IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.762 of 2019

==

Larsen and Toubro Limited, A company within the meaning of the Indian Companies Act and having its registered office at L and T House, Ballard Estate, Mumbai 400001 and its Smart World and Communication Business Unit at Mount Poonamallee Road, Manapakkam P.B. No. 979, Chennai 600089, Tamil Nadu, Represented through its Authorised Representative Pritam Khan aged about 30 years, Male, S/o Pallab Khan, resident of Flat NO. G-7/7, Phase No. 2, Dankuni Housing Estate, P.O.- Dankuni, Dist.- Hooghly, Pin- 712311, West Bengal.

... ... Petitioner

Versus

1. The State Of Bihar through the Principal Secretary, Urban Dept. Government of Bihar, Patna.
2. The Divisional Commissioner cum The Chairman Patna Smart City, Limited, Raja Ji Salai, Lodipur, Patna, Bihar- 800001.
3. The Managing Director Patna Smart City Limited, Maurya Lok, Patna Bihar.
4. M/s Tata Projects Ltd. its registered office at Mithona Towers-1,1- 7-80 to 87, Prenderghast Road, Secunderabad 50003 and its Smart World and Communication Business Unit at One Boulevard Street, 2nd 3rd and 4th Floor, Lake Boulevard Road, Powai, Mumbai 400076 through its Managing Director.

... ... Respondents

==

Appearance :

For the Petitioner	:	Mr Sandeep Kumar, Sr. Advocate M/s Rohit Roy & Alok Kumar @ Alok Kr Shahi
For the State	:	Mr. Lalit Kishore, Sr. Advocate
For Respondent No. 4	:	M/s Mrigank Mauli, Sanket, Prince Kumar Mishra & Neeraj Kumar

==

CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
Date : 23-07-2019

The petitioner company has filed the writ petition assailing the decision of respondent Nos. 1 to 3 communicated by email dated 22.12.2018 rejecting the price proposal submitted by the petitioner for being awarded contract for "Master System Integrator for Implementation of Integrated Smart Solutions at

Patna". As a consequence of rejection of petitioner's price proposal respondent No. 4 has been awarded the contract. Award of contract in favour of respondent No. 4 is also impugned in the instant writ proceedings.

The brief facts are as follows:

One International Competitive Bidding Notice Inviting Tenders bearing NIT No. 08/MD/PSL/2018 dated 22.06.2018 was published electronically on the e-procurement portal of the government of Bihar and also in print in national newspapers on 24.06.2018 with the seal and signature of Managing Director, Patna Smart City Limited, Patna (hereinafter referred to as 'PSCL' for short.

Five Bidders submitted their tenders who are:

A. Larsen & Toubro Limited (Petitioner) & Consortium Partner M/s Fluent Grid Ltd.

B. Tara Projects Limited (Respondent no. 4) & Consortium Partner M/s Wipro

C. Shapoorji Pallonji & Consortium Partner M/s Schneider Electric + CMS Ltd.

D. Bharat Electronic Ltd. (BEL) & Consortium Partner M/s Horizon Technologies + Sofrtech Engineers Ltd.

E. Bharat Sanchar Nigam Ltd. (BSNL) & Consortium Partner M/s Hitachi + Rolta + Vantage.

The Bid of all the five tenderers were evaluated by PSCL appointed ICT expert of Project Management Consultant and also the tender committee based on the pre-qualification and technical qualification criteria as mentioned in the Request for Proposal (‘RFP’ for short). Minimum 70 marks were required out of 100 to qualify technically and all the five tenderers were declared successful in Technical Proceeding for the tender document dated 12.12.2018 to 13.12.2019.

The details of marks secured by all the five bidders are as follows:

Sl. No.	Bidders	Total Marks scored out of 100	Remarks
1.	M/S BSNL	72	Qualified
2.	M/S Shapoorji Pallonji	76	Qualified
3.	M/S Larsen and Toubro	95	Qualified
4.	Bharat Electronics Limited	70	Qualified
5.	M/S Tata Project Limited	95	Qualified

It would be relevant to mention here that Clause 8 and 8.1 which is format for submission of commercial bid requires submission of “Total Price Summary”. The same is required to indicate total price (inclusive of all taxes, levies , duties etc. as applicable).

