

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: 14.09.2010

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CM No. 11954/2010 (Stay) in W.P.(C) 6063/2010

LARSEN & TOURBO LTD & ANR

..... Petitioners

- versus -

UNION OF INDIA & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Mukul Rohatgi, Mr S. Ganesh and Mr Neeraj Kishan Kaul, Sr Advocates with Mr Pratap Venugopal
For the Respondent : Mr Parag Tripathi, ASG with Ms Bindu Saxena, Mr K. K. Patra and Ms Aparajita Swarup for R-2/NTPC.
Mr A. S. Chandhiok, ASG with Mr Saurav Agrawal and Mr D. Kumar for R-1&R-3/BHEL.
Mr C. S. Vaidyanathan, Sr Advocate with Mr Prashant Mehta & Ms Radhika Arora for R-4
Mr Rajiv Nayar, Sr Advocate with Mr Sagar Pathak & Mr Shiv Shankar for R-5

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

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

BADAR DURREZ AHMED (ORAL)

1. We have heard the counsel for the parties at length.
2. We are not inclined to pass any interim order in favour of the petitioners. The reasons for the same would be clear from what is stated below.
3. This writ petition has been filed in respect of a tender which was invited by National Thermal Power Corporation (Respondent No.2) for the supply and installation of 11 Steam Turbine Generator (STG) Packages for its various Super

Thermal Power Projects.

4. The bids were invited in two sequential stages. The first stage was that of the Techno-Commercial Bid and the second stage involved the Price Bid.

5. The bids were to be submitted, as aforesaid, in sequence. Only those parties which cleared stage-I would be entitled to submit their price bids in stage-II.

6. The petitioner is aggrieved by the fact that it has not been allowed to continue to the second stage by virtue of the impugned letter dated 18.08.2010. In the said letter, it has been stated that the petitioner's bid was rejected on the ground of it being non-responsive in terms of clause 21 of the Instruction To Bidders (ITB) read along with item no. 4.0 of the Bid Data Sheet (BDS), Section-III. In view of the said rejection, the Bank Guarantee (BG) submitted by the petitioner towards Bid Security was returned in original.

7. Essentially the petitioner's bid has been rejected on the ground that the Deed of Joint Undertaking (DJU) which was required to be submitted by the bidders was not in conformity with the format prescribed under the bid documents. It is the contention of the learned counsel for the petitioner that while the Deed of Joint Undertaking (DJU) which had been submitted along with the Techno-Commercial

Bid did not comply with the format as prescribed under the bid documents, this deficiency was subsequently corrected and the revised DJU was furnished in June, 2010, which was exactly in terms of the format prescribed under the bid documents.

8. Mr Mukul Rohatgi, senior advocate, the learned counsel for the petitioner drew our attention to several clauses of the Instructions To Bidders (ITB), and in particular, he referred to clauses 20, 21, 22, 23 and 24. The said clauses read as under:-

Clause No.	INSTRUCTIONS TO BIDDERS (ITB)
20.	Clarification of Bids
20.1	During bid evaluation, the Employer may, at its discretion, ask the Bidder for a clarification of its bid. The request for clarification and the response shall be in writing, and no change in the price or substance of the bid shall be sought, offered or permitted.
21.	Preliminary Examination of Stage-I (Techno-Commercial) Bid:
21.1	The Employer will examine the bids to determine whether they are complete, whether required securities have been furnished, whether the documents have been properly signed and whether the bids are generally in order.
21.2	Prior to the detailed evaluation, the Employer will determine whether each bid is generally complete, acceptable and is substantially responsive to the bidding documents. For purposes of this determination, a substantially responsive bid is one that conforms to all the terms, conditions and specifications of the bidding documents without material deviations, objections, conditionalities or reservations. A material deviation, objection, conditionality or reservation is one (i) that affects in any substantial way the scope, quality or performance of the contract; (ii) that limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the successful Bidder's

