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HIGH COURT OF CHHATTISGARH, BILASPUR
Writ Petition (C) No. 2232 of 2014

AMAR-DRA, A Joint Venture Firm of M/s. Amar Infrastructure Limited and M/s. Dineshchandra R. Agrawal Infracon Pvt. Ltd. (Both incorporated company under the Indian Companies Act) and having its office at Mahesh Nagar, G.E. Road, Durg 491001 (C.G.) Through its Authorised Signatory Narendra S/o Shri Lalchandji Rathi, Aged about 44 years, Occu. : Business, R/o Mahesh Nagar, Durg, Chhattisgrh.

---- Petitioner

Versus

1. State Of Chhattisgarh, Through its Secretary, Public Works Department, Mantralaya, Mahanadi Bhawan, Naya Raipur, Chhattisgarh.
2. The Project Director, PIU, ADB Project, O/o The Engineer-in-Chief, Public Works Department, Sirpur Bhavan, Raipur 492001, Chhattisgarh.

---- Respondents

AND

Writ Petition (C) No. 2233 of 2014

AMAR-DRA, A Joint Venture Firm of M/s. Amar Infrastructure Limited and M/s. Dineshchandra R. Agrawal Infracon Pvt. Ltd. (Both incorporated company under the Indian Companies Act) and having its office at Mahesh Nagar, G.E. Road, Durg 491001 (C.G.) Through its Authorised Signatory Narendra S/o Shri Lalchandji Rathi, Aged about 44 years, Occu. : Business, R/o Mahesh Nagar, Durg, Chhattisgrh.

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2. The Project Director, PIU, ADB Project, O/o The Engineer-in-Chief, Public Works Department, Sirpur Bhavan, Raipur 492001, Chhattisgarh.

---- Respondents

For Petitioner	: Shri Anup H. Lohiya and Shri Vijay Sahu, Advocates.
For Respondents	: Shri UNS Deo, Government Advocate

Hon'ble The Acting Chief Justice,
Hon'ble Shri Justice P. Sam Koshy.

Order On Board

Per Navin Sinha, Acting Chief Justice

24/03/2015

1. The two writ applications by a common Petitioner arise from a Notice Inviting Tender for more than one package. The basic facts and the questions of law involved being common, they have been heard together and are being disposed by a common order.

2. The Petitioner is stated to be a Joint Venture Firm of M/s. Amar Infrastructure Limited and M/s. Dineshchandra R. Agrawal Infracon Private Limited. The Respondents published a Notice Inviting Tender (hereinafter referred to 'the NIT') bearing number 2/2013-14/CGPWD/IND-2981/B-01 dated 21.2.2014 inviting bids for civil works under the Chhattisgarh State Road Sector Project by International Competitive Bidding comprising of 17 different packages. The controversy in the present two writ applications are limited to Tender No. 17547 package No. 7, rehabilitation and upgradation of Raipur-Urla-Patharidih-Berla-Kodwa Road measuring 48.03 KMs and Tender No. 17551, package No. 12, rehabilitation and upgradation of Khairagarh-Dongargarh-Tumadibod, measuring 53.31 KMs.

3. Learned Counsel for the Petitioner submitted that its technical bid in both the packages was wrongly rejected without assigning reasons much less it being communicated to the Petitioner. The reasons have been disclosed for the first time in the counter-affidavit filed on behalf of the Respondents. Even if the project was being financed largely by the Asian Development Bank

(hereinafter referred to as 'the ADB') the Respondents themselves had constituted a committee of six persons comprising from an Assistant Engineer to Project Director which had examined and approved the technical bid documents of the Petitioner and concluded that it was a substantially responsive bid along with M/s. BSBK Private Limited, Bhilai, Chhattisgarh, in Writ Petition (C) No. 2232 of 2014, and M/s. NSPR Construction (India) Private Limited, Kadapa in Writ Petition (C) No. 2233 of 2014. The bidder found to be non responsive by the Respondents was separately identified. The matter was then referred to the ADB for concurrence only after which the price bid would have been opened.