Total price summary submitted by the petitioner was Crores 474.0851623.80. Respondent No. 4, on the other hand, submitted a total price bid of Crores 483.7172863.52. The grievance of the petitioner is that having submitted a higher total price summary respondent authorities ought to have rejected the same submitted by respondent No. 4 by declaring it “unresponsive”. On the contrary, they have granted opportunity to respondent No. 4 to change the total price bid to the detriment of the petitioner. Pursuant to such opportunity, bid of respondent No. 4 became lower than the petitioner. Such an opportunity could not have been granted as total price summary submitted by parties was fixed. Such variation after submission of total price summary not only causes prejudice to the petitioner company but is a clear indication of unfair process of bid evaluation adopted by the respondent authorities. The action of the respondent authorities is therefore unsustainable in the eyes of law.

The direct consequence of such unfair action of the authorities would also be detrimental to implementation of the project.

Once the petitioner had been declared L-1 i.e. the lowest bidder, the respondent authorities as per the Central Vigilance Commission Guidelines (hereinafter “guidelines” for brevity) dated 18.11.1998 could not have entered into post tender negotiation and allowed respondent No. 4 to alter its total price summary. In support of this contention Mr. Sandeep Kumar appearing for the petitioner refers to Clause 14.1 of the guidelines (Annexure 7A).

Other than the CVC guidelines Mr. Sandeep Kumar, petitioner's Counsel, also refers to Clause 2.21 of the RFP. It is his submission that in case of discrepancy in commercial bid the discretion of the authorities were limited under Clause 2.21 of RFP. The nature of discrepancy and to what extent and how the discrepancies could be permitted to be removed have been exhaustively laid down in sub-clause a), b) and c) of Clause 2.21 of the RFP and beyond the three circumstances laid down under Clause 2.21, authorities had no discretion to allow bidders to correct/remove any other aspect of the Total Price Summary. Authorities, therefore could not have permitted respondent no. 4 to change its Total Price Summary in the garb of exercising discretion under Clause 2.21 of the RFP. Since the price bid submitted by respondent No. 4 was quoting a higher amount than what the petitioner had submitted, there was no scope for even considering the same, let alone or allowing respondent No. 4 to correct the same.

To appropriately consider this submission of the petitioner's Counsel this Court would consider it useful to quote Clause 2.21 and Clause 8 of the Request For Proposal:-

"2.21 Acceptance/Rejection of Bids

a. PSCL reserves the right to reject in full or part, any or all bids without assigning any reason thereof. PSCL reserves the right to assess the Bidder's capabilities and capacity. The decision of PSCL shall be final and binding.

b. Bid should be free of over writing. All erasures, correction or addition must be clearly written both in words and figures and attested.

In the event of any assumptions, presumptions, key points of discussion, recommendation or any points of similar nature submitted along with the Bid, PSCL reserves the right to reject the Bid and forfeit the EMD.

If there is any discrepancy in the commercial bid, it will be dealt as per the following:

a). If, in the price structure quoted for the required goods/services/works, there is discrepancy between the unit price and total price (which is obtained by multiplying the unit price by the quantity), the unit price shall prevail and the total price corrected accordingly.

b) 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.

c) If there is a discrepancy between words and figures, the amount in words shall prevail.

d) If there is such discrepancy in an offer, the same shall be conveyed to the bidder with target date up to which the bidder has to send his explanations. On the above lines PSCL, reserves the right to take appropriate decision which needs to be agreed by the bidder. If the bidder does not agree to the decision of PSCL, the bid is liable to the disqualified. "

"8. Annexure 4-Formates for submission of the Commercial Bid

8.1. Total Price Summary

Sl#	Head	Amount (in INR)	Amount (in words)
1.	Total CAPEX price (inclusive of all taxes, levies, duties, etc. as applicable.		
2.	Total OPEX price (inclusive of all taxes, levies, duties, etc. as applicable		
3.	Total price (1+2) (Inclusive of all taxes, levies, duties, etc. as applicable		

Petitioner's Counsel has submitted that reading the provisions of Clause 8, 8.1 and 2.21 a), b) and c) of the RFP, the respondent authorities had no discretion to enter into negotiations with respondent No. 4 who had submitted bid higher than the petitioner.