	obligations under the contract; or (iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive bids.
21.3	Critical Provisions No deviation, whatsoever, is permitted by the Employer to the provisions relating to following clauses. (a) Governing Laws (Clause 5 of GCC, Section IV). (b) Settlement of Disputes (Clause 6 of GCC, Section IV). (C) Terms of Payment (Clause 12 of GCC, Section IV). (d) Performance Security (Clause 13.3 of GCC, Section IV). (e) Security for Deed(s) of Joint Undertaking (Clause 13.4 of GCC, Section IV). (f) Taxes and Duties (Clause 14 of GCC, Section IV). (g) Completion Time Guarantee (Clause 26 of GCC, Section IV). (h) Defect Liability (Clause 27 of GCC, Section IV). (i) Functional Guarantee (Clause 28 of GCC, Section IV). (j) Patent Indemnity (Clause 29 of GCC, Section IV). (k) Limitation of Liability (Clause 30 of GCC, Section IV). (l) Price Adjustment (Appendix-2 to Form of Contract Agreement, Section-VII) (m) Phased Manufacturing Programme (Clause 20 of GCC, Section V).
21.4	The Employer's determination of a bid's responsiveness is to be based on the contents of the bid itself without recourse to extrinsic evidence. If a bid is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by the Bidder by correction of the nonconformity.
22.0	Evaluation of Stage-I : Techno-Commercial Bids
22.1	Stage-I (Techno-commercial) Bid, prepared and comprising details/documents in line with ITB Sub-Clause No. 8.2, submitted by Bidder's will be evaluated as described below: The Employer will carry out a detailed evaluation of the

	Stage-I (Techno-Commercial) Bids in order to determine whether the technical aspects are in accordance with the requirements set forth in the bidding documents. In order to reach such a determination, the Employer will examine and compare the technical aspects of the bids on the basis of the information supplied by the bidders, taking into account the following factors: (a) overall completeness and compliance with the Technical Specifications and Drawing; deviations from the Technical Specifications as identified in Attachment-6 to the bid; suitability of the facilities offered in relation to the environmental and climatic conditions prevailing at the site; and quality, function and operation of any process control concept included in the bid. The bid that does not meet acceptable standards of completeness, consistency and detail will be rejected for non-responsiveness. (b) achievement of specified performance criteria by the facilities. (c) type, quantity and long-term availability of mandatory and recommended spare parts and maintenance services. (d) any other relevant factors, if any, listed in the Bid Data Sheet, or that the Employer deems necessary or prudent to take into consideration. (e) Deviation from Terms and Conditions of Bidding Documents as stated in Attachment-6. (f) Compliance with the time schedule as specified in the bidding documents. (g) Demonstration Parameters Bidders shall state the demonstration parameters for the proposed facilities in response to the Technical Specifications. In case of minimum (or a maximum, as the case may be) level of parameters is specified in the Technical Specifications for the bids to be considered responsive, bids offering plant and equipment with such functional guarantees less (or more) than the minimum (or maximum) specified may be rejected.
23.0	QUALIFICATION
23.1	The employer will ascertain to its satisfaction whether bidders determined as having submitted responsive Stage-I (Techno-Commercial) bids are qualified to satisfactorily perform the contract.
23.2	The determination will take into account the Bidder's financial, technical and production capabilities and past

	performance. It will be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB Sub-Clause 8.2(i) (c), as well as such other information as the Employer deems necessary and appropriate.
23.3	An affirmative determination will be prerequisite for the Employer to invite the Bidder to a clarification meeting in accordance with ITB Clause 24. A negative determination will result in rejection of the Bidder's bid.
24.0	CLARIFICATION MEETING
24.1	The Employer may conduct clarification meetings with each or any Bidder to clarify any aspects of its Stage-I (Techno-Commercial) bid that require explanation at this stage of the evaluation. During these meetings, the Employer may bring to the attention of the Bidder any matters, technical or otherwise, where for whatever reason, it requires amendments or changes to be made to the Stage-I bid. All such amendments or changes required by the Employer will be formally notified to all the Bidder Qualified in Stage-I (Techno-Commercial) Evaluation as part of the invitation to submit the Stage-II (Price) bid.
24.2	The Employer will advise the Bidder of any exceptions or deviations in the Stage-I (Techno-Commercial) bid, that are unacceptable and that are to be withdrawn in the Stage-II (Price) bid.