4. The ADB on 24.10.2014 wrote to the Respondents that on review of the technical bid evaluation report it had no objection to the evaluation report results subject to the exceptions pointed out by it. The ADB opined the Petitioners bid to be non-responsive being non-compliant with clause 19.8 of the Instructions to Bidders (hereinafter referred to 'the ITB'). The Petitioner was therefore a non-responsive bidder under clause 19.4 of the ITB required to be rejected under clause 19.1 of the ITB. It was submitted that clause 19.8 of the ITB provided that if the bidder was a joint venture, the bid security had to be submitted in the name of the joint venture. The Petitioner had submitted bid documents in the name of the joint venture and only bid security had been furnished by the lead partner of the joint venture M/s. Amar Infrastructure Limited instead of by the joint venture. Clause 19.8 of the ITB did not specify any consequence by way of disqualification if the bid security had not been submitted in the name of joint venture. Clause 19.4 of the ITB stipulates substantial compliance failing which the bidder could be declared as non-responsive. The omission by the Petitioner can at best be considered a mere irregularity and it therefore falls in the category of a substantially

compliant bidder under clause 30.2 of the ITB. Without prejudice to the same, it was next submitted that the bid of the Petitioner could not have been rejected at the threshold but only at the stage under clause 25 of the ITB at the time of opening of the technical bid. Even at this stage, the Petitioner's bid being otherwise substantially responsive, clause 31.1. of the ITB contained a provision for waiver of non-conformities in the bid that did not constitute a material deviation, reservation or omission. Likewise, clause 31.2 of the ITB stipulated that in case of a substantially responsive technical bid, an opportunity could be given to rectify the non-material, non-conformities in the technical bid relating to the documentation requirements. The Respondents therefore ought to have either waived non-submission of the bid security in the name of joint venture or granted opportunity for rectification of the defect by submission of the necessary documents. The Petitioner is ready and willing to remove the defects. If bid security had not been submitted at all, the matter would have been entirely different.

5. It was lastly submitted that with regard to package no. 16, under the same NIT, but for which the Petitioner was not a bidder, opportunity to remove defects had been granted to a joint venture M/s. Gayatri – RKTCPL relating to Bank guarantee. The action of the Respondents is therefore also discriminatory under Article 14 of the Constitution. It was lastly submitted that the financial bid of the only other successful bidder was opened on 31.10.2014 prior to filing of the writ petition on 18.11.2014 and subsequently works have been awarded and agreement signed with the successful bidder on 23.2.2015 during the pendency of the writ petition. The rates offered by the Petitioner are competitive conducive to the financial interest of the Respondents.

6. Reliance in support of the submissions was placed on (2006) 11 SCC 548 (B.S.N Joshi & Sons Ltd. v. Nair Coal Services Ltd), (2013) 19 SCC 95

(Rashmi Metaliks LImited v. Kolkata Metropolitan Development Authority) and a Bench decision of this Court dated 13.7.2005 in Writ Petition No. 1275 of 2005 (Surgi Aid Pharmaa v. State of Chhattisgarh).

7. Learned Counsel for the State denying any arbitrariness or illegality in rejecting the technical bid of the Petitioner as non-responsive submitted that the Government of India at the request of the State of Chhattisgarh, under an ambitious road project, had received a loan of 300 million US $ from ADB for rehabilitation and upgradation of 15 roads for a total length of 916.40 KMs in the State. Following negotiations a tripartite loan agreement had been signed between Government of India, the ADB and the State of Chhattisgarh on 26.2.2014 effective from 5.6.2014. The agreement was in two parts. The financial part was signed between the ADB and the Government of India while the project part between the ADB and the Public Works Department of the State Government.

8. The Project Administration Manual provides for the essential administrative and management requirements in accordance with the ADB policies and procedures. The Public Works Department of the State Government responsible for implementation of the ADB financed projects is required to perform its obligations and responsibilities in accordance with ADB policies and procedures. Schedule 4 relating to procurement of goods, works and consulting services in clause 13 provides that in contracts procured under International Competitive Bidding the procedure shall be subject to prior review by ADB. In accordance with the same, the Public Works Department on 28.7.2014 forwarded its opinion on the evaluation of the technical bids of the Petitioner and the two other bidders. The fact that it was not a conclusive finding with regard to the validity of the responsiveness of the Petitioner's technical bid is apparent from the contents which are styled as "conclusions

and recommendations". It seeks concurrence of the ADB to the recommendation of the bid evaluation committee. 78% of the project in the State is being financed by the ADB and the balance by the State Government. Naturally, the State Government was bound under the documents and the policies to obtain the prior concurrence of the ADB and could not act independently in the matter.

9. It is not disputed by the Petitioner that it had not submitted the bid security in the name of joint venture as required under the ITB. If that be correct, non-responsiveness of its bid constituting a material deviation, omission or reservation is apparent and admitted under the terms of the NIT itself. There are no allegations of malafides, arbitrariness or favouritism with regard to the two packages for which the Petitioner was a bidder. The waiver of the conditions of the NIT or opportunity to remove the defects cannot be claimed as a matter of right and may be permissible only to the extent permitted under the NIT. The fact that any relaxation may have been granted under another package for which the Petitioner is not an applicant is irrelevant unless all the facts and circumstances are similar. The pleadings in this regard are vague and non specific and the Respondents deny any such allegation. It is not the case of the Petitioner in its pleadings that the joint venture in that case also had submitted bid security in name of one of the companies only.

