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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 14.09.2017
PRONOUNCED ON: 10.10.2017

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+ W.P.(C) 7622/2017, CM APPL.31523-31525/2017

INDWELL CONSTRUCTION PVT. LTD. Petitioner

Through: Ms. Nitya Ramakrishnan, Mr. Shadan Farasat, Mr. Ashwath Sitaraman, Mr. Shashi Pratap Singh, Mr. Ahmed Said and Mr. Suhail Rashit Bhat, Advocates.

Versus

RAIL VIKAS NIGAM LTD. Respondents

Through: Mr. Parag P. Tripathi, Sr. Advocate with Mr. Udit Seth, Mr. Rishabh Kapur, Advocates for respondent.

Mr. Niraj Kishan Kaul, Sr. Advocate with Mr. D.K. Srivastava, Mr. Vivekananda, Mr. Varun Sibal, Mr. Sanjeev Kapoor, Mr. Prateek Kumar, Mr. Snehal Kakrania and Ms. Shagun Jaggi, Advocates for Interveners.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUNIL GAUR

S.RAVINDRA BHAT, J.

Facts

1. The petitioner (described as "Indwell") is engaged in construction business; it claims a direction to the Rail Vikas Nigam Limited (hereafter "RVNL" or "respondent") to consider

its price bid as responsive. Indwell had lodged its bid for construction of some structures, in response to RVNL's tender ("NIT").

2. The facts are that the respondent issued the NIT on 06.05.2017 for construction of sheds, structures, buildings etc., in connection with setting up of Wagon Periodic Overhauling (POH) workshop at Vadlapudi Visakhapatnam, Andhra Pradesh. Later, on 19.05.2017, an Addendum/Corrigendum-1 was issued wherein the estimated cost for some of the items in 'Summary Sheet of Bill of Quantities' was changed. This estimated cost was the benchmark based on which the bidders were to quote the price in their price bid. Indwell had purchased the bid document on 25.05.2017 and submitted its bid on 17.07.2017 at RVNL's office, at Visakhapatnam. Nine bids including that of Indwell were submitted. The same day, the nine bids were separated into price bids and technical bids by RVNL and the nine technical bids of the bidders were opened before them and a list of documents submitted with each of the bids was made by the respondent. On 24.07.2017, the respondent through a letter addressed to the petitioner sought the rectification of certain deficiencies in the Technical Bid of the petitioner. The petitioner's letter dated 25.07.2017, corrected all seven rectifications sought by RVNL and submitted all the relevant documents including a fresh affidavit as required by the respondent in its letter addressed to the petitioner. Thereafter, by letter, dated 07.08.2017, Indwell was

notified about the qualification of its Bid at the end of Technical Evaluation by RVNL. The petitioner was also informed that the price bids was scheduled to be opened on 16.08.2017.

3. On 16.08.2017, the price bids of all nine technically qualified bidders were opened in the presence of their representatives. At this stage the bid opening statement recorded that the petitioner's price bid contained two mistakes, i.e. Indwell had not submitted the Letter of Price Bid (hereafter "LPB") as required in the prescribed Form PS-2 and the Summary Sheet of Bill of Quantities was in accordance with the terms of the original tender and not the subsequent addendum that was issued. On 21.08.2017, Indwell wrote a letter to RVNL pointing out that their price bid was substantially responsive. It was pointed out that on account of an inadvertent error while submitting the bid they missed out on enclosing the 'Letter of Price Bid' (Form PS-2) and the same was being submitted along with the letter. Similarly, it was also pointed out that the 'Summary Sheet of Bill of Quantities' was submitted as per the estimated cost in the original bid document issued on 06.05.2017 and not as per the Addendum/Corrigendum-1, issued on 19.05.2017, on account of an inadvertent error. The clarified BoQ as per the amended cost estimates was also enclosed. It was further pointed out in the letter that these aspects had no financial implications.
4. Indwell, apprehensive that its price bid would be regarded as substantially non-responsive, wrote a letter dated 23.08.2017 to

