider the same while dealing with the request of the petitioner to award the contract to him.

16. The writ petition is disposed of in terms of the directions referred to hereinabove. The petitioner shall be paid a cost of Rs 15,000/-, which will be borne by respondents 1 to 3 in equal proportion. The cost be paid within a period of two weeks from today.

RAJIV SHAKDHER, J.

APRIL 08, 2011
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SANJAY KISHAN KAUL, J.