10. We have considered the submissions on behalf of the parties. The publication of an NIT, invitation of bids and award of works to the eligible are contractual matters. The terms and conditions to be complied with by bidders are mentioned in the NIT. The scope for judicial review with regard to the terms of the tender notice and compliance therewith will therefore be limited to examining issues for arbitrariness, discrimination favouritism and acceptance of a bid not complaint with the NIT. Full effect has to be given to the language

used in the NIT. It is not for the Court to decide what was intended and reinterpret the terms of the tender. Waiver or relaxation of the terms of tender cannot be claimed as a matter of right. In the present case, no malafides or arbitrariness has been alleged. The Petitioner failed to submit bid security on behalf of the joint venture as required in the NIT is an admitted fact. There has been no discrimination with regard to another bidder for the same packages. The discrimination sought to be alleged by comparison with another package, if permissible, is vague and wanting in material particulars.

11. The scope for judicial review in matters relating to NIT and terms of the same was considered in (2004) 4 SCC 19 (Directorate of Education v. Educomp Datamatics Ltd.) observing as follows :-

> "12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.
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> 13…… Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice….."

12. The nature of rights of a bidder participating in a tender process was considered in (2009) 6 SCC 171 (Meerut Development Authority v. Assn. of

Management Studies) observing as follows :-

> "26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.
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> 27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

13. Similarly in (2014) 3 SCC 760 (Maa Binda Express Carrier v. North-East Frontier Railway) considering the rights of a bidder it was observed :-

> "8.........submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided

> such relaxation is permissible under the terms governing the tender process."

14. The project is ambitious, technical and of a very high magnitude. Judicial interference by review will call for restraint. The Court shall only examine the decision making process by reference to the terms of the NIT as mentioned. There are no allegations of malafides, arbitrariness or favouritism or that the terms of the NIT have been given a go by. If 78% of the project is being financed by the ADB and the acceptance of the bid is subject to a preliminary review by the ADB, there is no occasion for us to scrutinize those conditions and neither is it the case of the Petitioner that the ADB has no such jurisdiction.

15. (1997) 1 SCC 738 (Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.) related to construction of wharf intended for creation of mechanised handling facility of coal at Paradip Port for which the Asian Development Bank at Manila had agreed to give loan to the extent of 134.85 million US dollars and it was intended that a part of this amount would be utilised for the construction of the wharf. The entire project consisted of nine major packages. A pre-qualification notice was issued inviting the offers and then on receipt of the pre-qualification documents those were sent to a committee for evaluation. The Tender Committee of Paradip Port Trust accepted the recommendation of the consultants and submitted the same for approval of the Financial Institution, the Asian Development Bank. The Bank by its communication dated 23-4-1996 stated that they are unable to support the approach set out in the Bid Evaluation Report and they cannot accept the proposed bid change in the quantity. The High Court took note of several clauses of the bid documents that under the bid documents there is a scope for amending the bid documents and there is scope for modification of the bids as well as there is scope for correction of errors. It further came to the conclusion

that a detailed procedure has been laid down to appreciate the responsiveness of the bids technically and there is also a scope for evaluation of the bids. The High Court held :

> "It is also not appreciated and it has not been explained by the Asian Development Bank authorities who have not cared to appear in the case in spite of notice, as to why the Asian Development Bank authorities did not appreciate the evaluation of the bids and on correction the offer of the petitioners being lower than that of AFCONS. The special fancy of the Asian Development Bank authorities in favour of AFCONS has not been justified with reasons before this Court for reasons best known to the Asian Development Bank authorities."

16. The Supreme Court setting aside the judgement of the High Court held :-

> "9. The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an international agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. ……….The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant."

17. The emphasis on behalf of the Petitioner that the Respondents in their bid evaluation report dated 28.7.2014 had found the Petitioner as responsive, was not conclusive but merely the expression of an opinion subject to approval and

confirmation of the ADB in view of the conditions of the loan agreement particularly in Schedule 4 at clause 13 where the ADB had the authority and jurisdiction for prior review. The report is styled as "conclusions and recommendations", requesting the ADB to concur with the recommendations. The final decision therefore lay with the ADB under Schedule 4 of the loan agreement. If something further was required to be done before the bid submitted by the Petitioner could be said to be fully responsive unless that eventuality happens, the recommendation of the bid evaluation committee report (technical) merely remained a recommendation.

