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

Date of decision : 01.10.2019.

+ W.P.(C) 10649/2019 & CM APPL. Nos. 44021-22/2019

GYPSUM STRUCTURAL INDIA PVT. LTD. Petitioner

Through : Mr. Samar Bansal & Ms. Devahuti
Pathak & Ms. Aditi Sharma,
Advocates.

versus

GAIL (INDIA) LIMITED AND ANR. Respondents

Through : Mr. Sanjeev Sagar, Standing Counsel
for GAIL with Ms.Nazia Parveen,
Advocate for R1.
Mr. Abhimanyu Garg, Advocate for
R2 with Ms.Smitha Sehgal, Senior
Manager (Legal), Ms.Sunita Mitra,
General Manager (SCM) &
Mr.Salman Q. Khan, Deputy Manager
(Legal) for R2/EIL.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

The petitioner has filed the present petition under Article 226 of the Constitution of India seeking a writ in the nature of certiorari and a direction for calling for the records of the respondents pertaining to tender document No. B035-TENDER_DOC-B035-002-83-41-MK-T-9508 (E-TENDER No. 8000014110) issued by respondent No. 2/Engineers India Limited ('EIL' for short) in respect of installation of a pipeline by Horizontal Directional Drilling ('HDD') for the Durgaur – Haldia section of the Dobhi – Durgapur

– Haldia Pipeline Project of M/s GAIL (India) Limited ; and a writ in the nature of mandamus or any other direction to the respondents to consider the bid of the petitioner in respect of works under Part-A of the subject tender as techno-commercially responsive and to open the price bid of the petitioner in respect of the said works under Part-A of the subject tender, and to consider the same for award of contract.

2. The brief facts leading to filing of the present petition are that respondent No. 2 published an invitation for bids in respect of the subject tender for works pertaining to installation of the pipeline in two parts : Part-A (Rupnarayan River crossing of 2700 metres with pipe diameter 24 inches) and Part-B (Hooghly River crossing of 1200 metres with pipe diameter 18 inches). The technical and financial criteria for eligibility for submission of bids in respect of each of the works under the subject tender are provided for separately in Section-II of the tender documents.

3. The petitioner submitted its bid on 27.05.2019. The price bids for the said tender were opened in the presence of all the representatives of the bidders including the petitioner on 23.09.2019. The petitioner was surprised and shocked to learn that the price bid of the petitioner for works under Part-A of the subject tender was not opened, implying thereby that the bid of the petitioner had not been found to be techno-commercially responsive for the said part in terms of clause 26.2.2 of Section-III of the tender documents. It is the case of the petitioner that no reason for the same was provided by the respondents.

4. The petitioner addressed a letter to respondent No. 2/EIL on 23.09.2019 seeking the reasons for non-opening of its price bid for works under Part-A of the subject tender; and a clarification as to whether the bid

of the petitioner for Part-B had been rejected, and if so, the reasons therefor.

5. Mr. Bansal, learned counsel for the petitioner submits that as per his information and knowledge, the price bid of the petitioner was not opened on account of the fact that the petitioner could not provide a completion certificate for the work carried-out by the petitioner in the past. It is further submitted however that respondent No. 2/EIL failed to respond to letter dated 23.09.2019 and did not specify that the price bid of the petitioner had not been opened by reason of non-acceptability of the requisite Completion Certificate dated 08.02.2016 issued by the Indian Oil Corporation Limited ('IOCL') to the petitioner for establishing its eligibility to bid for the work under Part-A of the subject tender.

6. Learned counsel for petitioner further submits that barring the furnishing of a completion certificate issued by IOCL, which IOCL is now seeking to deny, the petitioner had also furnished a certificate issued by M/s Ludwig Pfieffer Hoch-und-Tiefbau GMBH & Co. ('Ludwig'), a company which had appointed the petitioner as a sub-contractor for the work to be conducted on behalf of IOCL ; as also a Forensic Science Laboratory ('FSL') report to establish that the certificate issued on behalf of IOCL was not a forged or fabricated document. Counsel contends that the petitioner had successfully completed the work under the Paradip – Haldia – Barauni Oil Pipeline Augmentation Project ('PHBPL-Aug') and obtained Completion Certificate dated 08.02.2016 from IOCL. However, in its responses to certain applications filed under the Right to Information Act, 2005, IOCL later denied that such document formed part of its record. It is further submitted that the aforesaid facts came to the knowledge of the petitioner only subsequently ; and the petitioner therefore obtained a copy of

the FSL report and related communications from IOCL under the provisions of the RTI Act later-on.

