

GAHC010182342024



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

Case No. : WP(C)/4510/2024

JARPAL- JPW- DMC,
A CONSORTIUM OF (1) M/S JAI AMBEY ROADLINES PRIVATE LIMITED, A COMPANY, REGISTERED UNDER THE COMPANIES ACT, 1956, HAVING ITS REGISTERED ADDRESS AT I-37, ANUPAM NAGAR, SHANKAR NAGAR, RAIPUR, CHHATISHGARH, PIN- 492007. (2) JPW INFRATECH PRIVATE LIMITED, A COMPANIES ACT, 1956, HAVING ITS REGISTERED ADDRESS AT 146, S.P. MUKHERJEE ROAD, 3RD FLOOR, FLAT-9, KOLKATA, WEST BENGAL, PIN- 700026 AND (3) DEV MINING COMPANY, A PARTNERSHIP FIRM, HAVING ITS REGISTERED ADDRESS AT A-59, SHAILENDRA NAGAR, RAIPUR, CHHATISHGARH, PIN- 492001, HAVING ITS HEAD OFFICE AT I-37, ANUPAM NAGAR, SHANKAR NAGAR, RAIPUR, CHHATISHGARH, PIN- 492007, REP. THROUGH ITS LEAD PARTNER, M/S JPW INFRATECH PRIVATE LIMITED, HAVING ITS REGISTERED ADDRESS- AT 146, S.P. MUKHERJEE ROAD, 3RD FLOOR, FLAT-9, KOLKATA, WEST BENGAL, PIN- 700026, REP. BY ITS DIRECTOR/AUTHORIZED REPRESENTATIVE NAMELY SRI JAI PRAKASH WASSAN, SON OF JAGDISH LAL WASSAN, R/O- A-1 SHYAMA, 14, TP NAGAR, KORBA, CHATTISHGARH-495677.

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY, MINISTRY OF COAL, HAVING HIS OFFICE AT SHASTRI BHAWAN, DR. RAJENDRA PRASAD ROAD, NEW DELHI, INDIA-110066.

2:THE SECRETARY

MINISTRY OF FINANCE
DEPARTMENT OF EXPENDITURE
HAVING HIS OFFICE AT ROOM NO. 129A
NORTH BLOCK
NEW DELHI

INDIA-110001.

3:THE COAL INDIA LIMITED
REP. BY ITS CHAIRMAN-CUM-MANAGING DIRECTOR
HAVING HIS OFFICE AT COAL BHAWAN
PREMISES NO. 04 MAR
PLOT NO. AF-III
ACTION AREA-1A
NEW TOWN
RAJARHAT
KOLKATA
PIN- 700156.

4:THE GENERAL MANAGER
CONTRACT MANAGEMENT CELL (CMC)
COAL INDIA LIMITED
HAVING HIS OFFICE AT COAL BHAWAN
PREMISES NO. 04 MAR
PLOT NO. AF-III
ACTION AREA-1A
NEW TOWN
RAJARHAT
KOLKATA
PIN- 700156.

5:THE NORTH EASTERN COAL FIELDS
REP. BY ITS GENERAL MANAGER
HAVING HIS OFFICE AT MARGHERITA
TINSUKIA
ASSAM
PIN- 786181.

6:MAHALAXMI INFRA CONTRACT PRIVATE LIMITED
REP. BY ITS DIRECTOR
HAVING HIS OFFICE AT 813-825
BINORI B SQUARE 3
SINDHU BHAWAN ROAD
54
BODAKDEV
AHMEDABAD
GUJARAT
PIN- 380054

Advocate for the Petitioner : MR. SAILENDRA DEKA, MR P NAYAK,MR. D SAIKIA,MR
JITENDRA DAS,MS L RONGPIPI

Advocate for the Respondent : DY.S.G.I., MR. R M DEKA (R-6),N GAUTAM(R-6),MS N
MAHANTA(R-6),MS A CHOPHY(R-3,4),R. CHAUHAN(R-3,4),MR R DAS(R-3,4),MR T DAS(R-

3,4),MR. I CHOWDHURY SR ADV(R-3,4),MS. B DUTTA(R-5),MR. A M DUTTA (R-5),MR M Z AHMED(R-5),SC, COAL INDIA

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. D. Saikia Sr. Advocate.
Mr. S. Deka Advocate.

For the respondent nos.1 & 2 : Mr. D.J. Das Advocate.

For the respondent nos.3 & 4 : Mr. I. Choudhury Sr. Advocate.
Mr. T. Das Advocate.

For the respondent no.5 : Mr. M.Z. Ahmed Sr. Advocate.
Mr. A.M. Dutta Advocate.

For the respondent no.6 : Mr. K.N. Choudhury.... Sr. Advocate.
Mr. N. Gautam Advocate.

Date of hearing : 03.12.2024

Date of Judgment : 12.12.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. D. Saikia, learned Senior Counsel assisted by Mr. S. Deka, learned counsel for the petitioner. Also heard Mr. I. Choudhury, learned Senior Counsel assisted by Mr. T. Das, learned counsel for the respondent nos.3 & 4, Mr. M.Z. Ahmed, learned Senior Counsel assisted by Mr. A.M. Dutta, learned counsel for

the respondent no.5, Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. N. Gautam, learned counsel for the respondent no.6. Mr. D.J. Das, learned counsel appears for the respondent nos.1 & 2.

2. The petitioner's grievance in this writ petition is against the rejection of his technical bid on the ground that the Local Content (Make in India) Certificate dated 17.08.2024, submitted by the petitioner as a clarification sought by the State respondents vide Request No.1 on 16.08.2024, was disqualified on the ground that the clarification dated 17.08.2024 was not in consonance with Clause 19.2(II)(B) of the Additional Terms & Conditions (Instruction to Bidder). As per Clause 19.2(II)(B) of the Additional Terms and Conditions in the Bid Document (hereinafter referred to as the 'ATC'), whenever a clarification is required to be made in relation to some deficiency in the uploaded documents of a bidder, the shortfall information/documents sought for must pre-exist the date of opening the tender and should not have undergone any change since then.