He has also laid emphasis on the bar for entering into negotiation with bidders other than L-1, imposed in the CVC guidelines.

As per Clause 8 and 8.1 of the RFP bidders were to submit their price bid including GST. Such requirement as per RFP could not be permitted to be relaxed by the respondent authorities in favour of respondent No. 4, on their own perception regarding Clause 2.21 a), b) and c) as the same did not contemplate such discretion in the respondent authorities to allow alteration/modification of the price bid, to the prejudice of the highest bidder (L-1) i.e. the petitioner.

Petitioner is the most suitable entity to execute the contract as it has executed 22 smart city projects through out the country. Terms and conditions in the RFP are fixed. Authorities, therefore, cannot be permitted to alter the same by their own perception of the same, and allow respondent no. 4 to change the

Total Price Summary, earlier submitted as RFP did not provide for such opportunity.

Mr. Sandeep Kumar has placed reliance on a very recent decision of the Apex Court in the case of Nabha Power Limited (NPL) vs. Pubjab State Power Corporation Limited (PSPCL) & anr. Reported in (2018) 11 SCC 508. He places specific reliance on para 49 onwards of the said judgment.

Learned Senior Counsel appearing for the respondent Corporation has submitted that the clear and unambiguous requirement under Clause 8 and 8.1 of the RFP as regards total price summery for the process of evaluation for commercial bid is that the same is to be considered including the taxes, levies, duties etc. "as applicable". The term "as applicable" had been incorporated for a purpose. None of the bidders had the discretion to add the component of taxes, levies, duties etc. as per their own discretion. It was not open to the bidders to add these components at whatever rate they deemed fit as the components of taxes, levies, duties etc. were required to be passed on to the concerned authorities for whom the same was being collected. Thus the commercial bid could only have been assessed by including taxes, levies and duties etc., "as applicable", and in no other way as per terms and conditions in RFP. None of the bidders could be permitted to gain any advantage, or put any other bidder to advantage or disadvantage by submitting Total Price Summary by including GST at any rate other than what was applicable. If this was permitted to be done, then it would allow undue advantage/disadvantage amongst bidders inter se. As a result the employer would be prevented from making a genuine assessment of the Total Price Summary submitted by the parties, which would be detrimental to execution of the project and public interest would also suffer.

Respondent No. 4 had submitted its total price bid including GST @ 18 %. The undisputed position is that the rate applicable was 12%. By evaluating of total price summary of respondent No. 4 including GST "as applicable" , i.e. including 12% GST the same was in fact brought in accordance with the requirement of Clause 8 and 8.1 of the RFP.

It is submitted that Clause 2.21 of the RFP taken note of hereinabove provided discretion in the respondent authorities to correct discrepancy in the bid of respondent No. 4 in so far as the rate of GST is concerned. No bidder had any discretion in this regard, and GST "as applicable" only could have been included in the Total Price Summary. The effect of the exercise undertaken under Clause 2.21 of the RFP is that discrepancy in Total Price

Summary of respondent No. 4 has been removed. As a result public purpose and interest has been served and the lowest bidder by considering the total price summary including GST @ 12% (as applicable) has emerged successful. Reading Clause 2.21 as a whole he submits that Clause 2.21 (b) clearly contemplates as follows:-

> "If there is any discrepancy in commercial bid, it will be dealt as per the following:-"

The discretion of the authorities to deal with the discrepancies was not limited to illustration in Clause 2.21 a), b) and c). It is further understood from the reading of sub clause d) of Clause 2.21. Sub-clause d) of Clause 2.21 of RFP reads as follows:-

> "2.21….
>
> d) If there is such discrepancy in an offer, the same shall be conveyed to the bidder with target date up to which the bidder has to send his explanations. On the above lines PSCL reserves the right to take appropriate decision which needs to be agreed by the bidder. If the bidder does not agree to the decision of PSCL, the bid is liable to be disqualified."