RVNL reminding it of the submission of the LPB (Form PS-2) and the Summary Sheet of Bill of Quantities in the revised format. This letter also pointed out that at the technical stage of the bid, non submission of certain affidavits in the required format which would have led to disqualification of bidders, if the tender provisions were read literally, did not lead to disqualification and RVNL allowed different bidders including the petitioner to submit the corrected affidavit. It was therefore requested that in similar manner the non-material clarifications in the Price Bid of the petitioner, which were already rectified, should be accepted. But Indwell did not receive any reply to this letter. Apprehensive of rejection of its bid as non-responsive, Indwell approached this Court for appropriate direction to direct RVNL to declare its bid as responsive.

5. Learned counsel for the petitioner, Ms. Nitya Ramakrishnan argues that Indwell's bid was substantially responsive and the errors in the original bid submission were minor in nature, without any financial implications. She relied on Clause 27.1 of the Instruction to Bidders section (ITB) of the NIT, which provided that to assist in the examination and evaluation of the bids, RVNL had the discretion to ask for clarifications from the bidder. It was highlighted that in terms of Clause 27.1,

“no change in the prices or substance of the Bid shall be sought, offered, or permitted, except to confirm the correction of errors discovered by the Employer in the evaluation of the Price Bids, in accordance with ITB Clause 32.”

It was argued that the error in the present case was at best an arithmetical one, which pursuant to Clause 32, could be rectified either by RVNL itself or by seeking clarifications from the bidder. Relying on Clause 32.1, it was argued that if the bid was otherwise substantially responsive, RVNL would correct arithmetical errors and omissions in the price bid and in accordance with the terms *“if there is a discrepancy between the price mentioned in the summary sheet of the BOQ and the price that is obtained by calculation i.e. by taking into account the percentage rate quoted above/ below/at par for any bill/schedule in the summary sheet of BOQ, then the quoted percentage rate shall prevail and the price shall be corrected accordingly.”* Therefore, argued counsel, RVNL was obliged to correct the arithmetical error on its own, or at the most, seek clarification or rectification from the petitioner.

6. Indwell contended that when the price bids were opened, it was clear that it was the lowest bidder, i.e. L1 and therefore no other bidder's interests would be impacted by the direction of the Court. As lowest bidder it has a legitimate expectation that the contract would be awarded to it. It was further urged that at the stage of Technical Bid, RVNL had allowed large number of bidders to rectify various omissions/errors including in respect of an affidavit, the non submission of which, in the correct format, could have caused threshold disqualification if the provisions of the tender were read literally. RVNL previously

exercised its discretion in a certain manner when more than one bidder was involved. It would not be therefore, appropriate for it to not exercise a similar discretion when a similar question arises only in the case of a single bidder, i.e., the petitioner. It was also argued that Clause 14.9 of the ITB, which provided for the summary rejection of the bid would not be attracted if either the LPB or the Summary Sheet of Bill of Quantities were submitted and admittedly, the Summary Sheet was submitted in the first instance itself by the petitioner.

7. Learned counsel highlighted that the terms of a tender cannot be read literally using the canons of statutory interpretation, particularly considering that the public interest is involved and the petitioner in this case, being the lowest bidder, would save the public expense involved in performance of the contract. Learned counsel placed significant emphasis on two decisions of this Court in *R.G. Holding Pvt. Ltd. v. M.T.N.L.*, AIR 2005 Del 134 and *M/s. Supreme Infrastructure India Limited v. Rail Vikas Nigam*, (2013) 196 DLT 357 to argue that these two decisions stand as authority for the proposition that in a tender process, a bid should not be rejected for minor non-compliances. As a general proposition that minor non-compliances in submission of a bid should be waived, the learned counsel relied upon the decision in *Poddar Steel Corporation v. Ganesh Engineering Works*, AIR 1991 SC 1579, specifically the portion extracted below:

“It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the Clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka and Ors. (1990) 1 SCR 229 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 1 ILLJ 217 (SC) but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the

difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.”

