IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 913 OF 2017

1. Seftech India Private Limited,]
a company incorporated under]
the Companies Act, 1956]
having its registered office at Keytuo]
Chemicals Compound, Kondivita,]
Andheri (East), Mumbai 400 059]
]

2. Saboo Engineers Private Limited.]
A company registered under the]
Companies Act, 1956 having its]
registered office at 209,]
Niranjan 99-Marine Drive,]
Mumbai – 400 002.] **..Petitioners.**

Versus

1. Export-Import Bank of India,]
A statutory corporation established under]
the Export-Import Bank of India Act, 1981]
having its head office at Centre-1 Building,]
21st Floor, World Trade Centre Complex,]
Cuffe Parade, Mumbai - 400 005]
and office at Maker Chambers-IV,]
8th Floor, 222, Nariman Point, Mumbai.]
]

2. Union of India,]
Ministry of Finance,]
Department of Economic Affairs,]
Bilateral Cooperation Division, New Delhi.]
]

3. Macmet Engineering Limited,]
A company registered under the]
Companies Act, 1956, having its]
registered office at 27B Camac Street,]
Kolkata – 700 016.]
]

4. Promac Engineering Industries Limited,]

a company incorporated under the]
Companies Act, 1956 and having its]
registered office at Avalahalli,]
Anjanapura Post,]
Bangalore, Karnataka 560062.]
]

5. FL Smidth Private Limited,]
a company incorporated under the]
Companies Act, 1956 and having its]
registered office at "FLSmidth House" 34,]
Egatoor, Rajiv Gandhi Salai, Kelambakkam]
Tamil Nadu – 603 103.] **..Respondents.**

Mr. Zubin Behram Kamdin and Sayeed Mulani I/b Mulani & Co., for the Petitioner.
Mr. Charles De'souza, Ms. Aneesa Cheema I/b Verus for Respondent No. 1.
Mr. Pranil Sonawane, N. R. Bhumkar for Respondent No. 2.
Mr. Vishal Kanade, Ms. Kirtida Chandarana I/b Mehamosh J. Humranwala for Respondent No. 4.

Coram : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
Date : **24th July, 2018**.

Judgment [Per Ranjit More, J.] :

1. By filing this writ petition under Article 226 of the Constitution of India, the Petitioner seeks direction to the first and second Respondent to pre-qualify the consortium / joint venture consisting of Petitioner No.1, Petitioner No.2 and Respondent No.3 for bidding as EPC / Turnkey Contractors for package-II of the R-Congo Project pursuant to the invitation for Pre-qualification dated 8th November 2016 and permit the said consortium to bid for the said

contract or a similar contract. The Petitioners have also sought to quash and set aside the requirement under clause C1 (financial status) and clause D2 (specific experience) for package-II in the Application Document for Pre-qualification dated 8th November 2016 issued by Respondent No. 1 and decision of Respondent No.1 dated 27th December 2016 not to pre-qualify the said consortium to bid for Package-II of the R-Congo project.

2. The facts giving rise to present petition, in brief, are as under :

[A] The Republic of Congo approached the Government of India for grant of line of credit for studies, turnkey construction and equipment for a cement plant proposed to be constructed in Tao Tao. This request was considered and approved by the Government of India and accordingly on 25th February 2015 a line of credit agreement was executed between Respondent No.1 and the Republic of Congo.

[B] The above mentioned project of the Republic of Congo is required to be implemented as per 2015 guidelines framed by Government of India which *inter alia* provides specific role and responsibilities to Respondent No.1 as a lending bank in respect of inviting expression of interest from Indian companies / entities, undertaking a pre-qualification exercise for each project at the cost of Respondent No.1 and provide list of pre-qualified companies and entities to the borrower government. Upon receipt of the list of the pre-qualified companies, it is for the borrower government to issue tender to all the pre-qualified Indian companies/ entities with a view to appoint engineering, procurement and construction / turnkey contractors and project management consultants. Thus, Respondent No.1 was responsible for pre-qualifiying the Indian companies / entities for Republic of Congo project. It was the responsibility of Respondent No.1 to undertake the competitive bidding process among the pre-qualified Indian companies / entities as per the procurement laws, rules and regulations of the Republic of Congo and award the contract which would be covered under the line of credit.