7. In order to establish the genuineness of the said certificate, the petitioner vide letter dated 21.11.2017 furnished the original certificate to IOCL for verification. IOCL referred the same to the FSL along with samples of signatures of Sh. Subhash Chander Kaital, General Manager (PJ-Civil), who had issued the said Completion Certificate, seeking to verify the authenticity of his signatures on the certificate. The FSL vide its report dated 27.02.2018 confirmed that the signatures of Sh. Subhash Chander Kaital on the Completion Certificate were genuine.

8. The main thrust of the argument of learned counsel for the petitioner is that although the petitioner performed and completed work under the project of IOCL as a sub-contractor of Ludwig, IOCL has refused to give a certificate for technical reasons that their contract with Ludwig did not provide for appointing a sub-contractor.

9. Additionally, on a query raised by respondent No. 2/EIL vide e-mail dated 04.01.2018 on the work carried-out by the petitioner in connection with the work order for installation of 18''OD pipeline by HDD technique for the PHBPL Aug project and associated work, IOCL replied vide letter dated 18.01.2018 as under :

"1. There was no provision of subcontracting in Indian Oil Corporation Limited (IOCL) tender for HDD job across Ganga river. Main contractor M/s Ludwig had applied for subcontracting, which was not accepted by IOCL.

2. However, based on the documents submitted by M/s Gypsum to IOCL and the reply received from M/s Ludwig, Germany it is apparent that M/s Gypsum Structural India

Ltd. has carried out the work of installation of 18" OD pipeline across Ganga River at Barauni of PHBPL Augmentation Project by HDD method."

10. According to Mr. Bansal, this communication of 18.01.2018 would clinch the issue and leave no manner of doubt that the petitioner had satisfactorily performed the work and he would therefore meet the eligibility requirement. He submits that the terms and conditions of the tender documents are to be read harmoniously and intelligently and to ensure that there is healthy competition in the larger public interest. He further submits that a tenderer should not be thrown-out on technical grounds where even the respondent is satisfied that the petitioner had performed the work of a sub-contractor. He submits that respondent No.2/EIL's reliance on technical grounds for rejecting the petitioner's bid is wholly arbitrary and illegal.

11. Mr. Bansal has further drawn the attention of the court to some of the tender conditions, which we reproduce below :

"BID EVALUATION CRITERIA & EVALUATION METHODOLOGY"

Technical Criteria

1.1 HDD works

1.1.1 Part-A

*1.1.1.1 Bidder on his own shall have completed design & installation of directionally drilled carbon steel pipeline crossing of size 610.0 mm (24") OD or higher for minimum length of 2000 meters or more using HDD method with **intersection technique** (Performing pilot hole by deploying rigs from both sides) by utilizing electromagnetic steering technology for precise real time tracking. The above work experience shall be in last ten (10) years reckoned from bid*

due date.

1.1.1.2 Bidder who does not meet the evaluation criteria as per clause 1.1.1.1 above but having experience of design & installation of directionally drilled carbon steel pipeline crossing on his own of size 406.4 mm (16”) OD or higher for minimum length of 1350 meters or more using HDD method in single crossing within last ten (10) years reckoned from bid due date, can also be considered, provided bidder engages a back-up agency which has specialist manpower, tracking tools & equipment. Back-up agency shall have previous track record for supply of manpower, tools & equipment for HDD by intersection technique (size 610.0 mm (24”) OD or higher for minimum length of 2000 meters) by utilizing electromagnetic steering technology for precise real time tracking in the past.