Epiphany

8. Learned senior counsel appearing for RVNL, Mr. Parag Tripathi argued that in tender matters, the scope for judicial review under Article 226 is necessarily and unquestionably, limited. It is argued that according to Clause 14.9 of the ITB, if either the LPB or the Summary Sheet of Bill of Quantities were not submitted in the price bid, it would automatically be rejected. It is clear that Clause 14.9 is a mandatory and essential provision inasmuch that the word “shall” had been used, thus robbing RVNL of any discretion in that respect. It was also argued placing reliance on Clause 29.1 of the ITB that the determination of responsiveness of a price bid had to be made with reference to the contents of the bid as according to Clause 11 of the ITB- which included the LPB and the Summary Sheet of Bill of Quantities. Further, Clause 29.4 of the ITB provided that if a bid was not substantially responsive, it shall be rejected and it cannot be subsequently made responsive by correction of the deviations or omissions. It was therefore contended that reading these two clauses together, it was clear that the failure to furnish a LPB would render the bid substantially non-responsive and could not be cured subsequently according to Clause 29.4 of the ITB. It was also argued that under Clause 27.1, while RVNL had the discretion to seek clarifications, the

same could only be sought with respect to documents that were already submitted by the petitioner and this provision would not be applicable to seek documents- such as the LPB, which were otherwise not submitted admittedly, within the stipulated time for submission of the bid. It was further submitted that the Court should not permit the petitioner to submit these documents, once the price bid has already been opened and the prices already discovered.

9. Learned senior counsel placed reliance on the decision of this Court in *M/s. Pratap Technocrats Pvt. Ltd. v. Bharat Sanchar Nigam Limited*, in Writ Petition No. 1712/2017, decided on 30.05.2017, specifically the following portion:

“Courts, in exercise of judicial review jurisdiction are in a sense second guessing decisions made by the executive, which is tasked by the Constitution to make those decisions, in the first instance. The lens that courts necessarily adopt is narrow rather than wide; they are to permit greater latitude to the public agencies. The determinations of such agencies are not like quasi judicial decisions but with economic and expectedly commercial objectives. Unless a constitutional value is shown to have been undermined, or a law violated, or fair procedure avoided, the outcome of processes adopted by the state agency, or its decisions should not be interdicted.”

Thus, contended counsel, the Court should not in exercise of its power of judicial review under Article 226 interfere in the decision of the public authority in tender matters, unless there is patently some illegality, *mala fides* or arbitrariness. Absent any

of the above in the present case, there is no case made out for exercise of writ jurisdiction by this Court.

10. Learned senior counsel, Mr. Neeraj Kishan Kaul appearing for RVNL, seconded Mr. Tripathi's submissions and argued that in view of the clear and emphatic wording of Clause 14.9 of the ITB, RVNL was duty bound to reject the tender of the petitioner once it was found that the LPB was not submitted and the Summary Sheet of Bill of Quantities was not in accordance with the addendum. It was also clear that inasmuch that Clause 14.9 provided for the summary rejection of the bid, it was an essential condition, whose non-compliance could not be waived. He relied on the decision of the Supreme Court in *Kanhaiya Lal Agarwal v. Union of India*, (2002) 6 SCC 315 to support his claim. He also relied on the decision of the Supreme Court in *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd.*, (2016) 8 SCC 446, specifically the following parts of the decision:

“Unfortunately, even though the High Court noticed the open ended nature of Respondent No. 1's bid, it went on to add that the offer of Respondent No. 1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the

component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No. 1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddled the waters and rendered the price quoted by the bidder as variable and not fixed.

The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. Ganesh Engineering Works (1991) 3 SCC 273, this Court held as under:

“[...] The requirements in a tender notice can be classified into two categories--those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.... [para 6].”