3. In the present case, the last date of submission of tender/bids was 05.08.2024. The Local Content (Make in India) Certificate, submitted by the petitioner as a clarification to Request No.1 was dated 17.08.2024. Clause 19.2(II)(B) of the ATC states as follows :-

“19.2 Evaluation of Tender :

II. For Two Part System:

B. *In case the Tender Committee finds that there is some deficiency in uploaded documents corresponding to the information furnished in Bid Submission Confirmation Sheet or in case corresponding document have not been uploaded by Bidder(s) then the same will be specified online by*

Evaluator clearly indicating the omissions/shortcomings in the uploaded documents and allowing 7 days (7 x 24 hours) time for online re-submission by Bidder(s). Additionally, information shall also be sent by system generated email and SMS, but it will be the Bidder's responsibility to check the updated status/information on GeM Portal regularly after opening of bid. No separate communication will be required in this regard. Non-receipt of e-mail and SMS will not be accepted as a reason of non-submission of documents within prescribed time. The Bidder(s) will upload the scanned copy of all those specified documents in support of the information/ declarations furnished by them in Bid Submission Confirmation Sheet within the specified period of 7 days. No further clarification shall be sought from Bidder.

The shortfall information/documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should be called only on basis of the recommendations of the TC. So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a work order document related to a particular contract without its completion/ performance certificate, the certificate can be asked for and considered. However, no work order for new contract should be asked for so as to qualify the bidder.”

4. The petitioner’s technical bid was also disqualified on another ground, i.e. the Joint Venture Consortium Agreement submitted by the petitioner in relation to Request No.3, was not in consonance with the format provided in Annexure-II of the ATC. As such, it was held by the State respondents that the petitioner did not fulfil the eligibility criteria as per the requirement of the Notice Inviting Tender dated 05.07.2024, (hereinafter referred to as the ‘NIT’).

5. The petitioner’s case is that the petitioner had submitted his bid in

pursuance to the NIT dated 05.07.2024, for Hiring of HEMM for Removal of Overburden (936.72 Lakh CuM) and Extraction & Transportation of coal (53.00 Lakh Tes) from Tirap OCP of Tirap Colliery at NEC, Margherita for a period of 10 years (1 year for development and 9 years for Production.)

6. The petitioner is a Joint Venture Consortium, hereinafter referred to as the "JV/Consortium", consisting of the following partners : **(1)** M/s Jai Ambey Roadlines Private Limited, a Company, registered under the Companies Act, 1956, having its registered address at 1-37, Anupam Nagar, Shankar Nagar, Raipur, Chhattisgarh, PIN 492007; **(2)** JPW Infratech Private Limited, a Company, registered under the Companies Act, 1956, having its registered address at 146, S.P. Mukherjee Road, 3rd Floor, Flat 9, Kolkata, West Bengal, PIN 700026 and **(3)** Dev Mining Company, a Partnership Firm, having its registered address at A-59, Shailendra Nagar, Raipur, Chhattisgarh, PIN 492001. For the specific purpose of participating in the impugned NIT, floated by the respondent No.4, the said consortium has been formed vide JV/ Consortium Agreement dated 02.08.2024, under the name and style of JARPL-JPW-DMC.

7. As per the Joint Venture/Consortium Agreement, the lead partner was M/s JPW Infratech Private Limited having a share of 50% in the Consortium, while the share of M/s Jai Ambey Roadlines Private Limited was 30% and the share of Dev Mining Company was 20%.

8. The petitioner while submitting documents in compliance with the order issued by the Government of India and the NIT, regarding Local Content (Make in India), had submitted the local content certificates in the name of two out of

the three partners of the JV/Consortium in their individual capacity and no Local Content (Make in India) Certificate had been submitted in the name of the Bidder, i.e., the JV/Consortium. The local content certificate certified by the Chartered Accountant on 02.08.2024 showed the partner M/s Jai Ambey Roadlines Private Limited as being a Class-I local supplier having local content of more than 50%. The other Local Content Certificate dated 12.07.2024 was made in the name of the partner M/s JPW Infratech Private Limited by the Chartered Accountant, showing M/s JPW Infratech Private Limited as a Class-I supplier having local content of 100%. The 3rd partner in the JV/Consortium, i.e., Dev Mining Company, did not submit any local content document/certificate.

9. In terms of Clause 19 of the ATC, which pertains to evaluation of tender, after the opening of the tender bid, the same is to be evaluated by the constituted Tender Committee. As per Clause 19.2(II)(A) of the ATC, the documents submitted by the Bidder(s) in Cover I as enlisted in the Bid Document, is to be examined by the tender committee against information/declarations furnished by the Bidder(s) in the Bid Submission Confirmation Sheet (in short "BSC sheet"). If the downloaded documents confirms to all of the information/declarations furnished by the bidders in the BSC sheet and if they do not change the eligibility status of the bidder, then the bidder will be considered eligible for opening of the price bid.

10. In terms of Clause 19.2 (II)(B) of the ATC, in case the tender committee finds that there is some deficiency in the uploaded documents corresponding to the information furnished in the "BSC sheet" or in case some corresponding document has not been uploaded by the bidder, then the same will be specified

online by the evaluator, clearly indicating the omissions/short comings in the uploaded documents and allowing seven days time for online re-submission by the bidder.

11. Clause 19.2(II)(B) of the ATC further states that the shortfall information(s)/documents should be sought only in case of historical documents, which pre existed at the time of tender opening and which has not undergone change since then. Clause 19.2(II)(H) of the ATC provides that in case the bidder fails to confirm the submitted information(s)/ declarations(s) by the submitted documents as provided in Sub-Clause-B, the bid shall be rejected.

12. Pursuant to Clause 19.2(II)(B) of the ATC, the respondents issued a clarification query dated 16.08.2024 seeking 3 (three) clarification requests from the petitioner, which are as follows:-

“a. Request 1 - "You are requested to submit the certificate in the name of M/s JARPL-JPW-DMC issued by practicing cost accountant or practicing chartered account regarding Local content as per Annexure IX of ATC of Bid Document."

b. Request 2 - "You are requested to submit the clearly readable copy of Partnership Deed of M/s Dev Mining Company."

c. Request 3 - "Due to text limit by the GeM Portal, the query is attached."

13. The petitioner's counsel submits that since the 3 clarifications sought for on 16.08.2024 pertained to non-essential conditions of the NIT and did not pertain to any material deviation or reservation, as provided under Clause 22 of the NIT, the petitioner responded to the queries, and furnished the requisite clarifications/documents with respect to Requests 1 & 2. However, the petitioner

could not respond to Request-3, since there was no attachment appended to the said query, to enlighten the petitioner as to what clarification was sought for by the Tender Committee. That with respect to Request No. 1, regarding the certificate to be issued pertaining to the Local Content of the materials (Make in India), the petitioner submitted a fresh certificate dated 17.08.2024 issued by a Chartered Accountant, in the name of the Joint Venture/Consortium, i.e. the Bidder, showing that it was a Class-I local supplier. The petitioner also submitted a readable copy of the partnership deed of M/s Dev Mining Company as per Request No. 2. However, as the clarification with regard to Request Nos. 1 and 2 could not be uploaded, without making a clarification in respect of all the three Requests, the petitioner re-submitted a copy of the working capital certificate in respect to Request No. 3, which was not the document sought for by the State respondents. The petitioner later came to learn that the clarification that had been sought in terms of Request No.3, was with regard to the Joint Venture/Consortium agreement made by the petitioner, which was to be submitted as per the format provided in Annexure-II (Proforma of Joint Venture/Consortium) of the Bid document.

