

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CA-CWP No.14 of 2017 (O&M)

DATE OF DECISION: 04.08.2017

Deepak Builders through its authorized partner Sh.Deepak Singal

.....Appellant

versus

Union of India and others

.....Respondents

**CORAM:- HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU, JUDGE**

Present: Mr. Puneet Bali, Senior Advocate with
M. Aashish Batra and Mr.Paramveer Singh, Advocates,
for the appellant.

Mr. Chetan Mittal, Senior Advocate with
Mr. Udit Gaur, Advocate, for the respondent Nos.1 to 3.

Mr. Akshay Bhan, Senior Advocate with
Mr. A.S.Talwar, Advocate, for respondent No.4.

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S.J. VAZIFDAR, CHIEF JUSTICE:

This is an appeal against the order and judgment of the learned Single Judge dismissing the appellant's petition. The appellant sought a writ of certiorari to quash and set-aside an order dated 28.04.2017 rejecting its technical bid on the ground that it was not eligible.

2. Respondent No.2 is the Institute of Nano Science and Technology. Respondent No.3-one Niranjn Singh is the Engineer consultant of the 2nd respondent. Respondent No.4 M/s Sam Built Well Pvt. Ltd. is a private party, in whose favour the work has been allotted.

3. Respondent No.2-Institute of Nano Science and Technology invited tenders for the “Construction & Development of Campus of Institute of Nano Science and Technology” in Mohali, Punjab. It was a ‘Percentage Rate Tender for Works’. Part-A thereof contains the technical/eligibility bid, notice inviting tender, eligibility criteria and General Conditions of Contract. Part-B contains the Special Conditions of Contract, Additional Conditions, Particular Specifications, Approved makes & Tender Drawings. Part-C contains the Financial Bid. The relevant provisions of Part-A Technical/Eligibility Bid read as under:-

“2.2. INFORMATION AND INSTRUCTIONS FOR BIDDERS FOR TENDERING FORMING PART OF BID DOCUMENT

(Applicable for inviting two bid system)
The Director, Institute of Nano Science & Technology, Mohali (INST), on behalf of Nano Science & Technology Mohali invites percentage rate composite bids from eligible firms/contractors in two bid system for the following work:-

Sr. No.	Name of work & Location	Estimated cost put to Tender in Crores (Rs.)	Earnest Money deposit (EMD) in Lacs (Rs.)	Date & Time of pre-bid meeting	Last date & time for submission of bids	Date and time of opening of Technical/ Eligibility bid
1	2	3	4	5	6	7
1	Construction of Institute of Nano Science & Technology Campus (Package-I) at Knowledge City Sector-81, Mohali (Punjab)-140306. SH: Research, Academic & Admin Buildings, Hostel Buildings, Residential Buildings, Amenity Building and Utility buildings including Water supply, Sanitary Installations, Drainage, Electrical, Lifts, HVAC, Fire Alarm & Fire Fighting System and External development works etc.	Rs. 162.18 Cr.	Rs.1.72 Cr	29.03.2017 At 2.30 PM	Upto 3.00 PM on 10.04.2017	10.04.2017 At 3.30 PM

The same clause requires the bidders to comply inter-alia with the following conditions:-

“The contractor submitting the tender should read the schedule of quantities, Special conditions, additional conditions, additional specifications, particular specifications and other terms and conditions given in the NIT and drawings. The tenderer should also read the General Conditions of Contract for CPWD Works 2014 & CPWD Specifications amended upto date of submission of tender, which are available as Government of India Publications; however, provisions included in the tender document shall prevail over the provisions contained in the standard form. The set of drawings and NIT shall be available for download from the websites: www.inst.ac.in or www.eprocure.gov.in However for inspection a set of the same will be available in the office of **Director, Institute of Nano Science & Technology, Mohali**. The contractor should also visit the site of work and acquaint himself with the site conditions before tendering. The following conditions, which already form part of the tender conditions, are specially brought to his notice for compliance while filling up the tender. They are requested to comply with following instructions. (emphasis supplied).

8. Contractors/bidders who fulfil the following minimum criteria shall be eligible to apply. Joint ventures/Consortium are not accepted.

(a) Should have satisfactorily completed the works as mentioned below during the last seven years ending previous day or last date of submission of bids.

- (i) Three similar completed works each costing not less than Rs.64.9 Cr.
or
Two similar completed works each costing not less than Rs.97.3 Cr.
or
One similar completed work of aggregate cost not less than Rs.129.7 Cr.