Analysis and Reasoning

11. Before proceeding to evaluate the merits of the petitioner's case, it would be appropriate to recollect the scope of judicial review under Article 226 of the Constitution in tender matters involving a public authority. Among the catena of decisions of the Supreme Court, it would be useful to refer to the seminal decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651,

where, having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:

- 1) *“The modern trend points to judicial restraint in administrative action.*
- 2) *The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- 3) *The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
- 4) *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- 5) *The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.*
- 6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”*

Similarly, in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court laid down that there must be two questions that the Court must ask itself

while exercising judicial review in tender matters involving a public authority:

“Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

Again in *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, the Supreme Court noted:

“After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the

application of Wednesbury principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.”

12. Keeping the above enunciation of law in mind, this Court must now proceed to examine the facts and contentions of the parties. At the outset, it would be convenient to reproduce the relevant terms of the tender document below:

“11. Documents Comprising the Bid

11.1 The Bid shall comprise two envelopes submitted simultaneously, one containing the Technical Bid and the other Price Bid, enclosed together in an outer single envelope.

11.2 Initially, only the Technical Bids are opened at the address, date and time specified in ITB Sub-Clause 25.1. The Price Bids remain sealed and are held in custody by the Employer. No amendments or changes to the Technical Bid are permitted. Bids with Technical Bids which do not conform to the specified requirements will be rejected as deficient Bids.

11.3 Price Bids of technically compliant Bids are opened in public at a date and time advised by the Employer. The Price Bids are evaluated and the Contract is awarded to the Bidder whose Bid has been determined to be the lowest evaluated substantially responsive Bid.

....

11.5 The Price Bid shall contain the following:

- (a) Letter of Price Bid and completed schedules as required including Bill of Quantities in accordance with ITB Clauses 12 and 14;*
- (b) alternative Price Bid corresponding to the alternative Technical Bid, if permissible, in accordance with ITB Clause 13; and*
- (c) any other document required in the BDS.*

.....

14.9 Bidder should note that non-submission of the Letter of Price Bid (LPB) and/or Summary sheet of BOQ by the bidder shall result in summary rejection of his bid.

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22. Deadline for Submission of Bids

22.1 Bids must be received by the Employer at the address and not later than the date and time indicated in the BDS.

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25. Bid Opening

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25.11 All envelopes containing Price Bids shall be opened one at a time and the following read out and recorded:

(a) the name of the Bidder

(b) whether there is a modification or substitution

(c) the Bid Price(s), including any discounts and alternative offers; and

(d) any other details as the Employer may consider appropriate.

Only Price Bids, discounts, and alternative offers read out and recorded during the opening of Price Bids shall be considered for evaluation. No bid shall be rejected at the opening of Price Bids.

25.12 The Employer shall prepare a record of the opening of Price Bids that shall include, as a minimum: the name of the Bidder, the Bid Price

(per contract if applicable), any discounts, and alternative offers. The Bidders' representatives who are present shall be requested to sign the record. The omission of a Bidder's signature on the record shall not invalidate the contents and effect of the record. A copy of the record shall be distributed to all Bidders.

27. Clarification of Bids

27.1 To assist in the examination, evaluation & comparison and pre-qualification of the Bids, the Employer may, at its discretion, ask any Bidder for a clarification of its Bid. Any clarification submitted by a Bidder that is not in response to a request by the Employer shall not be considered. The Employer's request for clarification and the response shall be in writing. No change in the prices or substance of the Bid shall be sought, offered, or permitted, except to confirm the correction of errors discovered by the Employer in the evaluation of the Price Bids; in accordance with ITB Clause 32.

.....

29.1 Determination of Responsiveness

The Employer's determination of a bid's responsiveness is to be based on the contents of the bid itself, as defined in ITB 11.

29.2 A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:

(a) if accepted would:

(i) affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or

(b) if rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.

29.4 If a bid is not substantially responsive to the requirements of the Bidding Document, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

30. Nonconformities, Errors and Omissions

30.1 Provided that a bid is substantially responsive, the Employer may waive any nonconformities in the bid that do not constitute a material deviation, reservation or omission.