9. The learned counsel for the petitioner submitted that clause 21.3 referred to those documents/clauses which were classified as "Critical Provisions" in which no deviation, whatsoever, was permitted by the Employer. He submitted that while the security for the Deed of Joint Undertaking is specified as a 'critical provision' by virtue of clause 21.3(e), the DJU itself is not one of the documents specified therein. Following up on this, the learned counsel for the petitioner submitted that if there were deviations in the DJU itself, they

were not critical and, therefore, could be corrected during the evaluation process of stage-I.

10. The learned counsel for the petitioner drew our attention to the letter dated 20.03.2010 which had been issued by the respondent No.2 (NTPC Ltd.) to the petitioner, indicating in paragraph 2.0 thereof, that certain items were still required to be fulfilled in support of the petitioner qualifying for the requirements stipulated in the BDS at item No.4.0. In the said letter, there were various items which were mentioned which were required to be fulfilled but the requirement of the DJU not being in conformity with the format prescribed was not specifically mentioned. Consequently, it was inferred by the learned counsel for the petitioner that the DJU submitted by the petitioner along with its bid on 12.02.2010 was substantially compliant and that is the reason why respondent No.2 did not require any clarification or response in writing from the petitioner regarding this aspect. He further submitted that as late as on 21.07.2010, the petitioner received a letter from the NTPC requiring it to extend its Bid validity, as the same was expiring on 11.08.2010. Consequent upon the said letter, the petitioner did extend the validity for a further period of 60 days as required. In the meanwhile, in June, 2010, the

petitioner had also submitted a revised DJU which according to the learned counsel for the petitioner was exactly in terms of the format prescribed under the bid documents.

11. It was, therefore, the contention of the learned counsel for the petitioner that since the bid documents only required that the DJU be substantially compliant with the prescribed format and that the petitioner in any event submitted the revised DJU which was in the exact format as prescribed, there was no reason whatsoever for the respondent No.2 to have rejected the petitioner's bid at stage-I itself.

12. Another plea taken by the learned counsel for the petitioner was that the terms of the tender were such that the three bidders who are now left in the fray would get some part of the order irrespective of what their price bids are. The total contract would be split in the ratio of 2:2:1 as between L-1, L-2 & L-3 subject to the condition that in the case of Public Sector Undertakings, the ratio would be that as in the case of the L-2 Bidder. It is also subject to the condition that L-2 and L-3 would have to match the price of L-1. Thus according to the learned counsel for the petitioner, it would be very easy for the remaining three bidders to enter into some sort of arrangement and therefore ensure that the price is inflated.

13. Mr Rohatgi, also referred to clause 24 of the

Instructions To Bidders and submitted that clarifications may be sought by the employer at any stage of the evaluation and the bidders could be required to make such amendments or changes as notified by the employer and if the bidder then makes those changes, their bids cannot be rejected. It was submitted that during the meetings, it was pointed out by representatives of respondent No.2 that the DJU originally submitted by the petitioner was not compliant and therefore the petitioner submitted a revised DJU which was, according to the learned counsel, compliant with the format prescribed in the bid documents. Therefore, it was submitted, the petitioner's bid ought not to have been rejected at stage-I itself.

14. We have also heard Mr Parag Tripathi, learned Additional Solicitor General on behalf of respondent No.2 as well as Mr A.S.Chandhiok, learned Additional Solicitor General, who appears for respondent No.1 (Union of India) and respondent No.3(BHEL). Counsel for respondent Nos. 4 & 5 were also present.

15. Mr Tripathi straight away drew our attention to clause 20.1 of the ITB and submitted that the employer, during the bid evaluation could at its discretion ask the bidder for clarification of its bids but that clarification and response was to be in writing and consequently there was no change

permissible in the price or the substance of the bid. In fact, there was an embargo on even seeking a change in the substance of the bid on the part of the employer.