14. The petitioner's counsel submits that the petitioner was thereafter surprised on coming to learn that his technical bid had been disqualified on the ground that the clarification dated 17.08.2024 made in pursuance to Request No. 1 had not been accepted, in view of the clarification not being a historical document, as provided in Clause 19.2 (II)(B) of the ATC. Also the JV/Consortium Agreement submitted by the petitioner had not been made in line with the format provided at Annexure-II of the ATC, which was in relation to Request No.3.

15. The petitioner's counsel submits that there is no infirmity in the partners of the Joint Venture/Consortium submitting separate certificates, showing that they are Class-I local suppliers having the required local content (Make in India), required of a Class-I local supplier. He submits that when the requirement of a Class-I local supplier is that the goods, services or works offered have a local content, equal to or more than 50%, the rejection of the clarification dated 17.08.2024 by the State respondents was arbitrary. He submits that the local content certificate submitted by the partner M/s Jai Ambey Roadlines Private Limited was more than 50% and the local content certificate submitted by the lead partner M/s JPW Infratech Private Limited was 100%. As there were three partners in the Joint Venture/Consortium, the local content of the 2 out of the 3 partners made a total of 50% + 100%, i.e. 150% local content. The division of 150% by 3, amounted to 50% local content, which showed that the 3 partners, as a Joint Venture/Consortium, would have 50% local content. Thus, even without any certificate of local content being submitted by M/s Dev Mining Company, the Joint Venture/Consortium were to be treated as a Class-I local supplier. He accordingly submits that the disqualification of the petitioner's technical bid, on the ground that the petitioner had not submitted a clarification which should have been in existence at the time of the last date of submission of the bid, i.e. 05.08.2024, should be set aside.

16. The petitioner's further case is that the JV/Consortium agreement submitted by the petitioner in pursuance to the NIT, when compared with the format provided at Annexure-II of the ATC, showed that the only difference between the two documents was that the petitioner had used seven more words in the consortium agreement in para 7, which were as follows "to the as

mention proportionate Clause No. 04”.

17. The petitioner’s counsel submits that Clause No. 7 of the JV/Consortium Agreement submitted by the petitioner is similar to Clause-5 in the Format provided in Appendix-II of the Bid Documents, except for the additional 7 words. The petitioner’s counsel submits that as there was no material difference in Clause 7 of the JV/Consortium Agreement submitted by the petitioner and Clause-5 of Annexure-II, the disqualification of the petitioner’s technical bid on the ground that the Clause 7 of JV/Consortium Agreement was not in consonance with Clause 5 of Appendix-II was arbitrary and had to be set aside.

18. The petitioner’s counsel submits that a perusal of the Tender Committee Minutes shows that various documents were submitted by the partners of the petitioner Joint Venture/Consortium individually, which included PAN, GST Working Capital and Working Experience etc. Thus, when individual documents submitted by the partners of the JV/Consortium were being accepted by the State respondents, the non acceptance of individual certificates for local content (Make in India) by the State respondents, was arbitrary.

19. The petitioner’s counsel submits that the bid submitted by the petitioner was lower than the bid submitted by the respondent No.6, by Rs.112 crores. He submits that as public money is involved, the State respondents should have considered the financial bid of the petitioner, which was in public interest. He submits that the disqualification of the petitioner’s bid was not in terms of the NIT, inasmuch as, the bid of the petitioner was in terms of the Eligibility Criteria required of bidders, i.e., Clause 2 of the ATC. There was no material deviation in the bid of the petitioner or in its clarifications and the petitioner’s bid was

consistent with the requirements of the ATC. He submits that the disqualification of the petitioner's clarification, regarding the local content certificate was unreasonable, as the historical data of the partners of the Joint Venture/Consortium remained intact. As such, when the historical data required remained intact for the partners of the Joint Venture/Consortium, the rejection of the clarificatory local content certificate, only on the ground that the same was not a historical document as it had been issued after the last date of submission of bids, was unreasonable. He also submits that when the partners of the Joint Venture/Consortium had submitted their individual local content certificates, it was the job of the State respondents to add, subtract and divide the local contents of the partners of the JV/Consortium, provided in the two individual certificates. As such, the technical bid of the petitioner could not have been rejected, only because the State respondents did not do their part of the job. He also submits that when the State respondents have accepted the individual local content certificates of the partners of the JV/Consortium and had only called for a clarification and not for a replacement of data, the subsequent disqualification of the clarification was unreasonable.

20. He also submits that the local content certificate is basically a qualification criteria and when the qualification has been met, the respondents could not have disqualified the technical bid of the petitioner, as Clause 2.2(ii) of the ATC provides that the qualifying criteria parameter of the Joint Venture/Consortium would be added together and the total criteria should not be less than that spelt out in the eligibility criteria provided in the ATC. He submits that when the local content certificate submitted by two of the partners of the Joint Venture/Consortium showed that there was a local content (Make in India) of 150%, a division of the said 150% by 3, would show that all the 3 partners of

the Joint Venture/Consortium had 50% local content.

21. The petitioner's counsel further submits that in terms of Annexure IX-A, which is the format provided in the ATC for the local content certificate, the details of the location at which local value addition is made is not required to be provided, when the percentage of local content in the offered product is offered by a Class-I local supplier. The additional details provided in the lower half of the said Annexure IX-A format would only be applicable for a Class-II local supplier. He submits that every individual certificate regarding local content submitted by a partner of the Joint Venture/Consortium has to be considered by the authorities and not a joint certificate. He further submits that the petitioner is not praying for setting aside the NIT dated 05.07.2024. The petitioner's prayer is only to set aside the disqualification of the petitioner's technical bid and to direct the State respondents to open its financial bid, which would be in public interest.