30.2 Provided that a bid is substantially responsive, the Employer may request that the Bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the bid related to documentation requirements. Requesting information or documentation on such nonconformities shall not be related to any aspect of the price of the bid. Failure of the Bidder to comply with the request may result in the rejection of its bid.

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32. Correction of Arithmetical Errors and Omissions in Price Bid

32.1 Provided that the bid is substantially responsive, the Employer shall correct arithmetical errors and omissions in the price bid on the following basis:

(a) If there is a discrepancy between the price mentioned in the summary sheet of the BOQ and the price that is obtained by calculation i.e. by taking into account the percentage rate quoted above/below/at par for any bill/schedule in the summary sheet of BOQ, then the quoted percentage rate shall prevail and the price shall be corrected accordingly;

(b) if the percentage rate has been quoted both in words and in figures and there is a discrepancy in such rates, then the rate in words shall prevail and shall be considered for evaluation of the price of the schedule/bill;

(c) If the percentage rate has been quoted either in words or in figures only, then the same shall be considered for evaluation of the price of the schedule/bill;

(d) If no percentage rate has been indicated for any particular schedule/bill in words, as well as in figures, irrespective of the fact whether the bidder has written or not written above/below/at par, in such cases, the rate shall be considered as at par and the price shall be calculated accordingly;

(e) If the bidder has indicated a percentage rate other than zero percent without mentioning whether it is above/below or has mentioned it as at par, in such cases the percentage rate shall be considered as at par and the price shall be calculated accordingly;

(f) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected

32.2 If the Bidder that has submitted the lowest evaluated bid does not accept the correction of errors and omissions as per above provisions, its bid shall be disqualified and its bid security shall be forfeited.

13. In this case, incontrovertibly, Indwell did not submit the Letter of Price Bid in the prescribed Form PS-2. The Summary Sheet of Bill of Quantities was also submitted in terms of the original tender issued on 06.05.2017 and not in accordance with the Addendum/Corrigendum-1, issued on 19.05.2017. In terms of Clause 14.9, non-submission of the Letter of Price Bid *ipso facto* resulted in potential summary bid rejection. The bare terms of the tender document, therefore, rendered Indwell's bid liable to rejection. Moreover, while Indwell had submitted a Summary Sheet of Bill of Quantities, yet it was not in accordance with the corrigendum issued to the terms of the tender. Here again, Clause 14.9 is attracted- which provides that non-submission of Summary Sheet of Bill of Quantities would result in the rejection of the tender. While Indwell had furnished

a summary sheet, the same was not in accordance with the tender requirements. Thus, the consequence of summary rejection under Clause 14.9 would equally follow in this respect, considering that Clause 11.5(a) read together with Clause 14.9 would contemplate submission of a *valid* summary sheet that was in accordance with the tender requirements (and not merely submission of any summary sheet, even if non-compliant with tender conditions). Submission of a summary sheet that did not follow the tender requirements would therefore necessarily attract the same condition- that of summary rejection under Clause 14.9. The counsel for the petitioner sought to argue that only when both conditions in Clause 14.9 are not fulfilled, would rejection of the bid arise as a consequence. Apart from the fact that this submission flies in the face of the clear terms of the particular clause- which provides that non-submission of the LPB and/or summary sheet would result in summary rejection, we have also concluded above that a summary sheet that was not compliant with the tender requirements, would have the same consequence as non-submission of the summary sheet.

14. Indwell contends that on discovering these discrepancies, it immediately clarified the same through its letter dated 21.08.2017 and submitted the LPB and also revised the Summary Sheet of Bill of Quantities as required by the corrigendum issued by RVNL. It was argued on behalf of Indwell that these changes did not have any financial