Similar work shall mean work of “Construction of Institutional/Educational buildings Campus with minimum five storey RCC framed structure building including electrical, plumbing, Fire fighting, HVAC works under composite contract executed in India in a Single Contract.

Components of work executed other than those included in definition of similar work shall not be considered while calculating cost of similar work. Bidder shall submit abstract of cost of work in support of this.

The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum; calculated from the date of completion to previous day of last date of submission for bids.” (emphasis supplied).

Clause-7 contains the “Eligibility Criteria (Technical/Eligibility Bid)”. Clause-7.1 is identical to clause 2.2(8) which we set out earlier.

Respondent Nos.1 and 2 availed the services of Tata Consulting Engineers Ltd. for evaluating the bids.

4. The Technical Evaluation Report stated that the petitioner did not meet the minimum eligibility criteria. The report stated that none of the works submitted by the petitioner meet the similar works criteria as per the National Building Code (NBC).

5. The National Building Code is not a part of the tender documents. The eligibility criteria does not refer to it. Neither Mr.Mittal nor Mr.Bhan, the learned senior counsel appearing on behalf of the official respondents and the private respondents, respectively, co-related the provisions of the NBC with the eligibility criteria stipulated in the tender documents. The Technical Evaluation Report does not analyze the provisions of the tender documents in the manner in which it was sought to be analysed before us on behalf of the respondents.

6. To establish its eligibility, the petitioner relied upon four works executed by it. The fourth is not eligible as the work is under progress. The other three works are tabulated in the petition as follows:-

Sr. No.	Name of Work	Completion date	Current cost after addition 7% per annum	Remarks
1.	Construction of District Administrative Complex at Sector 76, SAS Nagar, Mohali	31.03.2016	Rs.97.76 Cr. Current enhanced value as per clause 2.2.4 Rs.97.76 cr. x 107% =Rs.104.60 cr.	It has basement plus 5 storeys RCC framed structure.
2.	Construction of Office Building of Punjab Mandi Board, Phase-11, SAS Nagar, Mohali.	05.10.2011	Rs.62.65 cr. Current enhanced value as per clause 2.2.4 Rs.62.25 cr x 114% = Rs.70.96 cr.	It has basement plus six storeys RCC framed structure.
3.	Construction of Jang-e-Azadi Memorial Project at Kartarpur, Jalandhar- (Phase-1).	16.03.2015	Rs.172.32 Cr.	It has height of 42 meters i.e. more than 8 storeys RCC framed structure.

7. The question is that falls for consideration is whether these works fall within the ambit of the words “similar completed works”. Clause 8(a)(i) set out above has three options, namely:-

(i) Three similar completed works each costing not less than ₹ 64.9 cr. or

Two similar completed works, each costing not less than ₹ 97.3 Cr. or

One similar completed work of aggregate cost not less than ₹ 129.7 Cr.

If the projects completed by the respondents fall within the meaning of the words “similar completed works”, the petitioner would be eligible in each of the above cases for the works meet the financial parameters in all the categories.

Each of the three projects is of a value not less than ₹ 64.90 crores. The first option is, therefore, satisfied. The projects at Sr. Nos.1 and 3 each cost not less than ₹ 97.30 crores. The second option is, therefore, satisfied. The aggregate cost of the third work viz. the “Jang-e-Azadi Memorial Project” at Kartarpur, Jalandhar (Phase-1) being not less than ₹ 129.70 crores, the third option is satisfied.

8. The only question, therefore, is whether the three works done by the petitioner fall within the ambit of the words “similar completed works”. Mr. Mittal and Mr.Bhan contended that they do not. They firstly contended that the experience must be of constructing campuses of institute of Nano Science & Technology. In the alternative, they contended that the words “similar works” refer to the construction of buildings, campuses of educational institutions and not any other institutions. In the

further alternative, they submitted that the words “Construction of Institutional/Educational buildings Campus” refer to institutions engaged in research work.

9. The contention that the experience must be of constructing campuses of institutes of Nano Science and Technology is not only unsustainable but could never have been the intention of respondent No.2. The works of the other bidders found eligible were not of building campuses of institutes of Nano Science and Technology. It was not even contended that the works relied upon by them pertain to an institute of Nano Science and Technology. If the official respondents’ intention was that the bidders ought to have experience of construction of campuses of institutes of Nano Science & Technology, the tender documents would have stated the same specifically. That this was never the intention is clear from the eligibility condition providing that the bidders should have satisfactorily completed “similar works”.