22. In support of his submission, the learned counsel for the petitioner has relied upon the following judgments:

(i) New Horizons Ltd. and Anr. Vs. Union of India and Ors.,
reported in ***(1995) 1 SCC 478;***

(ii) Ganapati RV-Talleres Alegria Track Pvt. Ltd. Vs. Union of India and Anr., reported in ***(2009) 1 SCC 589;***

(iii) CRRC Corporation Ltd. Vs. Metro Link Express for Gandhinagar and Ahmedabad (MEGA) Company Ltd., reported in ***(2017) 8 SCC 282;***

(iv) Reliance Energy Ltd. and Anr. Vs. Maharashtra State Road Development Corpn. Ltd. and Ors., reported in **(2007) 8 SCC 1;**

(v) Kanhaiya Lal Agrawal Vs. Union of India and Ors., reported in **(2002) 6 SCC 315;**

(vi) G.J. Fernandez Vs. State of Karnataka and Ors., reported in **(1990) 2 SCC 488 and**

(vii) Poddar Steel Corporation Vs. Ganesh Engineering Works and Ors., reported in **(1991) 3 SCC 273.**

(viii) Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal & Others., reported in **(2011) 1 SCC 236.**

23. In the case of **New Horizons Ltd. (supra)** and **Ganapati RV-Talleres Alegria Track Pvt. Ltd. (supra)** the Supreme Court has held that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. It further held that a joint venture connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. It further held that in a joint venture, the experience

of its various constituents had to be taken into consideration. It also held that in respect of the joint venture company, the experience of the company can only mean the experience of the constituents of the joint venture.

24. In the case of ***CRRC Corporation Ltd. (supra)***, the Supreme Court has held that in terms of the Clause of the tender documents therein, the appellant corporation which claimed to be an amalgam of 2 companies, could utilise the experience of its subsidiary companies to meet the evaluation and qualification criteria required of the bidders therein.

25. In the case of ***Reliance Energy Ltd. (supra)***, the Supreme Court referred to another Supreme Court judgment in the case of ***Reliance Airport Developers (P) Ltd. vs Airport Authority of India***, reported in ***(2006) 10 SCC 1*** and held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. It further held that the principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. It further held that one of the most important principles laid down in ***Reliance Airport Developers (P) Ltd.*** was that whenever a norm/benchmark was prescribed in the tender process in order to provide certainty, that norm/standard should be clear. It further held that that grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety.

26. In the case of ***Kanhaiya Lal Agrawal (supra)***, ***G.J. Fernandez***

(supra) and **Poddar Steel Corporation (supra)**, the Supreme Court has held that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender, otherwise it is only a collateral term.

27. In the case of **Hari Chand Shri Gopal (supra)** the Supreme Court has held that the doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequential aspects, which cannot be described as the "essence" or the "substance" of the requirements.

28. Mr. I. Choudhury, learned Sr. Counsel for the respondent Nos. 3 & 4 submits that in terms of the NIT, participation of a Joint Venture/Consortium through the GeM Portal for the NIT, requires that the registration of the bidder should be in the name of the lead member of the Joint Venture/Consortium. Further, the documents to be submitted against the eligibility criteria should be in the name of the Joint Venture/Consortium. He further submits that as per Clause 2 of the ATC, which is the provision for "eligible bidders", two or three company/contractors may jointly undertake contracts and each entity would be jointly and severally responsible for completing the tasks as per the contract. He submits that in terms of Clause 19.2(II)(B), when a clarification is sought, after recording some deficiency in an uploaded document by the Tender Committee, the shortfall information/documents should be sought only in case of historical documents, which pre-existed at the time of the tender opening and which had not undergone change since then.

29. Mr. I. Choudhury, learned Senior Counsel for the respondent nos.3 & 4 submits that the petitioner's Joint Venture/Consortium Agreement had not been made in terms of the format provided in Annexure-II, which is the proforma of a Joint Venture/Consortium Agreement annexed to the ATC. The addition of seven words in Clause-7 of the Joint Venture/Consortium Agreement submitted by the petitioner, which should have been in Clause-5 as per Appendix-II, shows that the format of Annexure-II had been changed by the petitioner. The change aside, the addition of 7 words resulted in an ambiguity, inasmuch as, the petitioner could thereafter take a stand in the future that the partners of the Joint Venture/Consortium would not be fully liable jointly or severally, except as per their respective share participation in the Joint Venture/Consortium, which was reflected in sub-clause 4 of Clause 6 of their JV/Consortium Agreement. He submits that despite a clarification being asked for against the Joint Venture/Consortium Agreement vide Request No.3, no clarification was submitted by the petitioner. Instead, the bidder submitted a copy of the Working Capital, for which a clarification was not required. He also submits that the stand taken by the petitioner in the writ petition that the petitioner could not see the attachment with regard to Request No.3 was clearly an afterthought, inasmuch as, the petitioner has not made a whisper of the same in its representation dated 23.08.2024 to the Tender Inviting Authority, thereby implying that the petitioner had opened and seen the attachment with respect to Request No.3. He also submits that the petitioner in their representation dated 23.08.2024 had stated that the Joint Venture/Consortium Agreement submitted by the petitioner was in terms of the format specified in Annexure-II of the ATC of the bid documents. He accordingly submits that the petitioner has made a false statement, when the contents of the petitioner's representation

dated 23.08.2024 clearly implies that the petitioner was aware of Request No.3, that the Joint Venture/Consortium Agreement required clarification.

30. The learned Senior Counsel for the respondent nos.3 & 4 further submits that the further information required of bidders as per the contents of the lower portion of Annexure-IX-A, required both the Class-I Local Supplier or Class-II Local Supplier, to add the same to their Local Content Certificate. However, the State respondents were not required to go into the said issue, inasmuch as, the clarification made by the petitioner, vide letter dated 17.08.2024 issued by the Chartered Accountant in response to Request No.1, had in any event, failed the historical document test required under Clause 29.2(II)(B) of the ATC.

31. Mr. I. Choudhury further submits that PAN Card, GST Certificate, Working Experience and Working Capital were taken individually from the partners of the Joint Venture/Consortium, because the bid document allowed for the same in respect of certain documents. In this respect, he has relied upon certain clauses of the “eligibility criteria of the bidders” as provided in Clause 3.1(c) and (d) of the ATC for example, wherein it has been stated as follows:

“In case of JV/Consortium, Work Experience shall be met collectively by all the members” and

“In case of Joint Venture/Consortium, above documents of partner(s) shall be submitted and Work Experience shall be met collectively by all the partner/members.”

However, the tender conditions does not allow/provide for submission of “Local Content” Certificate by the partners of the Joint Venture/Consortium

individually, but by the Joint Venture Consortium in terms of Clause 1 and the “Notes” to Clause 3.3 of the NIT.

32. Mr. I. Choudhury submits that the petitioner has not put to challenge any of the Tender Committee recommendation, including the rejection of the petitioner’s representation dated 23.08.2024, vide Tender Committee Meeting Minutes dated 26.08.2024, which had treated the petitioner’s representation as an Appeal. He submits that the Tender Committee has also not been made a party and as such, there is no question of malafides in the present case.