16. A reference was also made to clause 21 which dealt with the preliminary examination at stage-I. Clause 21.1 clearly stipulated that the employer will examine the bids to determine whether they are complete, whether the required securities have been furnished, whether the documents have been properly signed and whether the bids are generally in order. Clause 21.2 required a further evaluation, prior to the detailed evaluation, in order to come to the conclusion as to whether each bid was generally complete, acceptable and was substantially responsive to the bidding documents. What is important is that the expression “substantially responsive bid” has been explained in clause 21.2 of ITB itself as one that conforms to all the terms, conditions and specifications of the bidding documents without “material deviations”, objections, conditionalities or reservations. Furthermore, what exactly is meant by the expression “material deviation” is also explained in clause 21.2 itself. One of the situations which could be regarded as a material deviation would be where a particular clause in its existence or absence limits in a substantial way, inconsistent with the bidding documents, the employer’s

rights or the successful bidder's obligations under the contract.

17. In this context, Mr Tripathi handed over a copy of the DJU as originally submitted by the petitioner along with its Techno-Commercial Bid on 12.02.2010. However, in the copy of the DJU furnished to us by Mr Tripathi, he took care to indicate in red and underline, as well as to strike out those portions which were added by the petitioner to the original format and those portions which were omitted, respectively. We take on record the document which has been handed over by Mr Tripathi as there was no objection by the learned counsel for the petitioners with regard to its authenticity. Upon going through the document, we find that full-scale changes have been made to the DJU as prescribed under the bid documents. And, the DJU submitted by the petitioner is virtually a different document.

18. The rights of the employer have been seriously diluted and the obligations which were originally cast upon the bidder and its Joint Venture Partners have been reduced. In our view, *prima facie*, this would amount to a material deviation which would be inconsistent with the bidding documents and would materially affect the employer's right as well as the bidder's obligation under the contract and

therefore, it would fall within the ambit of being a 'material deviation' within the meaning of clause 21.2 of the Instructions To Bidders. Consequently, the deviations would be of substantial nature and the respondent No.2 would not be in the wrong in saying that the petitioner's bid was not substantially compliant.

19. By way of a sample, we are reproducing paragraphs 4, 5, 6, 7 & 8 of the DJU as submitted by the petitioner on 12.02.2010. The portions which have been added are shown in bold and underlined. The portions which have been deleted are shown as having been struck out.

*"4. That in consideration of the award of the Contract by the Employer to the Contractor, we, the Qualified Steam Turbine Generator Manufacturer, the *Qualified Generator Manufacturer, JV Company and the Contractor, do hereby declare and undertake that we shall be jointly and severally responsible to the Employer for the execution and successful performance of the Generator and its auxiliary equipments as per Annexure-I. We, the Qualified Steam Turbine Generator Manufacturer, JV Company and the Contractor, do hereby further declare and undertake that we shall be jointly and severally responsible for the successful performance of all the contractual obligations under the said Contracts **Provided, however, Notwithstanding anything to the contrary in this undertaking or the contract, such joint and several liability shall be expressly conditioned and subject to the Qualified Steam Turbine***

Manufacturer and the Qualified Generator Manufacturer having no liability to the Employer except in the event that, the following conditions are all met: (i) the equipment other than the products supplied by the Qualified Steam Turbine Manufacturer or/and the Qualified Generator Manufacturer in the plant meets the performance guarantees as specified in the heat balance diagrams for guaranteed gross output and guaranteed heat rate, (ii) the contractor carries out the erection, commissioning and testing in accordance with the procedures furnished by the Qualified Steam Turbine Manufacturer and the Qualified Generator Manufacturer and (iii) such liability directly results solely from a material defect in the engineering, designs, material and workmanship in the product supplied by the Qualified Steam Turbine Manufacturer or/and the Qualified Generator Manufacturer.