10. The alternative submission that the eligibility conditions require a bidder to have constructed campuses only of educational institutions is not well founded either. If that was the intention, the words “similar works” would have been defined to mean works of construction of campuses of educational institutions. . If the intention was to restrict the work to educational institutions, it would not have been necessary in the tender documents to use the rather convoluted language “construction of institutional/educational building campuses” to refer to the buildings in educational institutions”. The reference was clearly to institutional and/or educational buildings/campuses. The word “institutional” is not meant to

be synonymous to the word “educational”. The word “institutional” is not controlled by the word “educational”. The words “institutional” and “educational” are used disjunctively. The word “institutional” is wider than the word “educational”. An educational institute is only one kind of institute

11. That this was never the intention of the official respondents is also demonstrated by several works which were considered to be eligible by the Tender Evaluation Committee. The works of each of the bidders have been tabulated. For instance, one of the works found eligible was of M/s Ahluwalia Contracts (India) Limited which was of construction of Institutional Building, Hostel, Residential accommodation etc. for the Indian Institute of Corporate Affairs, MCA, Government of India. It was not an educational institution. The same bidder had also constructed the emergency block including associated services and operation and maintenance during DLP at the S.J.Hospital Complex in New Delhi which was also considered to be a similar work. This was not an educational institution either and yet considered eligible.

12. The contention in the further alternative that the bidder must have experience in constructing campuses of Research Institutes is also not well founded. The plain language of the terms of the tender does not indicate the same. The definition of the words “similar works” does not contain such a qualification. In support of this contention the respondents relied upon clause 2.2 which describes the name of the work and location which we set out earlier. Under this column, the word “Research” does appear. The description, however, opens with the words “Construction of Institute of Nano Science & Technology Campus.” This is followed by the

words “Research, Academic & Admin Buildings, Hostel Buildings, Residential Buildings, Amenity Building and Utility buildings including Water Supply, Sanitary Installations, Drainage, Electrical, Lifts, HVAC, Fire Alarm & Fire Fighting System and External development works etc.” This is only a reference to the type of buildings to be constructed and to the purpose for which they are to be used and not to the work of the institute to be carried out therein. The description of the works does not qualify the definition of the words “similar works”. In other words the name of the work is not descriptive or indicative of the works to be carried out therein.

13. Here again several works of other bidders which were found eligible were not in respect of “Research Institutes”. The works of M/s Ahluwalia Contracts (India) Ltd., referred to above, illustrate this aspect as well. Several other works found eligible involved the construction of hospital campuses and institutes. There is no indication that they also carried on research. Every hospital and every institute does not necessarily carry on research.

14. The respondents relied upon the following query and the answer thereto at the pre-bid meeting:-

Sr. No.	Ref. to NIT/BO Q	Descripti on	Pre bid query from Bidders/Points Discussed	INST, Mohali Clarification	Name of Bidder
1.	Part A, Chapter 2.2 Para 8, Page 12	Definition of Similar Work	We have executed more than five storied RCC structure “housing projects” of desired value in last 7 years. Is these housing works will be considered for this tender where in CONSTRUCTION OF INSTITUTIONAL / EDUCATIONAL BUILDINGS CAMPUS have been mentioned in the scope of work? Since all the multistoried RCC framed structure have the same	Similar work has been defined under NIT clause 7.1 (a) page 39 and is required to be executed under a composite contract. No change in the NIT clause.	Varindera Constructi ons Limited.

			concept of construction, it's only the usage, as per the client wish changes from place to place. As such it should not be insist upon & we should be allowed to participate.		
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15. The reliance upon the clarification at the pre-bid meeting does not support the respondents' contention. If the respondents' contentions were well founded, the answer to the queries would have been in the negative. Instead all that the official respondents did was to refer the bidder to the definition in the tender document.

16. Our attention was not invited to anything that indicates that the work in respect of which the tenders were invited involved the construction of or was specific to the activities proposed to be carried on therein. In other words, the work does not involve any construction peculiar to or for the activity of or relating to Nano Science & Technology. It is not even that the buildings to be erected required any internal work within the scope of the tender peculiar to Nano Science & Technology. That indeed could not have been the case for otherwise many if not most works relied upon by various bidders which were found to be eligible would not infact have been found to be eligible. The names of the works in the table, therefore, only described the purpose for which the buildings were to be constructed. The works were not in respect of the activities to be carried on within the buildings.