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“C. Only documents (Work Order, Completion certificate, Execution Certificate etc.) which have been referred/specified in the bid shall be considered in reply to queries during evaluation of Bids.

Experience of bidder acquired as a subcontractor can be accepted against submission of certificate from end user by such bidder along with other specified documents.

D. DOCUMENTS TO BE SUBMITTED FOR COMPLIANCE TO BEC.

<i>BEC Clause no.</i>	<i>Description</i>	<i>Documents required for qualification</i>
<i>1.1</i>	<i>Documents Required-Technical Criteria</i>	

1.1.1 & 1.1.2	Experience criteria	a) Bidder shall furnish documentary evidence along with the bid by way of track record, copies of work orders, completion certificate, MOU, responsibility/scope matrix (in case, the bidder has an experience as a consortium member) meeting the bid evaluation criteria. xxxxxx b) Completion certificate issued by end user/Owner (or their consultant who has been duly authorized by owner to issue such certificate) OR Execution certificate (issued by the end user/owner/authorized consultant) in place of completion certificate for meeting the stipulated experience criteria provided that the asset for which the said execution certificate has been issued is ready for commercial use. Note : The completion certificates/execution certificate shall have details like tender no. /work order no. & date, brief scope of work, completion date etc.
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“INSTRUCTIONS TO BIDDERS

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“[E] – BID OPENING AND EVALUATION

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“29. EXAMINATION OF BIDS AND

DETERMINATION OF RESPONSIVENESS

29.1 The owner's determination of a bid's responsiveness is based on the content of the bid only. Prior to the detailed evaluation of Bids, the Employer will determine whether each Bid :-

- (a) Meets the "Bid Evaluation Criteria" of the Bidding Documents;*
- (b) Has been properly signed;*
- (c) Is accompanied by the required 'Earnest Money/Bid Security';*
- (d) Is substantially responsive to the requirements of the Bidding Documents; and*
- (e) Provides any clarification and/or substantiation that the Employer may require to determine responsiveness pursuant to "ITB : Clause-29.2"*

29.2 A substantially responsive Bid is one which conforms to all the terms, conditions and specifications of the Bidding Documents without material deviations or reservations or omissions for this purpose employer defines the foregoing terms below :-

- a) "Deviation" is departure from the requirement specified in the tender documents.*
- b) xxxxx*
- c) xxxxx*

29.3 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 job as specified in tender documents.*
 - ii) Limit, in any substantial way, inconsistent with the Tender Document, the Employer's rights or the tenderer's obligations under the proposed Contract;*

- b) If rectified, would unfairly affect the competitive*

position of other bidders presenting substantially responsive bids.”

12. Mr. Bansal submits that the report of the FSL furnished at the behest of IOCL categorically establishes the genuineness of Completion Certificate dated 08.02.2016 and also establishes that the same had been issued by a senior official of IOCL to the petitioner. He submits that the mechanism for maintenance of records by IOCL is its internal matter and merely because the said document was allegedly not traceable by IOCL in its records, would in no manner detract from its authenticity or veracity. The contract in respect of the works which form subject matter of the Completion Certificate was *inter se* IOCL and Ludwig and the petitioner was not party to the same ; and therefore, the petitioner was neither aware nor concerned with the fact as to whether Ludwig was authorised under the contract to sub-contract the said works. Completion Certificate dated 08.02.2016 issued by IOCL attests to the fact that the said work had been successfully executed by the petitioner and any perceived irregularity in respect of sub-contracting of the same by Ludwig to the petitioner would not disentitle the petitioner or detract from the fact that the petitioner had indeed successfully completed the said work.

13. While relying on clause (D), Mr. Bansal contends that the main object and aim of incorporating such experience criteria was to enable the respondent to satisfy itself on the basis of documents, which the petitioner had provided ; and thus the petitioner would meet the eligibility criteria. While relying on clause 29.3 of the tender document, Mr. Bansal submits that non-provision of completion certificate is only a technical glitch, which does not amount to any material deviation, reservation or omission as contemplated in clause 29.3 to render the petitioner non-eligible for the

contract. It would not affect the scope, quality or performance of the job as specified in the tender documents in any material way.