33. The learned Senior Counsel further submits that in terms of the CVC Guidelines which has been adopted by the Coal India Limited at Clause 5.6.7 of the ATC of the bid document, when only one bid is submitted in a tender process, the process can be considered valid, provided three conditions are satisfied, which are –

- i) The procurement was satisfactorily advertised and sufficient time was given for submission of bids;
- (ii) The qualification criteria were not unduly restrictive; and
- (iii) Prices are reasonable in comparison to market values.

He submits that in the present case, the 3 conditions are fulfilled.

34. The learned Senior Counsel submits that there were altogether 12 bidders and only the bid of the respondent no.6 has been declared responsive, after the technical bids of other bidders were disqualified. He submits that opportunity had been given to the petitioner to make clarifications and a perusal of the

meeting minutes of the Tender Committee also shows the great pains they took in considering the bids of each and every bidder. He submits that in the meeting minutes there was no arbitrariness or unreasonableness in deciding the allotment of the contract work. As such, the writ petition should be dismissed, as there is no infirmity in the decision making process of the respondent nos.3 & 4.

35. The learned Senior Counsel, in support of his submissions, has relied upon the following judgments :

(i) ***Ramana Dayaram Shetty Vs. International Airport Authority of India and Ors.***, reported in **(1979) 3 SCC 489;**

(ii) ***Vidarbha Irrigation Development Corporation and Ors. Vs. Anoj Kumar Agarwala and Ors.***, reported in **(2020) 17 SCC 577;**

(iii) ***G.J. Fernandez Vs. State of Karnataka and Ors.***, reported in **(1990) 2 SCC 488;**

(iv) ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors.***, reported in **(1999) 1 SCC 492;**

(v) ***Silppi Constructions Contractors Vs. Union of India and Anr.***, reported in **(2020) 16 SCC 489;**

(vi) ***N.G. Projects Ltd. Vs. Vinod Kumar Jain and Ors.***, reported in **(2022) 6 SCC 127** and

(vii) ***Air India Ltd. Vs. Cochin International Airport Ltd.***, reported in **(2000) 2 SCC 617.**

36. In the case of ***Ramana Dayaram Shetty (supra)***, the Supreme Court has held that it is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

37. In the case of ***Vidarbha Irrigation Development Corporation (supra)***, the Supreme Court has held that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. It further held that if an essential tender condition which had to be strictly complied with was not so complied with, the State respondents would have no power to condone the lack of such strict compliance.

38. In the case of ***Raunaq International Ltd. (supra)***, the Supreme Court held that a mere difference in the prices offered by two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in a commercial transaction. It further held that it is important to bear in mind that by court intervention, the proposed project may be considerably delayed, thus escalating the cost far more than any saving which the court would ultimately effect in public money, by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into malafide, the court should not intervene under Article 226 in disputes between two rival tenderers.

39. In the case of ***Silppi Constructions Contractors (supra)***, the

Supreme Court has held that there is a need for overwhelming public interest to justify intervention in contractual matters and that the Court should give weight to the opinion of the experts, unless a decision is totally arbitrary or unreasonable. It further held that the Court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted. The Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

40. In the case of *N.G. Projects Ltd. (supra)*, the Supreme Court held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. If the view of the Technical Evaluation Committee is not to the liking of the bidder, such decision does not warrant for interference in a grant of contract for a successful bidder. The Court further held that the Writ Court should refrain itself from imposing its decision over the decision of the employer, as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present- day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues, as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be, not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is made after

complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender, but instead relegate the parties to seek damages for the wrongful exclusion, rather than to injunct the execution of the contract.

41. In the case of ***Air India Ltd. (supra)***, the Supreme Court has held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

42. Mr. K.N. Choudhury, learned Senior Counsel for the respondent no.6 submits that the petitioner had not submitted their Joint Venture/Consortium Agreement in terms of Annexure-II of the ATC. He also submits that the petitioner's bid being inconsistent with the bidding documents that were required to be submitted, the same amounted to a material deviation under Clause 22 of the ATC.

Clause 22 of the ATC provides as follows:

“22. EXAMINATION OF BIDS AND DETERMINATION OF RESPONSIVENESS

22.1. A substantially responsive Bid is one which conforms to all the terms, conditions, and specifications of the Bidding documents without material deviation or reservation. A material deviation or reservation is one:

a. which affects in any substantial way the scope, quality, or performance of the works;

b. which limits in any substantial way, inconsistent with the Bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or

c. whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive Bids.

22.2. If a Bid is not substantially responsive, it may be rejected by the Employer at its sole discretion.”

He further submits that Clause 19.2(II)(B) was correctly applied, as the petitioner had not submitted the historical document while making a clarification to Request No.1. He also submits that the petitioner has not make a challenge to the rejection of it's representation/appeal, vide the Tender Committee

Meeting Minutes dated 26.08.2024. He also submits that the CVC Guidelines regarding acceptance of a single bid has been adopted by Coal India Limited and as the petitioner has not made any challenge on this score, the recommendation of the Tender Committee to allot the work to the respondent no.6 should not be interfered with. The writ petitioner not having the eligibility criteria, there was no infirmity with the disqualification of the petitioner's Technical Bid. In support of his submission that the writ petition should be dismissed, the learned Senior Counsel has relied upon the following judgments of the Apex Court in -

- (i) ***Central Coalfields Limited & Another vs. SLL-SML (Joint Venture Consortium) & Others***, reported in **(2016) 8 SCC 622 (47)**
- (ii) ***M/S Sorath Builders vs Shreejikrupa Buildcon Limited & Another***, reported in **(2009) 11 SCC 9 (26 & 27)**

43. In the case of ***Central Coalfields Limited (supra)*** the Supreme Court held that the issue of the acceptance or rejection of a bid or a bidder should be looked at, not only from the point of view of the unsuccessful party, but also from the point of view of the employer. It further held that there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned, but the decision making process can certainly be subject to judicial review.

44. In the case of ***M/S Sorath Builders (supra)***, the Supreme Court referred to another of its decision in ***W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Others***, reported in **(2001) 2 SCC 451**, where it had held that adherence to the instructions cannot be given a go-by, otherwise

it will encourage and provide scope for discrimination, arbitrariness and favouritism, which are totally opposed to the rule of law and constitutional values. It further held that the very purpose of issuing rules/instructions is to ensure their enforcement, lest the rule of law should be a casualty.