5. Subject to the forgoing article 4, In case of any breach of the Contracts resulting solely & exclusively from the Engineering and supply of STG and integral Auxiliaries, ~~committed by the Contractor,~~ we the Qualified Steam Turbine Generator—Manufacturer, JV Company and the *Qualified Generator Manufacturer do hereby undertake, declare and confirm that we shall be fully responsible for the successful performance of the Steam Turbine and Generator and their **integral auxiliaries** equipments including thermal performance and guaranteed parameters and undertake to carry out all the obligations and responsibilities under this Deed of Joint Undertaking in order to discharge the Contractor's obligations and

responsibilities with respect to performance of the STG and integral auxiliaries stipulated under the Contracts. Further, if the Employer sustains any loss or damage on account of any breach of the Contracts, resulting solely and exclusively from the Engineering and supply of STG and integral auxiliaries by the contractor we the Qualified Steam Turbine Manufacturer, JV company and the *Qualified Generator Manufacturer and the Contractor jointly and severally undertake to promptly indemnify and pay such losses / damages caused to the Employer on its written demand ~~without any demur, reservation, contest or protest in any manner whatsoever.~~

6. Notwithstanding anything to the contrary in this undertaking and the contract, the total and aggregate liability of the Qualified Steam Turbine Manufacturer, the JV Company and the Qualified Generator Manufacturer respectively under or in connection with the Contract and this undertaking shall not be more than the amount equivalent to the respective value of service & equipment/ components supplied by the Qualified Steam Turbine Manufacturer, the JV Company and the Qualified Steam Generator Manufacturer.
This is without prejudice to any right of Employer against the Contractor under the Contract and all guarantees.

7. Notwithstanding anything to the contrary in this undertaking and the contract, the Qualified Steam Turbine Manufacturer, the JV Company and the Qualified Generator Manufacturer shall in no event be liable to Employer

by way of Indemnify or by reason of any breach of the contract or in tort, negligence, strict liability or otherwise for loss of use of Plant or any part thereof, loss of production, loss of profit or interest cost or loss of revenue or loss of any contractor, or for any indirect, special, incidental or consequential loss or damage that may be suffered by Employer arising out of or in connection with this undertaking and the Contract. This is without prejudice to any right of Employer against the Contractor under the Contract and all guarantee.

~~The liability of the Qualified Steam Turbine Generator Manufacturer and JV Company shall be limited to an amount equivalent to US\$122 (One hundred Twenty Two) Millions for each Turbine Generator Set to be supplied by the Bidder/ Contractor (to be finalized before Notification of Award). *The liability of the Qualified Generator Manufacturer, hereunder shall, however be limited to an amount equivalent to US\$ 18(Eighteen) Millions for each Generator Set to be supplied by the Bidder/ Contractor to be finalized before Notification of Award). This is without prejudice to any right of Employer against the Contractor under the Contract and all guarantees.~~

8. Without prejudice to the joint and several obligations of the Contractor, the Qualified Steam Turbine Generator Manufacturer, JV Company and the Qualified Generator Manufacturer hereunder, the analysis/investigations of the non-performance of the equipment manufactured by the Contractor may initially be carried out by the Contractor, within a period of 15 days from the date of reference of the problem by the Employer before the Employer approaches Qualified

*Steam Turbine Generator Manufacturer and the *Qualified Generator Manufacturer for any such analysis/ investigation. It shall not be necessary or obligatory for the Employer to first proceed against the Contractor before proceeding against the Qualified Steam Turbine Generator Manufacturer, JV Company and the Qualified Generator Manufacturer, nor any extension of time or any relaxation given by the Employer to the Contractor shall prejudice any right of Employer under this Deed of Joint Undertaking to proceed against the Qualified Steam Turbine Generator Manufacturer, JV Company, the *Qualified Generator Manufacturer and Contractor.”*

20. Mr. Tripathi also drew our attention to clause 22.1 and in particular to sub-clause(e) thereof which had reference to deviations from the terms and conditions of the bidding documents as stated in Attachment 6. The reference to Attachment 6 is to be found in clause 8.2(i) (f) of ITB which reads as under:-

Clause No.	INSTRUCTIONS TO BIDDERS (ITB)
8.2(i)	(f) Attachment 6 : Deviations Deviations (Technical as well as Commercial), if any, from the terms, conditions and technical specifications of the Bidding Documents shall be listed only in Attachment 6 to the Techno-Commercial Bid. Bidders may further note that except for the deviations listed in Attachment 6 the bid shall be deemed to comply with all the requirements of the bidding documents and the bidders shall be required to comply with all terms, conditions and specifications of the bidding documents irrespective of any mention to the contrary, anywhere else in the bid.