Sub clause (d) provides the procedure by which the issue has to be dealt with. In accordance with the same an e-mail was sent to the petitioner as well as respondent No. 4 asking both of them to participate in the negotiation on 21.12.2018 with the employer. The respondent authorities by calling both bidders has demonstrated fairness and transparency in their actions and the allegations made by the petitioner company are factually unfounded, legally unsustainable and false.

The proceeding of the meeting with the respondent officials on 21.12.2018 (Annexure D) to the counter affidavit filed by respondent Nos. 2 and 3 would show that petitioners were also allowed to correct their discrepancies in the commercial bid. The petitioner in their Total Price Summary had proposed a quantity of 560 mounting structures with junction boxes for ITMS; as against the required quantity of 1120. As a result of such opportunity to correct this discrepancy, petitioners had agreed in their clarification that they will provide 1120 mounting structure with junction boxes for ITMS.

Respondent No. 4 on the other hand was allowed opportunity to correct discrepancy in its price bid by applying GST "as applicable" (12 %) as per Clause 8 & 8.1 of the RFP, in stead of 18% which was not the rate applicable and was impermissible. Respondent No. 4 agreed to the same and submitted specific confirmation by their letter dated 21.12.2018.

No procedural error can be alleged in view of the fair and transparent action of the respondents. As per sub clause (d) of 2.21 of RFP the authorities took a decision since the petitioners as well as respondent No. 4 agreed for removing discrepancy in their respective RFPs. If the petitioner or respondent No. 4 disagreed with the decision of the PSCL to remove discrepancy in their RFPs than Total Price Summary submitted by them could have been considered to be “unresponsive”.

The minutes of the proceeding dated 21.12.2018 (Annexure D) clearly shows that for better understanding on GST rate applied by petitioner as well as respondent No. 4, both had been called by the Committee on 21.2.2018. The authorities in the proceedings have considered the fact that detailed project report (DPR)/project budget was Rs. 254.50 Crore. This amount of Rs.254.50 Crore was also without any taxes. Thus, it is clear that ultimate intention of the request for proposal or “core spirit” was to evaluate the bids on basic price. Quoting of taxes, levies and duties submitted by the bidders could by no stretch of imagination be considered as relevant component in the bidding process. The authorities have rightly considered the price bid of respondent No. 4 including GST as applicable i.e. (@ 12%).

"As applicable" has consciously been mentioned in Clause 8.81. It indicates that none of the bidders or employer has the discretion to consider total price summary including GST at any rate. It could only be at the applicable rates.

Senior Counsel Mr. Lalit Kishore, appearing for the respondent PSCL, in support of his submissions has placed reliance upon the decision of the Apex Court in the case of Municipal Corporation, Ujjain & anr. Vs. BVG India Limited & ors. Reported in (2018) 5 SCC 462. He has placed specific reliance on para 11 to 16, 21, 26 and 27. He has submitted that purpose of judicial review is to ensure that parties are meted out fair treatment in furtherance of public interest and public purpose. Unless the Court is satisfied that there is a substantial public interest involved or that the discretion exercised by the parties while evaluating inter bid is mala fide the Court should not interfere under Article 226 of the Constitution of India in a bid between two rival tenderers. He has specifically relied upon para 21 of the judgment wherein the Apex Court has referred to the scope of judicial review vis a vis interference of superior courts in matters of award of contracts. He has emphacised (iii) of para 66 of the judgment in the case of B.S.N. Joshi and Sons Ltd. v. Nair

Coal Services Ltd. Reported in (2006) 11 SCC 548, which reads as follows:-

> “(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;”

Award of contract, it is submitted, is essentially a commercial transaction wherein commercial considerations are paramount. In furtherance of such commercial transaction, if the discretion has been exercised bona fide, as in this case, for public purpose/interest. This Court should refrain from interferring with such decision under Article 226. In this connection he relies upon a decision of the Apex Court in the case of AIR India Ltd. Vs. Cochin International Airport Ltd. & ors. Reported in (2000) 2 SCC 617. He has also relied upon a decision of the Apex Court in the case of Raunaq International Ltd. vs. I.V.R. Construction Ltd. & ors. Reported in (1999) 1 SCC 492.