[C] Respondent No.1 thereafter in consultation with the Republic of Congo prepared Application Document for pre-qualification for the R-Congo project and by giving wide publicity, on 26th August 2016, invited the Indian companies / entities to participate in the tender to be issued in respect of the R-Congo project. In response to tender issued, Respondent No.1 received seven applications. However, none of them met the criterion set forth in the Application Document for pre-qualification for R-Congo project.

[D] Respondent No.1 thereafter split the R-Congo project into two parts, namely, (a) Package-I : Mining Development and Equipment and (b) Package-II : setting up a cement plant and revised the technical and the financial parameters for the applicants intending to participate in package-I and package-II of R-Congo project.

[E] Respondent No.1 thereafter prepared revised Application Document for package-I and Package-II for R-Congo project in consultation with the Republic of Congo and published the same for the pre-qualification of package-I and package-II on 8th November 2016 inviting Indian companies and entities to participate in the tender. The first Respondent received four applications under the impugned Application Document for package-I and six applications under impugned Application Document for package-II. In the present petition, we are concerned with the Application Document for package-II.

[F] The consortium of the Petitioners and Respondent No. 3, participated in package-II. The said consortium however did not meet the criterion set forth in the impugned Application Document and therefore their application came to be rejected by Respondent No.1 by communication dated 27th December 2016. This decision is impugned by the Petitioner by filing present petition.

3. The first Respondent did not qualify the consortium of the Petitioners and Respondent No.3 for bidding as EPC / Turnkey contractor on following grounds :

i] The average annual revenue of Petitioner No.2, i.e, Saboo Engineers Pvt. Ltd does not meet the requirement.

ii] The specific experience criteria are not met by the joint venture members.

iii] Third Respondent, i.e., Macmet Engineering Limited had not provided residual value of the on going contracts.

4. Under Clause C1 of the impugned Application Document, the average annual revenue for the last 5 financial years (i.e., for 2011 to 2016) was required to be not less than USD 23.50 million. Furthermore, in the case of joint venture, each member is required to meet at least 25%, lead member is required to meet at least 40% and all members together are required to meet 100% of average annual revenue. Thus, 25% of the average annual revenue of USD 23.50 million comes to USD 5.88 million and 40% of the average annual revenue of USD 23.50 million comes to USD 9.40 million. In other words, each of the joint venture member has to have at least USD 5.88 million average annual revenue and the lead member should have USD 9.40 million average annual revenue in the last 5 years.

5. The tender / application submitted by the Petitioners consortium show following average annual revenue.

sr. no.	Company	Minimum AAR required as per the PQ Doc (USD)		AAR of the Company (USD)
1.	Seftech (Petitioner No.1)	40%	9.40 mn	14.36
2.	**Saboo (Petitioner no.2)**	**25%**	**5.88 mn**	**4.20**
3.	Macmet (Respondent NO.3)	25%	5.88 mn	24.60
TOTAL			23.50 mn	43.16 mn

. Perusal of the above table shows that the consortium led by the Petitioners as a whole did meet the criteria of average annual revenue of USD 23.50 mn, but one member of the said consortium, i.e., Petitioner No.2 failed to meet the criteria of average annual revenue of USD 5.88 mn. (i.e, 25% of USD 23.50 mn.) and had average annual revenue of USD 4.20 mn only. The learned counsel for the Petitioner in this regard submitted that Petitioner No.2 did not match the requirement of average annual revenue due to the low business in cement industry during 2014-15 and 2015-16. He also submitted that the average annual revenue of the Petitioners and Respondent No.3's consortium was nearly double the criteria of USD 23.50 mn set up by Respondent No.1, and therefore the said consortium should not have been rejected. We do not find merit in the contention of the learned counsel for the Petitioner inasmuch as admittedly, Petitioner No.2 failed to meet the average annual revenue criteria of USD 5.88 mn in terms of the requirement under Clause-C1 and in the absence of any material showing that this requirement is arbitrary or unreasonable, this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India cannot interfere with the same.