21. Mr Tripathi submitted that any deviations that a bidder intended to make from the bid documents was to find place in Attachment 6 so that the attention of the employer is immediately drawn to any such deviation. The present deviation from the format of the DJU as prescribed was not mentioned by the petitioner in Attachment-6 and, therefore, if the attention of the employer had not fallen on the said DJU, it could have slipped by. In any event, going back to clause 22 of the ITB, it is only those deviations which are mentioned in Attachment-6 which could perhaps be permitted to be removed during the evaluation process.

22. Another set of important clauses are clause 7.5.2 of the Detailed Invitation For Bids and sub-clause 1.5.2 of item No.4.0 of the Bid Data Sheet. The said clauses read as under:-

Clause No.	DETAILED INVITATION FOR BIDS
7.5.2	The Bidder shall furnish a DJU executed by him, the JV Company and the Qualified Steam Turbine Generator Manufacturer, in which all the executants of DJU shall be jointly and severally liable to the Employer for successful performance of the contract as per format enclosed in the bidding documents. The deed of joint undertaking shall be submitted along with techno-commercial bid, failing which the Bidder shall be disqualified and his bid shall be rejected. In case of award, the JV Company and the Qualified Steam Turbine Generator Manufacturer will each be required to furnish an on demand bank guarantee for an amount of 0.5% of the total contract price of the Steam Turbine Generator Package in addition to the contract performance security to be furnished by the Bidder.

Clause No.	DATA
1.5.2	The Bidder shall furnish a DJU executed by him, the JV Company and the Qualified Steam Turbine Generator Manufacturer, in which all the executants of DJU shall be jointly and severally liable to the Employer for successful performance of the contract as per format enclosed in the bidding documents. The deed of joint undertaking shall be submitted along with techno-commercial bid, failing which the Bidder shall be disqualified and his bid shall be rejected. In case of award, the JV Company and the Qualified Steam Turbine Generator Manufacturer will each be required to furnish an on demand bank guarantee for an amount of 0.5% of the total contract price of the Steam Turbine Generator Package in addition to the contract performance security to be furnished by the Bidder.

22. It is clear from the above clauses that the bidder is required to furnish a DJU as per the format enclosed in the bidding document. It is also clearly stipulated that the DJU is to be submitted along with the Techno-Commercial Bid failing which the bidder shall be disqualified and his bid shall be rejected. An argument was raised on behalf of the petitioner that this clause would be operational when the bid is not accompanied by the DJU at all. However, at this *prima facie* stage, we are not inclined to accept this argument because we have already examined other clauses and particularly clauses 20 and 21 which deal with responsiveness of the documents submitted along with the bid. It is obvious that the reference to the DJU in clause 1.5.2 is also to its responsiveness to the

bidding documents and not solely to non-submission of the DJU. We have already found, *prima facie*, that the DJU submitted by the petitioner was not substantially compliant with the format as prescribed by respondent No.2.

23. Consequently, we are not inclined to interfere with the bidding process and, therefore, we refrain from passing any interim order in favour of the petitioner. With regard to the plea that there would be some sort of cartel which would be formed because there are only three bidders left in the fray, we are of the *prima facie* opinion that this plea is not tenable because one of the bidders left in the fray is a public sector undertaking and it certainly cannot be expected to enter into a cartel arrangement with the other two private bidders. In any event, no *mala fides* have been alleged by the petitioners in the bidding process.

24. For all these reasons, we are not inclined to grant the interim orders sought for by the petitioner.

The application is dismissed.

(BADAR DURREZ AHMED)
JUDGE

(V.K. JAIN)
JUDGE

SEPTEMBER 14, 2010
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