Mr. Mrigank Mauli has appeared on behalf of respondent No. 4. He has submitted that respondent No. 4 has emerged the lowest successful bidder pursuant to a process in accordance with terms of RFP. No favour has been shown to respondent No. 4 in the process, neither any specific malafide has been alleged against any individual in the process of evaluation by the petitioner. Relying upon Clause 2.5, 2.23, 2.29 and 2.30(b) of the request for proposal he submits that the authorities have acted well within their discretion.

He further adopts the submissions of the learned Senior Counsel appearing for the respondent authorities in respect of Clause 2.21 of the request for proposal. He submits that admitted position is that lowest bidder has emerged successful in the process. No public purpose would be served by interferring with the award of contract. He also submits that there is nothing on record to show that prior to 20.12.2018 i.e. date when petitioner as well as respondent No. 4 both were allowed opportunity to correct discrepancies in their bids, petitioner had never been declared as L-1. Since the petitioner had never been declared L-1 basic premise for invoking the provisions of the CVC guidelines are lacking. He submits that even if the petitioner, for the sake of argument, without admitting to the same, had ever been declared as L-1 (lowest bidder) CVC guidelines could not have been made applicable in this process as it is clear from bare perusal of CVC guidelines that the same applies only to the central government, its offices, boards and corporations. Respondent Nos. 1 to 3 are not covered by the CVC guidelines. The guidelines were issued in furtherance of CVC Ordinance 1998, which clothed the CVC with powers and functions to exercise superintendence over vigilance administration of the various Ministries of the Central Government or Corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by central government.

In this connection he refers to the opening lines of the guidelines (Annexure 7 series) of I.A. No. 1 of 2019. the respondent authorities in the instant case are authorities under the State Government and primafacie do not come within the guidelines relied upon by the petitioner's Counsel. The authorities have acted in furtherance of public interest. The procedure was fair and transparent and within the discretion provided by the RFP. Laying emphasis on Clause 2.21 and 2.15 he submits that the component of taxes are not left to the discretion of either bidder or employer. It is important that whatever rate is applicable should be quoted to facilitate the employer to pass on the same to the concerned authorities. Accordingly a scope has been left to amend this component if there is any amendment in the rate of existing taxed/duties/levies or there is introduction of any new taxes/duties/levies by any State or Central Government component in Clause 2.15 of the request for proposal.

Referring to Clause 2.23 of the RFP he submits that even while undertaking the exercise to allow the bidders to remove discrepancies under Clause 2.21 of the RFP, if a bidder disagrees the employer has the discretion to call for proper explanation. He submits that this discretion which vests in the authorities under the RFP has been exercised bonafide, in furtherance of public interest and to ensure compliance with the fulfillment of the requisites as per the RFP. The petitioner has not been able to demonstrate that decision of the respondent authorities in allowing respondent No. 4's bid is in any way to the detriment of public interest or is arbitrary. They have also not made out any specific case of malafide.

The petitioner, in order to invoke writ jurisdiction under Article 226 in matters of award of contract would be required to pass the three thresholds of malafide, arbitrariness and public interest before he can invoke jurisdiction of this Court under Article 226 of the Constitution of India. In absence of these three elements referred to above the proceedings in the instant case does not call for any interference by this Court under Article 226 of the Constitution of India.

Counsel has also submitted that the employer has interpreted the terms of request for proposal in furtherance of public interest and to ensure compliance with the Request For Proposal in good faith. They have exercised discretion for allowing removal of discrepancy uniformly for the petitioner as well as respondent No. 4.