17. On the other hand, Mr. Bali's reliance upon clause 3 of the tender document to contend otherwise is well founded. The clause reads as under:-

“3.0 “Eligibility Criteria”:-

“3.1. SECTION-I: BRIEF PARTICULARS OF THE WORK

27. Salient details of the work for which bids are invited are as under:-

Name of work	:	Construction of Institute of Nano Science & Technology Campus (Package-I) at Knowledge City Sector-81, Mohali (Punjab)-140306. SH: Research, Academic & Admin Buildings, Hostel Buildings, Residential Buildings, Amenity Building and Utility buildings including Water supply, Sanitary Installations, Drainage, Electrical, Lifts, HVAC, Fire Alarm & Fire Fighting System and External development works etc.
Estimated Cost	:	Rs.162.18 Cr.
Period of completion	:	20 (Twenty) Months

28. This tender is invited for the Construction of Institute of Nano Science & Technology Campus at Mohali (Punjab) to create state of the art facilities. The project is planned with modern building concepts and technology with IGBC rating certification.
29. The INST Mohali, proposes to construct a Campus buildings on its land measuring about 35.0 Acres located in a prime location at Knowledge City, Sector-81, Mohali (Punjab).
30. The proposed buildings shall be predominantly reinforced concrete framed high rise structure up to G+8 Floors consisting of academic block, Lab block, Residential building, hostels, Guest house, shopping complex etc. with a total built up area of about 35000 sqm.
31. General scope of the works given as below:
32. RCC pile foundation/ RCC footings or Raft foundation
33. RCC framed structure
34. Masonry and internal & external finishing works
35. Plumbing & Sanitary works
36. Façade work
37. Internal & External electrification
38. Fire fighting & protection System
39. Lifts
40. HVAC
41. Development works around buildings
42. All other services, all development works, Hardscape etc.
43. The Admin Block and Academic Building will be designed as required for IBGC Green rating.
44. Work shall be executed according to General Conditions of Contract for Central PWD works (CPWD,GCC 2014) available separately at printer’s outlets.
45. The Soil report, location plan, plans & elevations are available for inspection in the office of the INST Mohali on any working day between 10 AM to 4 PM and drawings are part of tender document uploaded in websites as specified.
46. The INST Mohali reserves the right to increase or decrease the scope of work before or after the award of work without assigning any reason to the bidder/ contractor. No claim whatsoever in this regard shall be entertained by the INST Mohali.”

18. Mr. Bhan contended that the petitioner's work in any case did not meet the eligibility criteria. Firstly, as Mr.Bali rightly pointed out, these submissions, were not the basis of the order declaring the petitioner to be ineligible. Even otherwise, the submissions are not well founded as we will now demonstrate.

19. Relying only upon the table set out in the petition describing the works which we set out earlier, Mr.Bhan submitted that the first item of work, namely, construction of District Administrative Complex at Mohali did not involve the HVAC system.

The table in the petition itself cannot answer the issue. The scope of the work had to be determined from the material submitted alongwith the bid. The Clients Performance Certificate issued in respect of the said works indicated that it involved HVAC works.

20. Mr. Bhan contended that the third item in the table, namely, the Jang-e-Azadi Memorial Project at Jalandhar was not a campus. This contention was raised only in the appeal. The petitioner, therefore, filed an affidavit before us which *inter-alia* described the works. The construction work of the Jang-e-Azadi Memorial Project included an auditorium, seminar halls, movie theatre, library, offices and art galleries, entrance hall, memorial icons, Minar and utility buildings. The project was constructed by the Punjab Freedom Fighters Memorial Foundation, a society for promotion of Punjab culture and to highlight the role and sacrifices made by various Punjabi Freedom Fighters during the independence struggle.

21. We appreciate that the technical evaluation of the work was done by the Project Management Consultant (M/s Tata Consulting

Engineers Ltd.) and by a Technical Evaluation Committee specifically set up for this purpose comprising of Engineers, Scientists and Administrators and by the Building Works Committee of the Institute appointed by the Board of Governors of the Institute comprising of highly experienced engineering consultants. They found the petitioner to be ineligible. We have no doubt that they carried out their duties honestly. It is for this reason that the respondents were granted time on an earlier occasion to bring further material on record. There appears to have been some misconception in the evaluation of the tenders. Mr. Mittal was, however, unable to justify the conclusions arrived at by this Committee. The Committee had certain perceptions which we have found to be contrary to the plain language of the terms and conditions of the tender documents. It is not the respondents' case that these committees were involved in drafting the tender documents.

22. If according to them, the nature of the work involved expertise other than that called for in tender documents, they could have abandoned the tender process and issued a fresh tender after modifying the eligibility criteria. Further, they were not bound to accept the lowest bid. It is not the official respondents' case that although the petitioner's bid is lower, they were inclined to prefer the bids submitted by other tenderers for any other reasons. Their only case is that the petitioner's bids were not eligible. In fairness to the tender evaluation committee that aspect viz. evaluating the bids *inter-se* did not arise as the petitioner's bid was not found eligible. The question of comparing it with the other bids, therefore, did not arise. If the

official respondents intend continuing with the present tender process, they must consider the petitioner's bid.

