

GAHC010148942023



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

Case No. : WA/258/2023

TECHNIP ENERGIES INDIA LTD.
(FORMERLY TECHNIP INDIA LIMITED), THROUGH ITS AUTHORIZED
REPRESENTATIVE, PRASHAT SHARMA, S/O- BRIJ MOHAN SHARMA,
HAVING ITS OFFICE AT TECHNIP TOWER, A-4, SECTOR-1, NOIDA, UTTAR
PRADESH- 201301.

VERSUS

THE UNION OF INDIA AND ORS.
THROUGH MINISTRY OF PETROLEUM AND NATURAL GAS, A-WING,
SHASTRI RAJENDRA PRASAD ROAD, 110001, AZAD BHAWAN RD, IP
ESTATE, NEW DELHI, DELHI- 110002.

2:NUMALIGARH REFINERY LIMITED
THROUGH ITS MANAGING DIRECTOR

HAVING ITS REGISTERED OFFICE AT 122A
G.S. ROAD
CHRISTIAN BASTI

GUWAHATI- 781005 AND ALSO HAVING OFFICE AT GOLAGHAT

NUMALIGARH
ASSAM
785699.

3:M/S THYSSENKRUPP INDUSTRIAL SOLUTIONS (INDIA) PRIVATE
LIMITED
THROUGH ITS PROJECT PROCUREMENT MANAGER

SUSHANT DESHPANDE/ AMAR SONSALE

UHDE HOUSE
LBS MARG VIKHROLI (WEST)
MUMBAI- 400083
INDIA.

4:G.R. ENGINEERING PROJECTS PRIVATE LIMITED
THROUGH GR ENGINEERING PROJECTS PVT. LTD.

366 DDA FLAT
BADARPUR
NEW DELHI 110044

Advocate for the Petitioner : MR. A SANDILYA

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE THE CHIEF JUSTICE
HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Mr. K. Goswami, Sr. Advocate.
Assisted by Mr. A. Khanna,
Advocate.

For the Respondents : Mr. K. N. Choudhury, Sr. Advocate
Assisted by Mr. N. Deka, Advocate
for the respondent Nos. 2 and 3.
Dr. A. Saraf, Senior Advocate.
Assisted by Mr. P. Baruah,
Advocate,
For the respondent No. 4.

Date of Hearing : 20.07.2023.

Date of Judgment : 20.07.2023.

JUDGMENT & ORDER (ORAL)

(A.D. Choudhury, J)

1. Heard Mr. K. Goswami, learned Senior Counsel assisted by Mr. A. Khanna, learned counsel for the appellant. Also heard Mr. K. N. Choudhury, learned Senior Counsel assisted by Mr. N. Deka, learned counsel appearing for the respondent No. 2 and 3 and heard Dr. A. Saraf, learned Senior Counsel assisted by Mr. P. Baruah, learned counsel for the respondent No. 4.

2. **The factual background of the case:**

I. The present intra court appeal is directed against the Judgment and Order dated 27.06.2023 passed in WP (C) No. 96/2023.

II. The appellant before this Court was one of the bidders in respect of a tender invited by the respondent no. 2, Numaligarh Refinery Limited (hereinafter to be referred to as NRL) being NIT bearing no. TK-1P25A-MP-RFQ-0034 dated 25.10.2022 for supply of Reactor and Regenerator package for PFCC Unit as per technical specifications for NRL, Assam, India.

III. The NIT invited was on an open global e-tender basis under a single stage 2 bid system, Part-I techno commercial bid (un-priced bid) and Part-II (price bid).

IV. In response to the said NIT invited by the respondent no.2, the appellant as well as respondent no. 4 submitted their bids. Both the bidders were found to be responsive in the techno commercial

evaluation.

V. Subsequently, when the price bids were opened on 26.12.2022, the price bid of the appellant could not be opened in the Portal as it was found to be password protected.

VI. As per the clauses of the NIT, a system generated BoQ Statement is to be taken out upon opening of the price bids. As the price bid of the appellant could not be opened, the BoQ system generated statement revealed the details only with regard to respondent no. 4. In so as the appellant is concerned, the particulars of the price bid and the items were not reflected.

VII. The appellant as a writ petitioner approached this Court by way of filing WP (C) No. 96/2023. By the impugned Judgment and Order dated 27.06.2023, the learned Single Judge dismissed the writ petition by holding that there is no infirmity in the decision making process and also in the decision itself taken by the NRL to reject the price bid of the petitioner (the appellant herein). The writ petition was found to be devoid of merit and was accordingly dismissed vide judgment dated 27.06.2023 which is assailed in this intra Court appeal.

3. Arguments advanced on behalf of the appellant:

Assailing such judgment, Mr. K. Goswami, learned Senior Counsel advanced the following arguments:

I. In terms of tender clause, the BoQ statement generated by system is not conclusive and actual comparative tabulation is required to be prepared in PDF format after downloading from the system and then only, the final comparative statement is required to

be prepared and therefore, without reaching such stage, the price bid of the appellant could not have been rejected. However, the learned Single Judge misinterpreted the tender Clause and held such rejection on technical ground to be the final one.