Counsel appearing for respondent No. 4, in support of his submissions has placed reliance upon decision of the Apex Court in the case of Jagdish Mandal vs. State of Orissa & ors. Reported in (2007) 14 SCC 517. He has also led great emphasis on the fact that discretion exercised by PSCL for removal of discrepancy was in furtherance of the intention to select the total price summary including GST "as applicable". The admitted position is that 12% GST was applicable. The clear and specific intention of Clause 8 of RFP was to ensure that GST was included in the total price summary submitted by tenderers at no other rate than what is applicable. If respondent No. 4 upon being offered an opportunity to remove discrepancy had not agreed to include GST at the rate applicable, the consequence may have been otherwise. Since respondent No. 4 had agreed, the intention of Clause 8 of the RFP was fulfilled. Entire exercise undertaken by the respondent authorities in selection of the lowest bidder by adopting a procedure which was described in Clause 2.21 of the RFP. Final decision of the respondent authorities therefore has only resulted in furtherance of public interest. Relaxation was granted for bonafide reasons and since terms of the RFP permitted such discretion to allow removal of discrepancy. The effect of the discretion is in public interest. No mala fide has been alleged. In the circumstances this Court should not interfere with the discretion exercised by the authorities which is impugned in the instant proceeding.

He has also relied upon the decision of the Apex Court in the case of Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & anr. reported in (2016) 16 SCC 818. He has placed specific reliance on para 15 and 16 of the said judgment which are being reproduced herein:-

> "**15.** We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

> "**16.** In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court."

Referring to these paragraphs he submits that in the instant case the terms of RFP has been interpreted by the employer as per the objective sought to be achieved i.e. submission and consideration of total price summary including GST as applicable. Actions have been taken by the employer bonafide and as per the procedure prescribed in the RFP. The procedure and exercise of discretion in terms of the RFP, as per the understanding of the employer has been exercised uniformly and without any discrimination in favour of the petitioner as well as respondent No. 4. He thus submits that in view of judgment of the Apex Court relied upon this Court should not interfere with the discretion exercised by the authorities in favour of respondent No. 4.

Having considered the rival submission of the parties this Court is in agreement with the submissions advanced on behalf of the respondents. Ongoing through the terms of the RFP, it is clear that parties submitting the price bid had no option or discretion in respect of the rate at which they could quote GST. None of the bidders could gain any advantage by quoting the rate of GST as per their discretion. The total price summary quoted by the parties, as per the scheme of the RFP was to form the basis of evaluation inter se the parties. As far as the component of GST is concerned, the same was required to be included “as applicable”. Admittedly, GST at the rate of 12% was applicable for the works in question at the time of evaluation of price bid.

The requirement of GST “as applicable” clearly meant rate applicable. The scheme of the RFP is such that the price summary, insofar as it relates to GST, taxes and levies, is dependent upon the rate applicable. There was no discretion in the bidders or the employer to consider and include GST at a rate other than that which is applicable. Submission of total price summary including GST at a rate other than that which is applicable, therefore was a discrepancy. Likewise, petitioner did not have the option of submitting total price summary containing mounting structure with junction boxes lesser in number than what was required. Submission of such total price summary by the petitioners, therefore also constituted a discrepancy. Authorities were therefore correct in allowing rectification of such discrepancies in total price summary submitted by respondent No. 4 as well as the petitioners, after observing the procedure available in clause 2.21 of the RFP. In fact, if such discrepancies in total price summary were not corrected, the same would have resulted in an incorrect evaluation of total price summary submitted by both parties. This would have been to the detriment of the entire project and public interest.