implications on the bid and consequently ought to have been allowed. It is necessary here to recollect Clauses 27.1 and Clause 29. From a bare perusal of Clause 27.1, it is clear that documents or clarifications submitted by the bidder that are not in response to any clarification request sought by RVNL, shall not be considered. Clause 29.1 provides that the determination of the bid's responsiveness would be based on the contents on the bid itself, as required in Clause 11 of the ITB. Further, Clause 29.4 provides that if a bid is not substantially responsive in terms of the requirements of the ITB, it shall be rejected by RVNL and such bid cannot be made responsive subsequently, by correction of the deviation or omission. These stipulations provide that once a bidder fails to adhere to the terms of the tender (Clause 11 of the ITB), its bid would have to be declared as non-responsive; subsequent amendments cannot be permitted to make the said bid responsive. Furthermore, any documents submitted to RVNL that are not in response to any clarification sought would also not be considered. This Court notices that Clause 27.1 as well as Clause 29.4 use the mandatory expression "shall". Such being the case, Indwell cannot insist on relaxation of strict enforcement of such mandatory conditions in the tender document. On this issue, the Supreme Court in *West Bengal State Electricity Board v. Patel Engineering*, AIR 2001 SC 682, held:

"The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international

competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in corpulence with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.”

Similarly in *G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488, the Supreme Court held:

“Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first

is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the N.I.T., it is open to the K.P.C. to decline to consider the party for the contract and if a party comes to Court saying that the K.P.C. should be stopped from doing so, the Court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the K.P.C. cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the K.P.C. made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Sri Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to Court with any such grievance. The question, then, is whether the course adopted by the

K.P.C. has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxations of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana's case (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, M.C.C. is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the M.C.C. and in the K.P.C. going in for a choice of the better on the merits. The appellant had no doubt also urged that the M.C.C. had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant visa-vis M.C.C. are, however, a matter for the K.P.C. (counselled by the T.C.E.) to decide and not for the Courts. We were, therefore, rightly not called upon to go into this question.”

On similar lines, it was held by the Supreme Court in *Meerut Development v. Association of Management Studies*, (2009) 6 SCC 171 that where a particular tender condition is clear and emphatic, there is no scope for the Court to not give effect to such a clause. The Court in that case held:

“Once it is clear that there was no vagueness, uncertainty or any confusion with regard to the reserved price there is no scope for any interference in the matter by this Court. The terms and conditions of tender were expressly clear by which the authority as well as the bidders were bound and such conditions are not open to judicial scrutiny unless the action of the tendering authority is found to be malicious and misuse of its statutory powers.”

15. Indwell, however argued that Clause 11.5 (a) requiring submission of Letter of Price Bid was not an essential condition and in any event, late submission of the LPB would not affect the bid substantially as there would only be a negligible change in the ultimate price quoted in the bid. As a statement of law, it is undeniable that essential conditions need to be assiduously adhered to, while relaxations may be permitted for ancillary conditions. On this issue, this Court in *R.G. Holding Pvt. Ltd.* (*supra*) held:

“There is no gainsaying that as a general rule tender conditions have to be adhered to scrupulously, for otherwise, as observed by the Supreme Court in West Bengal Electricity Board v. Patel Engineering Co. Ltd.(2001) 1 SCR 352 any relaxation or waiver of a tender condition, unless so provided in the NIT, would encourage and provide scope for discrimination, arbitrariness and favoritism, which are totally opposed to rule of law and our Constitutional values. But a distinction has to be drawn between an essential condition and an ancillary condition. It needs little emphasis that an essential condition has to be enforced punctiliously and rigidly but an ancillary condition can be waived depending on the facts and circumstances of a given case. We are of the considered view that in the

instant case, the competent authority acted irrationally in insisting on literal compliance of Instruction No.11.1 of the NIT and Therefore, its decision not to open petitioner's bid and disqualify them at the outset being illogical and too extreme cannot be sustained.”

16.The question that therefore arises is how it is to be determined whether a particular condition in the tender document is an essential or an ancillary condition. To ascertain this difference, we must take recourse to the decision of the Supreme Court in *Kanhaiya Lal Agarwal (supra)*, where it held:

“It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term.”