II. Under Clause-39 of the tender, though there is a contemplation that there should not be any password protection in technical bid, however, such restriction not being specifically imposed in respect of price bid, the price bid of the appellant could not have been rejected for the reason that the appellant uploaded the price bid with password and log in credentials, however, the learned Single Judge has failed to appreciate such fact.

III. As the tender clauses authorizes the tendering authority to seek clarification from the bidder and the tendering authority has sought for the log in credentials of the appellant, as such, after receipt of such credentials and passwords provided by the appellant, the reason for rejection was no more available. However, the learned Single Judge has given undue importance to such inadvertent mistake on the part of the appellant which was otherwise inconsequential for the evaluation process after being rectified at the behest of the tendering authority.

IV. It is the mandate of the procedure as laid down in the NIT that after the system generated BoQ comparative statement is created, the same is to be downloaded by the employer NRL, and thereafter it is to be changed to PDF format and then only the final comparative statement is to be prepared and therefore, the rejection of the price bid of the appellant at the stage of system generated

BoQ comparative statement on the ground that it was a password protected price bid which the system could not read and include in the comparative statement cannot be a valid reason for the rejection of the price bid and such aspect of the matter was mechanically considered by the learned Single Judge.

V. The action of the NRL communicating with the appellant as well as the NIC clearly establishes that the system generated rejection is not the final one, otherwise the NRL would not have asked for the log in credentials from the appellant and opinion from the NIC would not have sought. The fact also remains that such file format was opened by the NRL after 26.12.2022. However, to the surprise of the appellant, subsequently by the decision dated 02.01.2023, the bid of the appellant was rejected.

4. **Arguments advanced on behalf of the respondent Nos. 2 and 3.**

Per contra, Mr. K. N. Choudhury, learned Senior Counsel argues the following:-

I. The rejection of the bid cannot be attributed to the NRL inasmuch as there is no whisper and/ or allegation against the NRL that the rejection is result of malafide exercise of power.

II. The object of the communications issued to the appellant as well as to NIC subsequent to 26.12.2022, was to ascertain whether there is any problem in the e-portal so that same can be corrected in the interest of fairness and transparency of the tender process. Such communication cannot be treated as an assurance to

the appellant to re-evaluate the bid inasmuch as when it is the fault of the appellant, it is not within the domain of the NRL as per the tender conditions to allow and re-evaluate the price bid of the appellant in the given facts of the present case. Therefore, the learned Single Judge has rightly held that there was neither malafide exercise of power nor any infringement of right of the appellant under Article 14 of the Constitution of India.

III. The tender conditions specifically stipulated that in the event the tender documents/papers are not uploaded in the e-portal in terms of the form and format provided and mandated in the tender document, the tender would be liable to rejection. Making the price bid password protected amounts to change of format and therefore exclusion of the price bid of the appellant by the system and the formal rejection by the NRL was justified and cannot be interfered in exercise of a power of judicial review under Article 226 of the Constitution of India.

IV. For the unnecessary and meritless litigation initiated at the behest of the appellant, the NRL, a public sector company has suffered immensely and is bearing a loss of more than 70 crores per day and therefore, the writ appeal should be dismissed with exemplary cost and interim order passed earlier should be vacated and the respondent No. 4 be allowed to execute the work which involves expansion of production capacity of NRL.

5. **Arguments advanced on behalf of the respondent No. 4:**

Dr. A. Saraf, learned Senior Counsel representing the respondent No. 4, while arguing in the similar line, further contends that already the LoI has

been issued to the respondent No. 4 and the respondent No. 4 in fact has started mobilizing the machinery, etc by investing huge amount.

6. Determination of this Court:

We have given our thoughtful considerations to the arguments advanced by the learned Senior Counsels for the parties and also perused the materials available on record. From the aforesaid, the following conclusions are arrived at:

I. It is an admitted position that the bids were invited through e-procurement portal of the Government of India. It is the admitted case of the appellant that while uploading the price bid in Excel format, the Excel price bid sheet was protected by creating password and gave login credentials. It is also not in dispute that for this reason only, the system generated BoQ did not include the particulars of the appellant inasmuch as due to password protection the system could not read the price bid file required for generation of BoQ comparative statement. Accordingly, in the comparative BoQ, the details of the respondent No. 4 was shown and respondent No. 4 was declared as L1.

II. The NIC by a communication dated 19.01.2023, clarified that once the bid due date is over, the bidder cannot modify the BoQ and cannot modify the bid also. If the bidders make any mistake in the sheet name or any other values, the system will not be able to read the data from BoQ uploaded and may get missed out from the comparative analysis. The technical documents and financial documents are encrypted and safely stored with the help of technology and they remain encrypted format till bid opening date

and time and cannot be seen by any one till such time.

III. For the aforesaid reason, after the bid opening date and time were over, the automatically generated BoQ comparative statement in the e-procurement portal did not reflect the data and rates submitted by the appellant for its price bids in BoQ Excel file format for the reason that it was password protected.

IV. Accordingly, the respondent No. 4 was declared as L1 vendor in the system. Such BoQ comparative statement was automatically generated at 03.48 PM on 26.12.2022.