The judgment of the Apex Court in the case of Nabha Power Limited (supra) relied upon by petitioner's Counsel is dealing with the interpretation of terms of a commercial contract. The Apex Court has referred to the ground rule which is the basis of the moon rock test of giving business efficacy to transaction in a manner intended at all events by business parties. This Court would consider it appropriate to observe that in the instant case the terms of commercial contract are not in issue. The facts in the instant case are with respect to the stage of RFP much prior to the contract having even come into existence. The Apex Court in the case of Nabha Power Limited (supra) having considered the moon rock test has gone on to observe in para 49 of the said judgment as follows:-

> "**49.** We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties

indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock* [*The Moorcock*, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [*Shirlaw* v. *Southern Foundries (1926) Ltd.* [*Shirlaw* v. *Southern Foundries (1926) Ltd.*, (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd.* v. *Shire of Hastings* [*B.P. Refinery (Westernport) Proprietary Ltd.* v. *Shire of Hastings*, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (*1*) reasonable and equitable; (*2*) necessary to give business efficacy to the contract; (*3*) it goes without saying i.e. the Officious Bystander Test; (*4*) capable of clear expression; and (*5*) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society* [*Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society*, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and *Attorney General of Belize* v. *Belize Telecom Ltd.* [*Attorney General of Belize* v. *Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.”

In the instant case, parties, i.e. the petitioner, respondent No. 4 as well as the employer, in the process of evaluation of the total price summary have all considered the provisions of the RFP to allow removal of discrepancy. The three parties in view of the facts taken note of above have acted accordingly and participated in the process and both petitioner, as well as respondent no. 4 have availed opportunity in the process of removal of discrepancy. The parties were thus ad idem in respect of the scope of discretion in the RFP for removal of discrepancy. Accordingly this Court would not find any fault in the action of the PSCL in allowing removal of discrepancy as per the procedure prescribed in the RFP. The facts and circumstances of the instant case are different from the facts and circumstances and issues qua terms of contract, which fell for consideration before the Apex Court in the case of Nabha Power Limited (supra).

The facts as noticed above show that an opportunity was granted to the respondent No. 4 as well as petitioner for correction of discrepancy. The petitioners has also availed of such an opportunity. Having done so, he cannot be permitted to contend that opportunity for correction of discrepancy could not have been allowed to the respondent No. 4. From the minutes of the meeting dated 21.12.2018 it is apparent that the petitioners have been allowed opportunity to correct their bid in respect of the quantity of mounting structure with junction boxes from 560 to 1120. The discrepancy in the bid of the petitioner which was allowed to be rectified is also a discrepancy, other than the kind specified in 21.2 (a), (b) or (c). Petitioners have availed opportunity of such correction. The PSCL, petitioners as well as the respondent No. 4, have all considered (a), (b) and (c) of clause 21.2 to be illustrative and not exhaustive. This Court is also of the opinion and would hold that the scheme of the RFP permitted correction of such discrepancies as has been allowed to both petitioners as well as the respondent No. 4.

This Court would also take into consideration the consequence of such correction. The effect of such correction was that the lowest bidder came to be selected. The rates submitted by the respondent No. 4 which has been accepted is much above the project cost/DPR of 254 crore, on the basis of which proposals were invited by the PSCL. Acceptance of the proposal submitted by respondent No. 4 was thus in furtherance of public interest.

Various judgments cited at the Bar, which are relevant to the facts and circumstances of the instant case, leave no room for doubt that discretion exercised by the respondent authorities was as per their bonafide understanding and in furtherance of the objectives intended in Clause 8 of RFP. The discretion to allow removal of discrepancy was as per the procedure prescribed in clause 2.21 of the RFP. This procedure was invoked to allow removal of discrepancy uniformly and without any discrimination in favour of both petitioner as well as respondent No. 4. Result of the exercise/discretion of the authorities is that lowest bidder has come to be selected and as such neither interest nor public purpose has suffered in the process.

Petitioners have made no specific allegation of mala fide. In the circumstances there is no occasion for this Court to interfere with the discretion exercised by the authorities rejecting the price proposal submitted by the petitioners.

The writ petition is dismissed.

(Madhuresh Prasad, J)

SNkumar/-

AFR/NAFR	AFR
CAV DATE	15.7.2019
Uploading Date	2.8.2019
Transmission Date	N/A