6. The second ground on which the pre-qualification bid of the consortium consisting of Petitioners and 3rd Respondent is rejected is that they do not meet the specific experience criteria under Clause D2 of the impugned Application Document for pre-qualification. Under Clause D2, at least number and value of similar EPC/ Turnkey contracts completed between the period 1st September 2009 and the application submission deadline should be as per the table mentioned below :

	No. of contracts.	Value of each contract (USD mn)
Option I	3	18.80
or		
Option II	2	23.50
or		
Option III	1	37.60

7. Thus, Clause D2 gives 3 options to show the specific experience. The Petitioners and Respondent No.3's consortium

choose the Option-II. As per this option, the Petitioner and Respondent No.3 had to show two contracts having contractual value of not less than USD 23.50 mn. In addition to this, each member of the joint venture is required to show the experience of at least one contract of 50% of the value indicated under option-I above.

8. In compliance with clause D2, the Petitioners as a consortium relied upon the contract of cement plant set up at Djibouti, Africa, the contractual value of this project was esteemed at USD 24 mn. For second contract in terms of clause D2, the Petitioner submitted the completion certificate of various projects undertaken by third Respondent since the year 2009, the details of which are as follows :

Contract	Value of Contract (INR crores)	Value of contract in USD	Completion certificate annexed at page
Contract dated 23.7.2010 with Heidelberg Cement Indian Limited.	103.60	23.10 approx mn	307
Contract dated 07.03.2014 with Gayatri Projects Limited.	188.55	31 approx mn.	305
Contract dated 6.12.2011 with Gayatri Projects Limited.	107.84	21 mn	310
Contract dated 24.4.2010 with Hindalco Industries	718	160 approx mn.	313

Limited.			

9. So far as the first contract of cement plant set up at Djibouti relied upon by the Petitioners is concerned, it is specific case of Respondent No.1 that this contract could not be considered since there is no final acceptance certificate issued to the Petitioner. It is specific stand of Respondent No.1 that during the review meeting held on 2nd February 2017, the Petitioners informed Respondent No.1 that the said Djibouti project is expected to be completed only by March 2017. According to Respondent No. 1, therefore this contract cannot be taken into consideration and to decide as to whether the Petitioners and Respondent No.3's consortium complies with Option–II. Even for the sake of arguments it is accepted that the Petitioner have completed the project at Djibouti, in that case also they were under obligation to show second contract in terms of Option -II. So far as the second contract is concerned, the Petitioner relied upon the completion certificates referred to above by Respondent No.3. The completion certificate at serial numbers 2, 3 and 4 of Respondent No.3 cannot be considered as the projects undertaken therein are not similar to the present project. If the certificate in respect of the first contract is anaylised, on the Petitioners own showing value of the said contract is USD 23.10 mn, i.e., below the prescribed value under

Option-II of Clause D2 of the Application Document. Thus, the Petitioners have not even complied with Option-II.

. In addition to this, as stated above each member of the Petitioners and Respondent No.3's consortium is required to demonstrate experience of at least one contract of 50% of the value indicated under Option-I. The Petitioner in regard to this criteria also relied upon the Djibouti contract, the value of which is USD 24 mn. So far as this contract is concerned, the contract value of Petitioner No.1 was USD 9 mn and that of of Petitioner No.2 is concerned, was USD 15 mn. 50% of Option-I comes to about USD 9.40 mn. The maximum value of Petitioner No.1's contract is USD 9 mn, i.e., less than the criteria of USD 9.40 mn. The Petitioner thus failed to comply with this criteria.

10. The third ground on which the consortium of the Petitioners and Respondent No. 3 was rejected in the pre-qualification bid is that Respondent No.3 had not provided the residual value of the ongoing contracts. Clause D2(1) of the impugned Application Document required that aggregate residual value of all on-going contracts shall not be more than 350% of the highest annual

EPC/turnkey turnover for last 5 years. In case of joint venture, this will apply to each member. So far as this condition is concerned, admittedly Respondent No.3 has not provided the residual value of ongoing contracts. The Petitioners after the passing of impugned order, vide its letter dated 7th January 2017 forwarded to Respondent No.1 the details of the ongoing contracts as well as residual value of the ongoing contracts. Respondent No.1 however refused to consider the same on the ground that the details are given subsequent to the passing of impugned order and therefore the same are inconsequential. We do not find approach of Respondent No.1 is unfair or arbitrary as the Petitioner was expected to comply with the criteria under Clause D2(1) by giving particulars in the application form itself and the Petitioner cannot be allowed to give the same subsequent to the refusal of their pre-qualification bid.