Therefore, whether a particular condition in the tender document is an essential or an ancillary one, has to be determined with reference to the conditions prescribed for the non-fulfillment of such condition in the tender document. Where non-fulfillment of a particular condition results in summary rejection of the bid, then as per the law laid down in *Kanhaiya Lal (supra)*, such a condition would be an essential condition.

17.In this case, Clause 14.9 of the ITB provides that “*non-submission of the Letter of Price Bid (LPB) and/or Summary*

Sheet of Bill of Quantities by the bidder shall result in summary rejection of his bid.” That being the position, it is clear that non-fulfillment of Clause 11.5(a) (i.e. non-submission of the LPB) would attract the mandatory consequence under Clause 14.9 - that of summary rejection of the bid. Therefore, this Court fails to see any merit in the petitioner’s contention that Clause 11.5(a) was not an essential condition of the tender.

18. Reliance had been placed by Indwell on the decisions in *R.G. Holding Pvt. Ltd.* (supra) and *M/s. Supreme Infrastructure India Limited* (supra) to say that minor irregularities or omissions in submission of a bid should not be ground for summary rejection of the tender. However, this Court fails to see how either of these decisions assists the petitioner’s case. The operative part of the decision in *R.G. Holding Pvt. Ltd.* (supra) reads:

“Instruction No.4 stipulates that tenders not accompanied by earnest money are liable to be rejected summarily. Submission of EMD through a mode not prescribed, again, entails rejection of the bid. Similarly Instruction No.8 provides for summary rejection of a bid if it is not accompanied by required earnest money, though it leaves some discretion with the competent authority to grant exemption from the said condition. The pivotal Instruction No.11.1 stipulates that if details of earnest money are not super scribed on the outer cover of the envelope containing bid, the tender will not be opened. A bare reading of the said instruction shows that whereas Instruction Nos.4 and 8, being in the nature of a mandate, are essential conditions, instructions contained in Instruction 11.1 are subsidiary in as much as they do not have any material bearing on the terms of the bid submitted by any party. What is relevant is what is

contained inside the envelope and not what is outside. Possibly, though not pleaded by MTNL, the requirement of subscribing the tender number and date of opening of the tender on the face of the envelope could be to facilitate the sorting of the tenders received, basically a ministerial act but the requirement of superscription of details of the earnest money on the outer envelope for the same purpose defies logic. The stand of learned counsel for the MTNL on this aspect is that the superscription of these particulars was being insisted upon because in the past in some cases on the opening of the envelope it was discovered that the EMD had not been submitted and, therefore, the bid had to be rejected.”

The said decision is therefore clear on the point that where a particular condition in the tender stipulates that on non-fulfillment of the condition, the bid will be summarily rejected, then such conditions would be essential conditions and non-compliance with the same would entail rejection of the bid. In the present case, the Court distinguished between other conditions of the tender document, which required summary rejection of the bid on non-compliance, and the condition impugned in the present case, which did not entail a similar consequence. On that basis, the Court found that condition to be inessential, non-compliance of which would not entail automatic rejection of the bid. As noted above, in the present case, Clause 11.5(a) was an essential condition, non-compliance of which would attract the mandatory consequence of summary rejection of bid as provided in Clause 14.9. This decision therefore does not help the petitioner; rather, it fortifies RVNL's claim.

19. As far as the decision in *Supreme Infrastructure (supra)* is concerned, the extract reads as follows:

“In our view, there is merit in the petitioner's submission that this is not a case of an arithmetical error. An arithmetical error would mean an error in the carrying out the arithmetic exercise of additional/subtraction/multiplication or division and where the base figures/numbers on which such arithmetical exercise is carried out are correctly inscribed/typed. But where a particular base figure/number is itself wrongly noted on account of a typographical/writing error, which is otherwise obvious, the error in the bid document cannot be treated as an arithmetical error. Therefore, in our view, clause 33, in fact, had no application in the facts of the present case, which should have been sorted out by invoking clause 27.1 read with clause 31 of the bid conditions. However, even if one were to examine the present case in the light of clause 33 of the bid conditions which deals with correction of arithmetical errors, to us, it appears that clause 33.1(a) permits the respondent No. 1 to correct obvious errors in the price bid. In our view, the mention of the "obvious misplacements of the decimal points in the unit price" is only one such instance mentioned as an illustration of an obvious typographical/writing error, and not the only instance when resort could have been had to clause 33.1.”