14. Learned counsel appearing for the respondents have opposed this petition. Mr. Sagar has relied primarily on clause (C), which we have also reproduced above, to contend that no document would be a substitute in the absence of an experience certificate from the end user.

15. Learned counsel for the respondent contends that it is not for the respondent to examine either the work order or the authenticity of the same as this document cannot reflect that the work as a sub-contractor was carried-out or performed satisfactorily. He further contends that documents to be provided by the tenderer were in addition to the certification of the documents and that no document would be a substitute for the certificate so required i.e. the completion certificate from IOCL.

16. He submits that the certificate relied upon by the petitioner is not a valid certificate in the eyes of law. The controversy relating to the certificate has even reached the Forensic Science Laboratory. The FSL has given a report stating that the signatures are genuine ; but when the certificate was put to the IOCL, it responded by contending that it was a certificate issued by a person not authorized to do so. Learned counsel for the respondent contends that this aspect of the matter does not lie within the scope of judicial review as the court would not sit in appeal and would not hold an inquiry as to the genuineness of the document ; or the nature of the certificate ; or the circumstances in which such a certificate was issued. It is contended that the scope of interference in tender matters is narrow. The court is only concerned with the decision-making process and not the decision rendered by the respondent. It is also the joint stand of counsel for

the respondents that till a certificate was provided, it was not necessary for the respondent to examine the documents as they would have no means to verify the authenticity of the same.

17. Reliance is placed by respondent No. 2 on clause 19.1 of the Instructions to Bidders in the tender document to submit that there is no scope for deviation while applying the tender conditions at the time of examining the tender documents. Clause 19.1 reads as under :

“19. ZERO DEVIATION AND REJECTION CRITERIA

19.1 ZERO DEVIATION : Deviation to terms and conditions of “Bidding Documents” may lead to rejection of bid. GAIL will accept bids based on terms & conditions of “Bidding Documents” only. Bidder may note GAIL will determine the substantial responsiveness of each bid to the Bidding Documents pursuant to provision contained in clause 29 of ITB. For purpose of this, a substantially responsive bid is one which conforms to all terms and conditions of the Bidding Documents without deviations or reservations. GAIL’s determination of a bid’s responsiveness is based on the content of the bid itself without recourse to extrinsic evidence. GAIL reserves the right to raise technical and/or commercial query(s), if required, may be raised on the bidder(s). The response(s) to the same shall be in writing, and no change in the price(s) or substance of the bids shall be sought, offered or permitted. The substance of the bid includes but not limited to prices, completion, scope, technical specifications, etc. Bidders are requested to not to take any deviation/exception to the terms and conditions laid down in this “Tender Documents”, and submit all requisite documents as

mentioned in this “Tender Documents”, failing which their offer will be liable for rejection. If a bidder does not reply to the queries in the permitted time frame then its bid shall be evaluated based on the documents available in the bid.”

18. Mr. Sagar submits that in an almost similar tender issue by Bharat Petroleum Corporation Limited and GAIL in 2018, the tender of the petitioner was rejected and the rejection has attained finality.

19. We have heard learned counsel for the parties and have carefully examined their rival contentions.

20. The submissions of learned counsel for the petitioner can be summarized as under :

- (i) Sufficient documents have been placed on record to establish that the petitioner had carried-out the work previously as a sub-contractor;
- (ii) The tender documents require furnishing of documentary evidence, which stands provided;
- (iii) The certificate issued by IOCL is neither forged nor fabricated, but since IOCL does not have a provision for appointing a sub-contractor, only for that reason it was not in a position to issue/confirm issuance of a certificate to the petitioner; and
- (iv) Reply dated 18.01.2018 of IOCL shows that the petitioner had ordered carried-out the work as a sub-contractor.