45. I have heard the learned counsels for the parties.

46. A perusal of the documents and the submissions made by the counsels for the parties show that the technical bid of the petitioner had been rejected on the ground that the Local Content (Make in India) Certificate had not been issued in the name of the bidder/ JV/Consortium, which was a requirement under "Notes" to Clause 3.3 of the ATC, which is as follows:

"3.3. If the Bidder is a Subsidiary of a Company, the experience and resources of the Holding Company or its other Subsidiaries will not be taken into account. However, if the Bidder is a Holding Company, the experience and resources of its wholly owned Subsidiaries will be taken into consideration."

Notes: *The documents to be furnished by the Bidder to prove that he is satisfying the eligibility criteria laid down should all be in the Bidders' name except in cases where though the name has changed, owners continued to remain the same and in cases of amalgamation of entities and when a Holding Company relies on the credentials of its wholly owned Subsidiaries. Please refer Clause 2 of Additional Terms & Conditions (ATC) of GeM Bid Document."*

The clarification certificate dated 17.08.2024 submitted by the petitioner in terms of Clause 19(2)(II)(B) in response to Request No.1 could not be accepted, as the shortfall information/document should have been existing at the time of the opening of the tender and which should not have undergone change since then. Clause 19(2)(II)(B) further clarified that only the related shortfall documents were to be asked for and considered. The second ground

for rejecting the petitioner's technical bid was that the JV/Consortium Agreement submitted on behalf of the petitioner was not in consonance with the format provided in Annexure-II of the ATC of the Bid document.

47. As can be seen from Clause 19(2)(II)(B), the deficiency in the uploaded documents can be called for and clarification can be made on the same, provided that the historical document called for should have been in existence at the time of the tender opening and should not have undergone any change since then. In the present case, the JV/Consortium (bidder) has not submitted the Local Content (Make in India) Certificate. Only 2 out of the 3 partners of the petitioner JV/Consortium had submitted their Local Content (Make in India) Certificate, in their individual capacity. Clause 2.1 of the ATC provides that the invitation for bid is open for all Bidders, which includes a JV/Consortium.

48. In terms of Clause 3.1(a) of the ATC, bidders are required to submit the duly filled Bid Submission Confirmation Sheet and the scanned copy of the documents are to be verified against the data furnished in the Bid Submission Confirmation. Any Bid not accompanied by a Bid Submission Confirmation Sheet or if BSC is found tampered, the bid is liable to be rejected as nonresponsive.

49. In terms of Clause 3.1(r) of the ATC purchase preferences has to be given to Class-I local suppliers and in this respect, all the bidders are to submit along with their bid, a certificate with UDIN from the statutory auditor or cost auditor of the Company (in case of companies) or from a practicing cost accountant or practicing chartered accountant (in respect of suppliers other than companies) giving the percentage of local content. The "Notes" to Clause 3.3 provides that

the documents to be furnished by the bidder to prove that he satisfies the eligibility criteria laid down, including the criteria of being either a Class-I local supplier or Class-II local supplier, should be in the bidder's name, except in cases where though the name has changed, owners continue to remain the same and in cases of amalgamation of entities and when a Holding Company relies on the credentials of its wholly owned subsidiaries. The definition of Class-I Local Supplier, Class-II Local Supplier is as follows:-

"a. 'Class-I local supplier' means a supplier or service provider, whose goods, services or works offered for procurement, has local content equal to or more than 50%, as defined under said order.

b. 'Class-II local supplier' means a supplier or service provided, whose goods, services or works offered for procurement, has local content equal to or more than 20% but less than 50%, as defined under said order."

50. The eligibility criteria of a bidder is provided in Clause 3 of the ATC and in terms of Clause 3.1(R) of the ATC, the documents are required to be submitted in compliance with the order for preference to Make in India issued by the Government, for Class-I local supplier and Class-II Local Supplier, who are the only two eligible bidders, who can participate in the present NIT. The "Notes" to Clause 3.3 of the ATC provides that the documents to be submitted by the Bidder to prove that he satisfies the eligibility criteria laid down in Clause 3, should all be in the bidder's name. Thus, the petitioner was supposed to submit the local content certificate (Make in India) showing that it was a Class-I local supplier in terms of Clause 3 of the ATC. However, the petitioner, who is the bidder, did not submit the local content certificate (Make in India) in the name of the Bidder (Joint Venture/ Consortium). Instead the two partners of the Joint Venture/ Consortium, i.e. M/s JPW Infratech Private Limited and M/s Jay Ambey

Roadlines Private Limited submitted individual local content certificates (Make in India), which was not in terms of the "Notes" to Clause 3.3 of the ATC. Thereafter, the clarification with regard to the same showed that the clarificatory letter was issued on 17.08.2024, i.e., after the last date of submission of the bids, which was in violation of Clause 19.2(II)(B) of the ATC.

51. A reading of Clause 19.2(II)(B) shows that the information/clarification required would have to be based on documents. Not only should the data be in the form of a document, but the same should also be in existence at the time of opening of the bids of the tenderers. In the present case, the petitioner's clarifications coming into existence only after opening of the bid, the same fails the test provided under Clause 19.2(II)(B). Though it was submitted that the Local Content (Make in India) criteria could be submitted by the partners of the JV/ Consortium individually and that the necessary addition/subtraction of the eligibility criteria regarding the local content of the individual partners could be done by the Tender Committee, the "Notes" to Clause 3.3 of the ATC clearly provides that the document is to be furnished by the bidder/JV/Consortium to prove that the bidder/petitioner has satisfied the eligibility criteria laid down. Clause 1 of the NIT provides that for participation of a JV/ Consortium through the GeM Portal, the registration of bidder should be in the name of lead member of the JV/Consortium and the submission of document/s against the eligibility criteria should be in the name of the JV/ Consortium (bidder). In the present case, 2 out of 3 partners have submitted the eligibility criteria regarding Local Content (Make in India) Certificate in their individual capacity and not as the bidder/ JV/ Consortium.

52. In view of the reasons stated above, it is clear that the Local Content

(Make in India) Certificate had to be submitted in the name of the petitioner, i.e., the JV/Consortium/bidder, which had not been done. The clarifications sought for by the State respondents under Request No.1 was answered to by the petitioner by submitting a document dated 17.08.2024, which was not a historical document, as required under Clause 19.2(II)(B) of the ATC. The fact that the State respondents have interpreted the Clause 19.2(II)(B) of the ATC to be an essential condition of the tender and as the Clause appears to be an essential condition of the tender, this Court does not find any infirmity in the rejection of the petitioner's technical bid on this count.