18. The conditions of the ITB shall have to be given full effect to by the Court and in the garb of judicial review, it shall not be open to interpret the same by holding that there had been substantial compliance if the language was otherwise clear. Clause 19.1 of the ITB clearly provides for submission of a bid security. Clause 19.4 of the ITB expressly states that any bid not accompanied by substantially compliant bid security shall be rejected as non-responsive. Clause 19.8 of the ITB states that the bid security in respect of a joint venture bidder shall be in the name of joint venture. Reading the three clauses together, it is apparent that if a joint venture was a bidder, the bid security had to be submitted by the joint venture. If the bid had been submitted by a joint venture, the submission of a bid security by the lead partner of the joint venture on the face of it would not meet the requirement of Clause 19.8 of the ITB. That leaves the issue for the meaning of a substantially compliant bid under the ITB as was submitted on behalf of the Petitioner. Clause 30 of the ITB deals with responsiveness of technical bid. Clause 30.2 of the ITB states that a substantially responsive technical bid is one that meets the requirements of the bidding documents without material deviation, reservation or omission. It is further clarified that a material deviation or omission would be

one which if accepted would limit in any substantial way the scope, quality or performance of the works specified in the contract or limit in any substantial way, inconsistent with the bidding documents, the employers rights or the bidders obligations under the proposed contract or if rectified would unfairly affect the competitive position of other bidders presenting substantially responsive bids. Clause 30.4 of the ITB provides that if a bid was not substantially responsive, it was to be rejected and could not be made subsequently responsive by correction of the material deviation, reservation or omission. A reference to Clause 11.2(b) of the ITB would be relevant which provides, inter-alia that the technical bid was to comprise of bid security in accordance with Clause 19 of the ITB.

19. Therefore, if a joint venture was a bidder, its technical bid was required to be accompanied by the bid security furnished by the joint venture in absence of which it was to be considered as non-responsive being a material deviation or omission with regard to which no subsequent opportunity by way of correction could be provided. We arrive at this conclusion on a bare reading of the terms of the bid documents from the plain language used therein. The decision of the ADB in this regard dated 24.10.2014 declaring the bid of the Petitioner as unresponsive therefore cannot be faulted with. We are unable to hold that the bid submitted by the Petitioner was a substantially responsive or compliant bid according to the bid documents. It is only non material conformities which can be either waived or opportunity to rectify can be granted under clause 31 of the ITB. The Petitioner does not have and cannot claim a vested right to waiver or opportunity for removing the defect in its bid documents.

20. Learned Counsel for the Petitioner has invited our attention to para 69 in Nair Coal Services Limited (supra). The observations therein have been made

with regard to general power of relaxation from the practice prevailing in India. It was not a case where a large scale public project was being financed by an external financing agency with the terms and conditions laid down in the agreement for finance. The observations therein that once the power of relaxation has been exercised, judicial scrutiny had to be limited for examining whether it was done fairly, reasonably and bonafidely has no application to the facts of the present case. Relevant are the observations in paragraph 56 as follows:

> "56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

In paragraph 67, after noticing the trend of judicial review in contractual matters it was observed that it would depend on the facts and circumstances of each case. In the case before it, the Supreme Court had opined that there were few concerns in India who could handle the contracts of that nature with regard to transportation of coal and the appellants therein was in the business for the last 52 years. The case is completely distinguishable on its facts.

21. In Rashmi Metaliks Limited (supra), the necessary declaration of not having been black listed during the last five years and the valid PAN number and VAT number alongwith income tax return and professional tax return had not been furnished in response to the NIT. The issue involved was therefore substantially different from the present again. The company not having been black listed thought that it was not necessary for it to make any disclosure in this regard. The Court was of the opinion that they were not the essential elements. With regard to second issue, the Court was of the opinion that it was

not an essential element or concomitant of the subject NIT as it did not specify furnishing of either gross income or net income and therefore failure to file income tax return was not very relevant. The case is again distinguishable on its own facts.

22. In Surgi Aid Pharmaa (supra) again has no application to the facts of the present case with regard to the allegations of discrimination as we have already held that the relaxation granted pertained to another package in which the petitioner was not a tenderer. No proper pleadings have either been made in this regard that it was also in context of a material deviation, reservation or omission by submission of a bid security by one member of a joint venture bidder only as is the case presently. We have already noticed that the NIT itself provided that no relaxation could be granted for material deviation or omission. If the bid security by the Petitioner did not meet the requirements of the NIT, in our opinion, the fact that it may propose to offer competitive rates becomes irrelevant.

23. We therefore find no merit in the writ applications. Both applications are dismissed.

Sd/-	Sd/-
(Navin Sinha)	(P Sam Koshy)
ACTING CHIEF JUSTICE	**JUDGE**

Subbu