Therefore, in that case, the Court had found that the error in the bid was one that was of such character as could be treated as an obvious, inadvertent mistake, which having regards to the terms of that tender was of a nature that could be corrected by the public authority itself. The nature of the error that the Court was dealing with in that case was such that it found that it would fall within the same category as the error contemplated in Clause

33.1 of that tender document which dealt with “*obvious misplacement of decimal points*.” In the present case, the errors in the bid are in no way as similar or as obviously correctable by the public authority as the error in consideration in *Supreme Infrastructure (supra)*. The non-submission of a LPB and error in submission of Summary Sheet of Bill of Quantities, both of which can cause the bid to be summarily rejected under the terms of the tender document, can in no way be equated to an error as obvious as the misplacement of a decimal point. Therefore this decision too, does not aid the petitioner’s case.

20. It had been further contended that as per the terms of the ITB, Clause 27.1 empowers the respondent to seek clarification from the petitioner if there are certain omissions or errors. It is thus contended by the petitioner that the respondent should have sought appropriate clarifications from the petitioner and given it an opportunity to correct any deviations or omissions, rather than summarily rejecting its bid. It is contended by the petitioner that even in respect of other bidders, rectifications were allowed via clarifications sought by the respondent from them. This Court notices that in terms of Clause 27.1, the respondent can seek clarifications in respect of the petitioner’s bid. To that end, the respondent by letter dated 24.07.2017 sought for certain clarifications/rectifications from the petitioner, as was similarly done in the case of the other bidders. However, necessarily, clarifications or rectifications could only

be sought with respect to the documents that had already submitted by Indwell, the bidder. In respect of non-submission of documents- specifically, the LBP, the tender document stipulated that the mandatory condition of summary rejection under Clause 14.9 would operate. Therefore, to hold that Clause 27.1 could be used to allow the petitioner to submit the LBP which was not done before, would go against the mandate of Clause 14.9-which requires summary rejection of the bid in such cases; to the extent possible, the terms of the tender must be read in a harmonious manner and not one that leads to incongruity. Besides, Clause 29.4 provides that a substantially non-responsive bid cannot be allowed to be made responsive later, by correcting the deviations or omissions. Consequently, Clause 27.1 also does not come to the petitioner's rescue. Indwell also urged that as per Clause 32.1, the respondent was obliged to correct arithmetical errors in the price bid. However, the Court notices that Clause 32.1 would only be attracted when the bid is otherwise substantially responsive. In view of our above findings, it is clear that the omission to furnish LPB and/or a correct summary sheet would render the bid substantially non-responsive and liable to summary rejection; therefore, these omissions are not in the nature of arithmetic errors as contemplated within Clause 32.1 of the tender document.

21.Finally, Indwell had urged that as the lowest bidder i.e. L1 it had a legitimate expectation that the contract would be awarded

to it. Apart from the fact that its price bid was determined as non-responsive and not compliant with the tender conditions- which was *ipso facto* a ground for rejection of its bid (and thereby there was no question of it being declared L1), it is nonetheless also important to point out that in tender matters, there is no vested right of the lowest bidder to be awarded the contract. In *Maa Binda Express Carrier v. Northeast Frontier Railway*, (2014) 3 SCC 760, the Supreme Court held:

“The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, 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.”

Clearly Indwell had no vested right to be awarded the contract. In view of the above findings, it is held that RVNL’s evaluation of Indwell’s bid or any subsequent decision by it that the bid is non-responsive and liable to be summarily rejected, suffers from no infirmity.

22.The writ petition therefore fails and is dismissed, without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**SUNIL GAUR
(JUDGE)**

OCTOBER 10, 2017