11. The record reveals that the Petitioner was aware of the fact that they do not meet the criteria set forth in the impugned Application Document. The record further reveals that subsequent to the impugned order, the Petitioner requested Respondent No. 1 to waive the criteria in respect of their application. This is evident from the Petitioners' letter dated 7th January 2017 in which they have stated

that "*we have submitted in our application the reference list of major on going projects of Macmet which may not be as per your format attached in the PQ document. We enclose herewith the details of ongoing projects in the format attached to the PQ document and marked as Annexure-B."* In another letter dated 27th February 2017, the Petitioners have admitted that they do not meet the criteria as set out in the impugned Application Document. However, they wanted Respondent No.1 to waive the applicability of requirement under the impugned Application Document. In our considered opinion, granting of any relief as sought by the Petitioners in this writ petition would tantamount to reading down or re-writing of the conditions set forth in the impugned Application Document; that cannot be allowed as the same would tantamount to giving preferential treatment to the Petitioner to the detriment of other similarly placed applicants who participated in the qualification process and were disqualified. It is settled position that different yardsticks cannot be applied to different participants and it must be ensured that there is no remotest possibility of discrimination, arbitrariness or favoritism.

12. The Petitioners by amending the petition have sought quashment of requirements under clause C1 (of financial status) and

under clause D2 (of specific experience) for Package-II in the Application Document for pre-qualification. The petitioners have sought quashment of these requirements on the ground that the same are arbitrary, unreasonable and not relevant and having no rational nexus with the purpose to be achieved. In our considered opinion, it is not permissible for the Petitioner to challenge the pre-qualfication criteria in the impugned Application Document after they have participated in the process and were disqualified. It is settled law that once a party has participated in a tender process, it is not open to such party thereafter to challenge the terms of the tender. It is also pertinent to note that the impugned Application Document enabled prospective bidder to seek clarification in respect of the criteria set forth in the tender document within a prescribed period of 14 days. The Petitioner consciously elected not to avail of this opportunity in respect of the impugned Application Document and participated in the pre-qualification process without demur or protest whatsoever. In that view of the matter, the Petitioner now cannot raise objection about the legality and fairness of the criteria laid down in the impugned Application Document. In this regard reference can be made to decision in *B. Himmatlal Agarwal v. Maharashtra State Power Generation Co. Ltd*[1] and *Bee Jay Contractors, New Delhi v. Hindustan*

1 AIR 2014 Bom 108.

Petroluem Corporation Limited[2]. That apart, the Petitioner has vaguely alleged by amending the petition that criteria in respect of R-Congo project are *prima facie* unreasonable, arbitrary and malafide. However, apart from vague allegations, there are no pleadings. The Petitioner also in their arguments could not substantiate their allegations in this regard.

13. The Petitioners, in our opinion, have failed to make out even a *prima facie* case, let alone good one that the impugned Application Document was malicious or tailor-made to suit the requirements of certain companies or unfair in any manner. We find that the criteria under the impugned Application Document was laid down keeping in mind various factors, including the nature of R-Congo project and the geo-political relations of Respondent No. 1 with R-Congo with an intention to ensure that the R-Congo project is executed by a company that has the financial capability to complete the project. Further granting the reliefs sought in the present writ petition would result in restarting the whole process for execution of R-Congo project thereby resulting in a delay in completion of the same and potential escalation in costs as well.

2 2010(6) Mh.L.J. 392

14. The power of judicial review in the matters of awarding tenders or contracts is very limited. In this regard reference can be made to the Apex Court decision in *Jagdish Mandal v. State of Orissa*[3], wherein the Apex Court has observed thus :

> *"When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."*

15. If the Petitioners' case is examined in the light of above principles laid down by the Apex Court, then, we find that the Petitioners have failed to make out any case for interference at the hands of this Court.

3 (2007) 14 SCC 514

16. The petition is devoid of any merit hence the same is dismissed.

[SMT. ANUJA PRABHUDESSAI, J.] **[RANJIT MORE, J.]**