V. The exchange of communication between the NRL and appellant subsequent to 26.12.2022 (date of bid opening) cannot tantamount to acquiescence so as to be construed to mean that the price bid of the appellant after being opened with subsequently provided password credentials would be used for further evaluation inasmuch as there is no indication in the aforesaid communication that the NRL's query was aimed at giving an opportunity to rectify the mistake committed by the appellant while uploading its price bid. On the contrary, the NRL on affidavit stated that such communications were issued to ascertain whether such non inclusion of the appellants price bids in the system generated comparative statement was for the fault of NRL.

VI. Thus, it cannot be said that asking for log in credentials by NRL was for the purpose to keep the appellant in the fray inasmuch as the fact remains that the bid of the appellant shall not be visible either to the public in general and to other bidders without the log in credentials. Therefore, such password protection of the price bid by

the appellant is against the principle of transparency in government tender.

VII. As the file still remained password protected, the request of the NRL to the appellant asking for log in credential must not be construed to mean that the prices and the appellant's offer would be used for further evaluation inasmuch as it was made clear by the NRL that further bid evaluation, if any, shall be subject to the terms and conditions of the NIT and applicable clauses.

VIII. The non opening/non access of the appellants price bid by the system cannot be attributed to the technical glitch or to the NRL and same is attributable to the appellant, who uploaded the BoQ Excel price bid file with login credential and made it password protected.

IX. The note of discussions of the IEM dated 29.12.2022, reflects the conclusion that the appellant had made serious incurable mistake by submitting a password protected file, thereby, subverting the transparency of the tender process, therefore, the rejection of the appellants bid cannot be treated to be arbitrary or malafide.

X. There is no material on record as well as in the pleading of the appellant, even to remotely suggest that the appellants price bid was rejected to benefit the respondent No. 4 inasmuch as the appellant being a prudent business house could not have made the mistake of protecting their price bid by giving password and login credentials more particularly as the entire process was through the e-procurement portal and hence the compliances were required to be strict.

XI. The argument of Mr. Goswami, learned counsel that the system generated comparative statement is only provisional one and it is to be finalized through a PDF format after downloading the documents from the portal also do not find favour from this Court, for the reason that the question of subsequent evaluation will arise only if, the system generated comparative statement includes more than one bidder. However, in the case in hand, the price bid of the appellant was not even accepted/could not be assessed by the system, therefore, the appellant shall have no right to get his bid evaluated subsequently. Clause F(i)(bbb) of the NIT clearly stipulates that "***Bidders to ensure submission of Correct File Format in the portal. In case NRL./tkiS India cannot open the bids due to corrupt bid files/formats, the offer shall be rejected***". Thus rejection of a bid received in an incorrect format (which in the case would be the password protected price bid of the appellant) is an automatic consequence of this mandatory condition of the NIT.

XII. Law is by now well settled that owner or employer of a project having authored the tender document is the best person to understand and appreciate its requirement and interpret its document. It is possible that the tender or employer of a project may give an interpretation to the tender document, which may not be acceptable to a constitutional Court but, that by itself cannot be a reason for interfering with the interpretation given. In the case in hand, the appellant itself acquired the disqualification by giving login credentials and by protecting the Excel price BoQ and for that

reason admittedly the system could not read it and therefore, the bid of the appellant was rejected.

XIII. In the backdrop of aforesaid settled proposition of law, the interpretation/decision of the authority dated 29.12.2022 holding that as there is no express provision enabling the bidder to submit price bids with password protection, the bid of the appellant uploaded with password protection be treated as a defect in format in terms of Clause-F(h), cannot be faulted with in exercise of power of judicial review.

XIV. In the aforesaid factual as well as legal backdrop, this Court is in total agreement with the decision rendered by the learned Single Judge that there is no malafide exercise of power in making the decision and/or any intention on the part of the employer to favour someone.

XV. The decision to reject the bid of the appellant cannot also be said in the given facts, as discussed hereinabove, to be arbitrary or irrational.

XVI. In the considered opinion of this Court, the employer NRL has acted reasonably in accordance with the tender condition. Such decision cannot be said to be perverse. The NRL being the owner of the project is the best entity to understand and the appreciate its requirements and interpret its document.

XVII. From the aforesaid, this Court can safely conclude that the learned Single Judge has rightly held that it is for the fault of appellant that his bid got rejected and not for any other reason.

XVIII. This Court is of the view that due to the fault of the

appellant, an important public project remained stalled for almost for a year and therefore in the considered opinion this is a fit case where a cost of Rs. 1 lakh (Rupees One Lakh) should be imposed upon the appellant.

7. Directions:

- I. The impugned Judgment and Order dated 27.06.2023 passed in WP (C) No. 96/2023, by the learned Single Judge is upheld and resultantly the present appeal stands dismissed.
- II. The appellant to bear a cost of Rs. 1 lakh (Rupees One Lakh), and same should be deposited in the account of Gauhati High Court Bar Association Welfare Fund, within a period of thirty days from today.
- III. A proof of such deposit be placed before the Registry of this Court by the appellant.

JUDGE

CHIEF JUSTICE

Comparing Assistant