21. The submissions of learned counsel for the respondents can be summarized as under :

- (i) The conditions of the tender documents regarding provision of experience certificate by the end user are to be applied strictly ;

- (ii) Neither the respondent nor the court can decide the authenticity of the work order or the circumstances under which IOCL had issued a completion certificate after 2 years of completion of the work;
- (iii) No means exist to ascertain as to whether the work done was satisfactory or not;
- (iv) Scope of judicial interference in tender matters is limited ; and
- (v) The price bid already stood opened on 23.09.2019.

22. While the tender conditions sought to be relied upon by learned counsel for the petitioner, which we have reproduced above, do provide that the bidder would furnish documentary evidence as per clause (D), by way of track record, copies of work order, completion certificate, MOU etc., in our view this tender condition cannot be read in isolation. This tender condition also talks about a completion certificate.

23. Clause (C) of the tender documents which we have reproduced above also makes it clear that a bidder's experience as a sub-contractor can be accepted only against submission of certificate from the "end user" along with other specified documents. This clause appears prior to Clause (D) and the subsequent clause would not override clause (C) above, as is sought to be argued by the petitioner.

24. In essence and substance, the respondents' case is that the certificate sought to be produced by the petitioner, though signed by an officer of IOCL (and the genuineness of the signature having been confirmed by forensic examination), is now being disclaimed by IOCL for the reason that the petitioner had undertaken work on IOCL's contract, not directly but as a sub-contractor of Ludwig, which sub-contracting was impermissible under the terms of the contract between IOCL and Ludwig. IOCL could therefore

not acknowledge that any work was carried-out by the petitioner, in view of the prohibition against sub-contracting contained in the terms of the IOCL–Ludwig contract. Since IOCL did not, and indeed could not have, acknowledged the petitioner as a contracting party, IOCL obviously could not have issued a valid certificate to the petitioner. Once IOCL disclaimed having issued a certificate to the petitioner, the certificate produced by the petitioner was ignored by respondent No. 1. By reason thereof, it is respondent No. 2’s contention that the petitioner had failed to comply with a significant condition of the tender ; and therefore respondent No.1 was justified in rejecting the petitioner’s bid.

25. Viewed in the above manner, we are of the opinion that the rejection of the petitioner’s bid by respondent No. 1 cannot be termed as arbitrary, illegal or even unjustified. To that extent, this court will not substitute its own view in place of respondent No. 1’s stand that the tender conditions had not been met by the petitioner.

26. We also remind ourselves of the limited scope of interference by way of judicial review under Article 226 of the Constitution of India, of which the consistent position of law has been reiterated by the Supreme Court in the recent decision of ***Silppi Constructions Contractors vs. Union of India & Anr.*** 2019 SCC OnLine SC 1133, in which matter, by way of an order, the Supreme Court has held as follows:

“6. Aggrieved, the original writ petitioner is before us in these petitions. This Court in a catena of judgments has laid down the principles with regard to judicial review in contractual matters. It is settled law that the writ courts should not easily interfere in commercial activities just because public sector undertakings or government agencies are involved.

“7. In Tata Cellular v. Union of India, it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are :—

“94.

(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 fair play 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 from 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.”

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“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

27. Mr. Bansal has laboured hard to contend that the petitioner is not at fault; and that the petitioner in fact performed and carried-out the work as a sub-contractor, which is factually not disputed. However, IOCL's hands are tied as their tender document does not provide for a sub-contractor and hence even if IOCL is aware that work was performed by the petitioner who was appointed as a sub-contractor by Ludwig, IOCL is not in a position to acknowledge such work.

28. The court is bound by the consistent view of the Apex Court, whereby it has been held that the court cannot re-write the terms of the tender or even substitute its own view in place of that of the party issuing the tender. It is therefore for the respondent to decide as to whether the terms of the tender conditions have been met ; and unless the conduct of the respondent is completely arbitrary or illegal, the court cannot intervene.

29. In view of the above discussion, we find no ground to interfere in the rejection by respondent No.2 of the petitioner's bid in exercise of our extraordinary powers of judicial review under Article 226 of the Constitution. Accordingly, the present writ petition is dismissed. Pending applications, if any, also stand disposed of.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 01, 2019

j/uj/Ne