53. Clause 2.2 (ii) (iv) (vi) (ix) of the ATC provides as follows:-

“(ii) The qualifying criteria parameter e.g. experience, financial resources (of the relevant period) and the equipment/fleet strength of the individual member of the JV/Consortium will be added together and the total criteria is not to be less than the qualifying/eligibility criteria as specified in Additional Terms and Conditions/Bid document. However, the required Working Capital shall be met by individual members of JV/Consortium as spelt out in the relevant Clause.

(iv) The bid, and in case of a successful bid- the agreement, shall be signed so as to legally bind all members jointly and severally and any bid shall be submitted with a copy of the JV/Consortium Agreement providing the joint and several liabilities with respect to the contract.

(vi) The bid submission must include documentary evidence to the relationship between JV/Consortium members in the form of JV/Consortium Agreement to legally bind all partners jointly and severally for the proposed agreement which should set out the principles for the constitution, operation, responsibilities regarding work and financial arrangements, participation (percentage share in the total) and liabilities

(joint and several) in respect of each and all of the firms in the JV/Consortium. Such JV/Consortium Agreement must evidence the commitment of the parties to bid for the facilities applied for (if pre-qualified) and to execute the contract for the facilities if their bid is successful.

(ix) The contract agreement should be signed by each JV/Consortium members. Subsequent declarations/ letters/documents shall be signed by lead member authorized to sign on behalf of the JV/Consortium or authorized signatory on behalf of JV/Consortium."

54. As can be seen from Clause 2.2(ii), the qualifying criteria parameter e.g. experience, financial resources and the equipment/fleet strength of the individual member of the JV/Consortium is to be added together and the total criteria is not to be less than the qualifying/eligibility criteria as spelt out in the ATC. However, the required Working Capital is to be met by individual members of JV/Consortium. Clause 2.2 (ii) does not make a mention of "local content" or the requirement of a local content of either the JV/Consortium as a whole or of the individual partners of the JV/Consortium.

55. Clause 2.2(iv) of the ATC provides that the agreement for any successful bidder shall be signed by all members of the JV/Consortium jointly and severally.

56. Clause 2.2(xii) of the ATC provides that the JV/Consortium agreement may specify the share of each individual member, for the purpose of execution of the contract and the same is required only for the sole purpose of apportioning the value of the contract.

57. Clause 2.2 of the ATC provides that each entity will be jointly and severally responsible for completing the task as per the contract. With regard to the second issue pertaining to the petitioner's JV/Consortium Agreement not being in consonance with the format provided in Annexure-II of the ATC, the case of the petitioner is that it was unable to open the attachment to Request No.3 and as such, could not clarify the matter. It is however the stand of the petitioner that the JV/Consortium Agreement submitted by the petitioner was in consonance with the format provided in Annexure-II of the ATC, though the numbering of the paragraphs in the JV/Consortium Agreement submitted by the petitioner, was different than the paragraph number made in Annexure-II of the ATC, besides the use of 7 additional words.

58. The stand of the petitioner that it was unable to open the attachment made to Request No.3 seems to be an afterthought. In the representation dated 23.08.2024 submitted by the petitioner to the Tender Inviting Authority, which disagrees with the disqualification of its technical bid, the petitioner has not made a whisper to the effect that the attachment to Request No.3 could not be opened by the petitioner. The petitioner in its representation dated 23.08.2024 has stated the following:

“Furthermore regarding the Consortium Agreement, our submission did meet the format specified in Annexure II of the ATC of Bid Document. We are willing to provide additional information or clarify any points that may be unclear.”

59. Vide the said representation dated 23.08.2024, the petitioner requested the Tender Inviting Authority to accept their bid and consider the same accordingly. The above representation dated 23.08.2024 had been submitted by

the petitioner to the Tender Inviting Authority, after they were informed that their technical bid had been disqualified. It is only now that the petitioner has taken a stand that they could not open the attachment to the clarification required with respect to their JV/Consortium Agreement, which was to be done in terms of Request No.3. The petitioner appears to be playing "hide and seek" with facts, though it is supposed to be truthful, frank and open. In this context, the Hon'ble Supreme Court in the case of ***K.D. Sharma Vs. Steel Authority of India Ltd. & Ors.***, reported in ***(2008) 12 SCC 481***, has held that if material facts are suppressed or distorted, the very functioning of Writ Courts would become impossible. It further held that the Courts had inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court.

60. The JV/Consortium Agreement submitted by the petitioner, in pursuance to the NIT, shows that the petitioner had not used the exact words required as per the format provided under Annexure-II of the ATC. Firstly, Annexure-II consists of 15 paragraphs, while the JV/Consortium Agreement submitted by the petitioner consists of 17 paragraphs.

61. Clause 7 of the JV/Consortium Agreement and Clause 5 of the JV/Consortium Agreement in Annexure-II are as follows:-

“Joint And Several Liabilities

All partner of Consortium shall be liable jointly and severally "to the as

mention proportionate clause no-04” during the Pre-qualification and Bidding process; and in the event the contract is awarded, during the execution of the Contract, in accordance with Contract terms”

“Joint And Several Liabilities (Appendix-II)

All partner of Joint Venture/Consortium shall be liable jointly and severally during the Pre-qualification and Bidding process; and in the event the contract is awarded, during the execution of the Contract, in accordance with Contract terms”.

62. There is nothing stated in Clause 5 of the JV/ Consortium Agreement format in Annexure-II, with regard to the partners of the JV/Consortium joint and several liabilities being limited to the ratio of their respective share participation in the JV/Consortium. However, the JV/Consortium Agreement submitted by the petitioner, in terms of the Appendix-II, has added the following 7 words “*to the as mention proportionate clause no-04*”, which could be interpreted to the effect that the JV/Consortium would be jointly and severally liable to the extent of each partners share participation in the JV/ Consortium, as reflected in Clause 6 of the petitioner’s JV/ Consortium Agreement.

63. A submission had been made by the learned Sr. Counsel for the petitioner that some documents, such as PAN Card, GST, Working Capital, Working Experience etc, which were submitted by the partners of the JV/ Consortium in their individual capacity, had been accepted and as such, the non-acceptance of the Local Content (Make in India) Certificate in the individual capacity of the partners could not have been rejected. The said submission is not sustainable in view of the fact that the ATC provides for submission of certain qualifications/documents to be made collectively by all the partners of the JV/

Consortium. These can be seen in Clause 3.1(c)(d)(F) &(g) of the ATC. However, local content certificate had to be submitted by the bidder, i.e., the petitioner only.

64. As can be seen from the various decisions of the Supreme Court, an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards. Thus, when the ATC provides the manner in which a tender/document has to be submitted, the Tender Committee scrutinizing the bids would have to rigorously apply those standards, especially, when they pertain to essential conditions of the tender. Further, though the Supreme Court had held that the decision making process can be interfered with, if it is vitiated by malafides, unreasonableness and arbitrariness, none of the above has been made out in the present case. The petitioner's further case is that its bid is Rs.112 crores less than the bid submitted by the respondent No.6.