23. The learned Judge has not considered the scope or the ambit of the crucial words "construction of institutional/educational building campus". He merely refers to these words and suggests that that would be sufficient to hold that the petitioner is not eligible because in the table set out in the petition there is not a single work by the petitioner of constructing an institutional/educational building campus. Unless these words are construed, it is not possible to evaluate the eligibility criteria of the bidder. Referring to the works executed by the petitioner, the learned Judge merely stated that the same did not indicate any experience in the construction of a Institute of Nano Science & Technology Campus which not only required the construction of a building of the Administrative Block but also of Research and Academic buildings, hostel buildings, residential building and utility buildings etc. The definition of similar works, however, does not require the experience in each of the buildings mentioned in the name of the works. The requirement is only that the Institutional/educational buildings campus must be of a minimum of five storey RCC framed structure building including electrical, plumbing, Fire fighting, HVAC works under a composite contract. The purpose of the building is not specified. Again many of the works of other bidders found eligible do not necessarily pertain to Research and Academic buildings, hostel buildings, residential building and utility buildings etc.

The error in this line of reasoning is clear from the plain language of the definition of similar works. It would be convenient to set it out again:-

“Similar work shall mean work of “Construction of Institutional/Educational buildings Campus with minimum five storey RCC framed structure building including electrical, plumbing, Fire fighting, HVAC works under composite contract executed in India in a Single Contract”.

24. It is important to note that the works mentioned therein must be “under composite contract” executedin a Single Contract”.

The “Name” of the work includes the administrative building which the petitioner has constructed. If the reasoning adopted by the learned Judge was correct, namely, that the bidder must have the experience also in the construction of Research and Academic Buildings, Hostel buildings, residential buildings and utility buildings etc. they must all be in a composite contract, in a single contract. None of the works which have been found to be eligible by the Tender Evaluation Committee involved the construction of all these buildings. We are, therefore, with respect unable to accept the reasoning adopted by the learned Judge.

25. The petitioner’s tender was, therefore, clearly eligible. The official respondents’ decision to the contrary is set aside. The respondents are bound to consider the petitioner’s bid. If the official respondents had something else in mind, it did not find place in the tender documents.

26. By an interim order dated 24.05.2017, the Division Bench, to which one of us (S.J.Vazifdar, CJ) was a party, permitted the ground breaking ceremony to be held on the next day as the arrangements had been made

for the same. The Division Bench noted that there was no reason to stay the same as the same would not create any equities in favour of the respondents. The respondents also agreed not to claim any equities on the basis of the ceremony/function being held. By a further interim order dated 01.06.2017, another Division Bench to which one of us (S.J.Vazifdar, CJ) was a party, recorded that it had been made clear to the respondents especially respondent No.4 i.e. the private respondent in whose favour the work had been awarded, that any work carried out would be entirely at the risk and consequence of the private respondents and the respondents will not claim any equity on the basis of anything done thereafter. It was further directed that in the event of the appeal succeeding, the private respondent No.4 would not be entitled to any reimbursement for any work done thereafter.

27. In the circumstances, the appeal is disposed of by directing that if the official respondents intend pursuing the present tender process, they must consider the petitioner's bids alongwith the bids of other eligible tenderers and award the contract after assessing the bids on all permissible criteria. If despite the petitioner's financial bid being the most competitive, the official respondents decide to award the contract to any other tenderer, the petitioner would always be at liberty to challenge the decision in accordance with law.

28. Normally, we would not have compelled respondent Nos.1 and 2 to take a decision within a particular period of time. We, however, intend doing so not merely in view of the importance of the project but also on account of the fact that the private respondents had already commenced some work and would need to know how to proceed with the matter

hereafter. Hence, respondent Nos.1 and 2 are requested to take a decision as to whether they wish to proceed with the present tender process or to invite fresh tenders by 20.08.2017. In the event of the respondent Nos.1 and 2 deciding to continue with the present tender process, they are directed to complete the evaluation and award the work to the party concerned also by 20.08.2017.

There shall be no order as to costs.

(S.J. VAZIFDAR)
CHIEF JUSTICE

04.08.2017
ravinder

(HARINDER SINGH SIDHU)
JUDGE

Whether speaking/reasoned	√Yes
Whether reportable	√Yes