65. The Supreme Court in ***Raunaq International Ltd. (supra)***, has held that the prices offered by two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in a commercial transaction. It further held that due to Court intervention delaying the project, the cost escalation may be more than what is sought to be saved. It thus held that unless there was a substantial amount of public interest, or the transaction entered into was mala fide, the Court should not intervene in disputes between two rival tenderers under Article 226 of the Constitution. In ***Air India Ltd. (supra)***, it was held that price need not always be the sole criteria for awarding a contract.

66. In the present case, the Tender Committee has come to a finding that the

clarification made by the petitioner was not in consonance with the ATC. The Tender Committee has also come to a finding that the clarification sought for with respect to Request No.1 & 3 were essential conditions of the NIT. This Court does not have any reason to dispute the interpretation given by the Tender Committee/State respondents to the terms of the tender.

67. As can be seen from the Court records, the Tender Committee first had a meeting on 14.08.2024 when bids were opened. After the clarifications were sought for from the petitioner, by way of Request No.1, 2 & 3 and the reply to the same had been made, the Tender Committee again had held a meeting on 22.08.2024, wherein it was decided that the petitioner's bid did not fulfill the eligibility criteria as per the requirement of the bid document. The rejection of the petitioner's Technical Bid was thereafter conveyed to the petitioner. The petitioner thereafter submitted the representation dated 23.08.2024 against the disqualification, as per the GeM Portal Functionality and the Tender Committee again held a meeting on 26.08.2024.

68. The Tender Committee rejected the petitioner's representation dated 23.08.2024 on 26.08.2024, which was treated as an Appeal by stating the follows :

“As per clause no. 3.1(r), Local Content certificate was required from the bidder, i.e., M/S JARPL-JPW-DMC. The initial certificates submitted by the bidder were in the name of 2 individual partners of Consortium and against technical clarification, the certificate submitted in the name of bidder bears the date after the bid submission end date, which is not a historical document.

Conclusion: Bidder failed to submit the requisite historical document against the technical clarification/shortfall document as per clause no. 3.1 (r) of ATC of Bid Document and submitted a document bearing a date after the bid submission end date.

7. As per clause no. 3.1 (h), if the bidder is JV/Consortium, 'bidder to submit Scanned copy of JV/Consortium Agreement containing name of partners and lead partner, Power of Attorney to the lead partner and share of each partner etc' along with other document regarding Legal Status of Bidder.

The difference in the submitted consortium Agreement from Annexure II of ATC of Bid Document as follows:

Heading	Consortium Agreement	Annexure-II of ATC of Bid Document
Joint Several Liability Document	Bidder in the agreement stated that 'All partner of Consortium shall be liable jointly and severally to the as mention proportionate clause no-04 during the Pre-qualification and Bidding process; and in the event the contract is awarded, during execution of Contract, in accordance with terms' Contract terms'	Bidder in the agreement stated that All partner of Consortium shall be liable jointly and severally during the Pre-qualification and Bidding process; and in the event the contract is awarded, during execution of the Contract, in accordance with Contract terms

From the above table, it is evident that the submitted consortium agreement is not as per the format provided in the Annexure-II of ATC of Bid Document.

A clarification was sought regarding 'whether the statement written at sl. no. 7 for liable jointly and severally is inline of the statement written at sl. 4 and sl. no. 4.3 of 6 of consortium agreement submitted by bidder or liable for the proportionate share, i.e., M/s JPW Infratech Private Limited (50%), M/s Jai Ambey Roadlines Pvt. Ltd. (30%) and M/s Dev Mining Company (20%)'.

In response bidder submitted a copy of working capital certificate.

Conclusion: Bidder did not submit the clarification against the query sought and submitted a copy of working capital. The submitted document regarding Consortium Agreement is not in line with the format provided at Annexure II of ATC of Bid Document. Therefore, the bidder does not fulfill the eligibility criteria as per requirement of Bid Document.

In view of above, TC stands with its earlier recommendation that Bidder M/S JARPL- JPW-DMC does not fulfil eligibility criteria as per requirement of Bid Document and their appeal needs to be rejected on GeM Portal mentioning the following remarks:

- a) The submitted Consortium Agreement is not inline of Annexure-II of ATC of Bid Document.*
- b) The bidder i.e., M/s JARPL-JPW-DMC, a consortium did not submit required document to satisfy the clause no.3.1(r) of ATC of Bid Document.*
- c) Documents submitted by the bidder through challenge rejection window shall not be considered other than the application uploaded as 'appeal' "*

69. In the case of ***N.G. Projects Ltd. Vs. Vinod Kumar Jain and Ors.,*** reported in ***(2022) 6 SCC 127***, the Supreme Court held that the position of law with regard to the interpretation of terms of the contract is that, the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. It further held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers, while evaluating the consequences of non-performance. In the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd.,*** reported in ***(2016) 16 SCC 818***, the Supreme Court has held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate it's requirements and interpret it's documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the

constitutional courts, but that by itself is not a reason for interfering with the interpretation given.

70. As the authority inviting the tender is the best interpreter of the tender and such authority is satisfied, as to whether a particular bid satisfies the tender conditions, this Court cannot impose its decision over the decision of the Tender Committee. A reading of the Tender Committee Minutes shows the care and attention to details undertaken/given by the Tender Committee while examining the bids. The decision making process has taken into consideration the various clauses of the ATC of the Bid document and as such, this Court is of the view that no case of arbitrariness, irrationality, bias, malafides or perversity has been made out.

71. The above being said, Clause 15(c) of the ATC provides that the bidder will have to accept unconditionally, the Additional Terms & Conditions (Instruction to Bidder), and other agreements and documents in order to become an eligible bidder. Further, no conditional bid would be allowed or accepted. The said Clause 15(c) has not been put to challenge and the same is reproduced hereinbelow as follows:

“15.c. The Bidders will have to accept unconditionally the Additional Terms & Conditions (Instruction to Bidder), Service Level Agreement (Conditions of Contract), GeM GTC of GeM Bid Document, Integrity Pact and other conditions, if any, along with undertaking in support of the authenticity of the declarations regarding the facts, figures, information and documents furnished by the Bidder through BSC and online in order to become an eligible Bidder. No conditional bid shall be allowed/accepted.”

72. In view of the reasons stated above, this Court does not find any ground to interfere with the decision taken by the State respondents and as such, this

Court is not inclined to exercise it's discretion in the present case.

73. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant