

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

% *Reserved on : 27th September, 2019*
Pronounced on: 19 November, 2019

+ W.P.(C) 3490/2019, C.M. Appl. No. 16007/2019 (Stay), C.M. Appl. No. 19560/2019 (placing on record the documents), & C.M. Appl. No. 33954/2019 (Amendment in prayer)

CUBE CONSTRUCTION ENGINEERING LTD Petitioner

Through: Mr. Nakul Dewan, Senior Advocate
with Mr. Purvish Jitendra Malkan, Mr.
Dharita Punish Malkan, Mr. Bhaskar
Singh, Mr. Alok Kumar, Advocates

versus

NATIONAL HIGH SPEED RAIL CORPORATION LTD & ANR

..... Respondents

Through: Mr. Gopal Jain, Senior Advocate with
Mr. Konark Rishi Bhatnagar, Ms.
Prashanti, Ms. Dipika Sharma,
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

G.S. SISTANI, J.

1. Rule D.B.
2. Pleadings are complete.
3. With the consent of parties, the writ petition is set down for today for final hearing and disposal.
4. The necessary facts, which are required to be noticed for disposal of this writ petition are that respondent No. 1 invited bids for construction

of High-Speed Rail Terminal Building vide Tender No. NHSRCL/CO/SBI-HUB/2018/7. The petitioner submitted its bid in compliance with the conditions of the tender document. The procedure adopted was that, along with a technical bid, the financial bid was also to be submitted in a sealed cover, being a single stage Two-Enveloped Bidding process, by on or before 2.45 PM on 17.10.2018. As the petitioner and respondent No. 2 (L-1, successful tenderers) qualified the technical bid, the price bid was opened on 14.12.2018.

5. The main thrust of the argument of Mr. Dewan, learned senior counsel appearing for the petitioner revolves around non-submission of the Letter of Price Bid by respondent No. 2. It is the case of the petitioner that submission of Letter of Price Bid with seal and signature of the bidder is an essential condition of the tender. It is also the stand of the petitioner that it is a common case of the parties that the Letter of Price Bid was not submitted by respondent No.2. Resultantly, it is contended that the said defect in the submission of the bid, amounts to breach and non-compliance of the essential condition of tender. It is also the grievance of the petitioner that its representation informing respondent no.1 about the non-compliance by respondent No.2, has been rejected without any application of mind. The petitioner through the documents of price bid of respondent No. 2 found out that the price bid of respondent No. 2 was lower than that of the petitioner, hence the respondent No. 2 was awarded the Letter of Intent (LOI) of the contract. It is contended that respondent No. 2 has been awarded the LOI of the contract on the criteria of being L-1 and having submitted the lower price bid in comparison to the petitioner, who was L-2. The respondent

No. 2 quoted the price of Rs.328 crores as a lump sum price while the petitioner quoted Rs.331,91,11,111/- as a lump sum. Admittedly, the price difference between the two bids is Rs.3.91 crores; and without item-wise break-up and evaluation of the price bid of respective parties, respondent No. 1 awarded the contract LOI without application of mind and without complying with the tender conditions, more particularly, conditions 38, 29 and 41 of Section 1 Part 1 of the tender document.

6. Since the submission of Mr. Dewan revolves around some of the tender conditions and on which strong reliance has been placed, we deem it appropriate to reproduce the said tender conditions. The said tender conditions, which are relied upon are extracted below: -

11.3 The Price Bid submitted by the Bidder shall comprise the following:

- (a) Letter of Price Bid;*
- (b) completed Price Schedules, in accordance with ITB 12 and 18;*
- (c) alternative Price Bids, at the Bidder's option and if permissible, in accordance with ITB 13; and*
- (d) any other document required in the BPS.*

12.1 The Bidder shall complete the Letters of Technical Bid and Price Bid, including the appropriate Technical and Price Schedules, using the relevant forms furnished in Section IV, Bidding Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITB 22.2. All blank spaces shall be filled in with the information requested.

34.1 Provided that a Technical Bid is substantially responsive, the Employer may waive any non-conformity in the Technical Bid that does not constitute a material deviation, reservation or omission.

34.2 Provided that a Technical 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 non-conformities in the Technical Bid related to documentation requirements. Requesting information or documentation on such non-conformities shall not be related to any aspect of the price of the Price Bid. Failure of the Bidder to comply with the request may result in the rejection of its Bid.

18.3 Bidders shall provide price in each item in the manner and detail called for in the Price Schedules included in Section IV, Bidding Forms. Further, Bidders may add, breakdowns of items and provide the prices in each Price Schedule included in Section IV, Bidding Forms.”

7. Mr. Dewan, while relying upon Clause 11.3 as extracted above submits that this clause makes it mandatory that the price bid submitted by a bidder shall comprise of three basic documents; Letter of Price Bid being one of them. It is, thus, contended that since the language of Clause 11.3 makes submission of price bid mandatory, it automatically becomes an essential condition of the bid document and in the absence of the letter of price bid the tender of the respondent No.2 should have been declared as non-responsive and rejected.
8. Mr. Dewan, while also relying on Clause 12.1, contends that this clause also makes it mandatory for a bidder to complete the letters of technical bid and price bid, including the appropriate technical and price schedules having all blank places to be filled up with the information requested. It is contended that in the absence of letter of price bid, not only Clause 11.3 but even Clause 12.1 has not been complied with.

9. Mr. Dewan has also placed reliance on Clause 34.1 and 34.2 to highlight that respondent No.1 would be well within its right to waive any non-material requirements, however, the same is limited to only non-conformity with the technical bid and would not cover the price bid. Thus, respondent No. 1 cannot take shelter under Clause 34.1 to submit that the price bid was substantially responsive as the same does not apply at the stage of examination of the price bid. The flexibility provided under Clause 34.2 allows respondent No. 1 to request the bidder to submit necessary information to rectify non-material non-conformities in the technical bids but the same does not apply to the price bid. It is submitted that a reading of the entire tender document would show that the stand of the petitioner is well supported not only by the above relied Clauses but also by Clauses 18, 36 and 38. Strong reliance is placed on Clause 38, which we reproduce below: -

“38. Evaluation of Price Bids.

38.1 The Employer shall use the criteria and methodologies indicated in this Clause. No other evaluation criteria or methodologies shall be permitted.

38.2 To evaluate a Price Bid, the Employer shall consider the following;

- (a) the Bid Price, excluding Provisional Sums in the Price Schedules, but including Daywork items, where priced competitively;*
- (b) price adjustment for correction of arithmetic errors in accordance with ITB 36.1;*
- (c) price adjustment due to discounts offered in accordance with ITB 18.7 or ITB 18.9;*
- (d) price adjustment due to quantifiable nonmaterial nonconformities in accordance with ITB 34.3;*

- (e) *converting the amount resulting from applying (a) to (d) above, if relevant, to a single currency in accordance with ITB 37; and*
 - (f) *the evaluation factors indicated in Section III, Evaluation Qualification Criteria. and*
- 38.3 *If price adjustment is allowed in accordance with ITB 18.7, the estimated effect of the price adjustment provisions of the Conditions of Contract, applied over the period of execution of the Contract, shall not be taken into account in Bid evaluation.*
- 38.4 *If these Bidding Documents allow Bidders to quote separate prices for different lots (contracts), and the award to a single Bidder of multiple lots (contracts), the methodology to determine the lowest evaluated price of the lot (contract) combinations, including any discounts offered in the Letter of Price Bid, is specified in Section III, Evaluation and Qualification Criteria.*
- 38.5 *If the Bid, which results in the lowest evaluated Bid Price, is seriously unbalanced or front loaded in the opinion of the Employer, the Employer may require the Bidder to produce detailed price analyses for any or all items of the Price Schedules, to demonstrate the internal consistency of those prices with the methods and the Price Schedules proposed. After evaluation of the price analyses, taking into consideration the Schedule of Payment, the Employer may require that the amount of the Performance Security be increased at the expense of the Bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful Bidder under the Contract.”*

10. Learned senior counsel for the petitioner submits that above Clause 38 makes it abundantly clear that to evaluate a price bid the employer shall

consider various documents, the first amongst which is the bid price. In the absence of the letter of price bid, respondent No.1 was left with no option but to reject the bid of respondent No. 2 as the same was a non-responsive bid. Mr. Dewan highlights that it is an admitted position that when the bids were opened on 14.12.2018, respondent No. 2 did not submit letter of price bid, covering letter, complete bill of quantity (BOQ) and a CD, along with its price bid. Relying on the documents filed along with the counter affidavit of respondent No. 2, it is submitted that in the remarks column, it has been clearly mentioned that letter of price bid, covering letter, and complete BOQ were not submitted.

11. Learned senior counsel for the petitioner also highlights the manner in which the Evaluating Committee has examined the documents. Reliance has been placed on the Minutes of the Financial Evaluation Committee Meeting held on 21.12.2018 and 27.12.2018 at RITES Gurgaon. Some of the observations so made and referred to by both the parties, are being extracted below:

“NHSRCL forwarded a copy of the financial PRICE bid on same date vide letter no. NHSRCL/MA/CA01/SBI.HSR.BLD/394.2/3384 dated 14.12.2018. Comparative statement and Briefing note for financial offer has been prepared by Manager/CIVIL/RITES and Manager/FINCNCE/RITES as per Appendix-2(3 pages).

2.0 EVALUATION OF PRICE BIDS

2.1 The evaluation criteria are explained below.

2.1.1 Part I-Evaluation of Compliance and Responsiveness

Under this Stage the following items will be checked:

- i) *The Letter of Price Bid is compliant, i.e., it does not include any alteration to the basic terms and does not constitute an alternative offer.*
- ii) *All Forms and Price Schedules have not been altered and are correctly completed and signed*

2.1.2 Part 2 – Detailed Financial Evaluation

- a) *After passing the above requirements, the Bid will then proceed for Price Bid evaluation in accordance with ITB 38.*
- b) *In principle, the Lowest Evaluated Bid resulting from (a) above will move to next as per ITB “F. Award of Contract in the ITB Clause 41 to 44.”*

12. Mr. Dewan, learned senior counsel for the petitioner while relying on para 2.2.1 of the extracted part of the Minutes of the Meeting, submits that respondent No. 2 has not submitted letter of price bid and CD for the offer and in para 2.1 the relevance of these documents has been highlighted. Mr. Dewan also relies on para 3 of the briefing note for financial bids and submits that it can be noticed that the letter of price bid, covering letter, completed BOQ (Bill of Quantity), and CD have not been submitted, but in the subsequent para 4, non-compliance of complete BOQ has been deleted without giving any explanation for the same. The relevant extract of the Minutes of the Meeting which have been relied upon is reproduced below: -

2.2 Evaluation by committee

UTES examined the copies (3rd copy) of the Price Bids of the Bidders received from NHSRCL and carried out Financial Evaluation. The details of the evaluation are given below.

2.2.1 Part I Evaluation

- i) *All the Price Bids does not include any alternation to the basic terms and does not constitute an alternative offer.*
- ii) *All Forms and Price Schedules have not been altered.*
- iii) *As per financial bid opening details (Appendix-3), M/s. B.L. Kashyap and Sons Ltd. have not submitted letter of PRICE BID and CD for the offer, as per ITB 22.1 and Stage 5 of Vol I (1/3) Pg 32. TEC observed that M/s. B.L. Kashyap and Sons Ltd. have submitted tender documents duly signed on all pages as token of acceptance of tender conditions. He has submitted Section 5 – Financial submission of tender documents containing PRICE BID letter, price schedule and Payment schedule, duly signed. Hence, they have accepted all the term and conditions of the price bid. As per letter of Technical bid, bid validity of 120 days along with Addendum No. 1 and Corrigendum 1,2 & 3 have been accepted. There are no other special conditions in letter of PRICE BID. As they have submitted the PRICE BID rates duly signed. Tender evaluation committee feels financial submission as acceptable. They have not submitted CD for the financial offer, which is also not a major omission to bypass the offer. The above omissions have also been represented by M/S Cube Construction Engineering Ltd. (3/5) vides their letter Package No. NHSRCL/CO/SBI-HUB/2018/10 dated 14.12.2018 (Appendix-4). Tender evaluation committee (TEC) has gone through the contents of the letter and deliberated. As discussed above by TEC, it is felt that financial submission by M/s B.L. Kashyap and Sons Ltd is complete and acceptable.*
- iv) *M/S Cube Construction Engineering Ltd. (3/5) has not submitted CD along with copy of Price bid. CD has been submitted with Original Bid. This is acceptable.”*

13. Mr. Dewan, also contends that a different stand has been taken in the counter affidavit filed in the Gujarat High Court in a writ petition instituted by the petitioner, which was not entertained on account of lack of territorial jurisdiction. The averment made in the said counter affidavit was that letter of price bid was submitted which imply that the documents filed and handed over in Court in the present case, did not repose confidence. The paragraphs 6, 8 and 9 of the counter affidavit filed before the Gujarat High Court are relied upon by both the parties and are reproduced below:

“6. I say and submit that every Bidder is required to submit the Bid Documents comprising of Instructions to Bidders, Technical Submission, Financial Submission, etc. Each page shall be signed by the authorized person of the Bidder. In view of the signature and seal on each and every page of the Bid Document consisting of 13 Sections in Volume VI, every Bidder has agreed for the compliance of the terms and conditions of the Tender. I say that Letter Of Price Bid being part of the Bid Document is also signed and sealed by Respondent No.2 and submitted along with the Tender, [A copy of the Letter of Price Bid and Schedule- 1 of Payment Schedule submitted by Respondent No.2 is annexed hereto and marked as ANNEXURE "R-13" (COLLY).

Xxxx

Xxxx

Xxxx

I say and submit that Respondent No. 2 had submitted Schedule 2 and Schedule 3 of Payment Schedule in his Financial Submission. Annexed hereto and marked as ANNEXURE “R-14” (COLLY) is the Copy of Schedule 2 and Schedule 3 of Payment Schedule,

It is pertinent to mention at this stage that the Letter of Price Bid contemplates, inter alia, (a) A Declaration that the Bidder has no reservation to the Bid, Document including Addenda, (b) readiness to execute in conformity with the Bid Document and Technical Bid, (c) Total price of the Bid including discounts, if any, (d) Validity of a Bid for a period of 120 days from the date fixed for the Bid

submission deadline, (e) Upon acceptance of Bid, the Performance Security shall be provided, etc. Hence, the object of the Letter of Price is to seek a Declaration regarding confirmation with the Bid documents, validity of Bid for a period of 120 days, commitment, to provide a performance security etc. and the total Price Bid along with discount, if any: Estate that in view of the signed and sealed Bid Documents, including Letter of Price Bid, Schedule-1 of Payment Schedule, ITB, etc., submitted by Respondent No.2, the necessity undertaking and declaration, which is the object of the Letter of Price Bid and payment schedule has been complied with by Respondent No.2 So far as Letter of Price bid and Schedule 1 of the Financial Submission is concerned, the sum total of a Price Bid can be derived from Schedule 3 of the Financial Submission by the Tender Committee. So far ' as non-mentioning of the Price along with the discount, if any in Letter of Price Bid, is concerned, that amount can be derived from Schedule 3 of the Financial Submission submitted by the Bidder which is otherwise the same as mentioned, in the Letter of Price Bid. Hence, the Bid of Respondent No.2 is substantially responsive.

8. I further say and submit that the net Bid Price of Respondent No.2 M/s, B.L. Kashyap & Sons Limited is Rs. 328,00,00,000/- as compared to the net Bid Price of Petitioner Cube Construction Engineering Limited of Rs.331,91,11,111/- and thereby the Bid of Respondent No.2 is lower by Rs.3,91,11,111/-. I say that as per Clause 39.1 of ITB, the employer was required to compare and evaluate price of substantially responsive bids to determine the lowest evaluated Bid. As stated hereinabove, the Bid of Respondent No.2 is the lowest and, therefore, RITES Ltd. and further the Tender Committee of Respondent No. 1 NHSRCL recommended to award the Contract to Respondent No.2. Accordingly, the decision is taken by Respondent No. 1 NHSRCL as per Clause 41 of ITB to award the contract in favour of Respondent No. 2.

9. *I say and submit that for evaluation of Price Bid as per Clause 38.2 of ITB, the employer shall have to consider the Bid Price, Price adjustment for correction of arithmetical, error, price adjustments due to discount offered, etc which Respondent No.2 had submitted in its' Financial Submission in Schedule 3 and as the Bid of Respondent No.2 was the lowest evaluated Bid, hence RITES Ltd. recommended to award the subject work to Respondent No.2 and further the Tender Committee of Respondent No. 1 NHSRCL upon evaluation recommended to award the Contract to Respondent No.2."*

14. Mr. Dewan also submits that out of the set of documents handed over in Court, during the course of hearing, only some form part of the Court record. The said set is referred to as 'Horizontal Sheets' for the sake of convenience. It is contended that the document filed at page 4 of the Horizontal Sheets shows three rubber stamps while the same document filed by respondent No. 2, along with the counter affidavit, shows a single stamp. He further submits that while the document at page 5 of the Horizontal Sheets, shows four stamps, the corresponding document at page 103 (Annexure R-2) does not show any rubber stamp at all. In view thereof, Mr. Dewan contends that little or no reliance can be placed on either the averments made in the counter affidavit before the Gujarat High Court or on the averments made in the counter affidavit before this Court. It is further submitted that it appears that the documents were acquired subsequently, therefore the same are not authentic. The entire exercise of tampering is writ large on the face of the record, thus making the entire process of awarding the tender suspicious and ridden with mala fides, illegalities and arbitrariness.

Reliance is placed upon the observations made by the Supreme Court in a decision rendered in the case of *Vidarbha Irrigation Development Corporation v. Anoj Kumar Garwala*, reported at 2019 SCC Online SC 89 wherein the Court examined a situation wherein along with the tender document, the bank guarantee of 42.14 lakhs was to be submitted for a period of forty months. In response to the tender, the L-1 had submitted a bank guarantee of 42.14 lakhs, but for a period of six months. Though the deficiency was subsequently made up, the Court, however, held that the words used in the tender document cannot be ignored or treated to be redundant or superfluous. Paragraphs 15 and 17 are reproduced as under: -

15. The law on the subject is well settled. In Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd., (2016) 8 SCC 446, this Court held:

“14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)

“6. ... 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.”

15. Similarly, in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi &

Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

“(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(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;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;...”

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.”

17. *It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.*

15. Reliance is also placed on the judgements in the cases of ***W.B. State Electricity v. Patel Engineering Co. Ltd.*** reported at (2001) 2 SCC 451, ***Poddar Steel Corporation v. Ganesh Engineering Works*** reported at (1991) 3 SCC 273, ***Tata Cellular v. Union of India*** reported at (1994) 6 SCC 651 and paras 66(i) and 66(ii) of ***B.S.N Joshi and Sons Ltd. v. Nair Coal Services Ltd.*** reported at (2006) 11 SCC 548.
16. Per contra, Mr. Gopal Jain, learned senior counsel appearing for respondent No. 1 submits that neither there is any illegality, impropriety or tampering with the documents, nor has any process been followed against the settled principles of law or against the tender conditions. Mr. Jain, submits that it has been a consistent stand of respondent No. 1 before this Court as well as before the Gujarat High Court that the letter of price bid was not submitted by respondent No. 2. However, in a multilayer examination system, respondent No. 2, being the L-1 and having been declared substantially responsive, was awarded the tender on 09.04.2019, and the same was declared to be a successful tenderer

even prior thereto, that is, on 09.01.2019, when the letter of acceptance was issued.

17. Mr. Jain submits that all the tenderers are expected to sign and submit the tender document, along with the financial bid. Admittedly, the petitioner and respondent No. 2 signed the tender document, which is a blank document containing many formats to be filled by the tenderers and submitted along with the financial bid and inter-alia the letter of price bid is one such document. Mr. Jain, clarifies that the counter affidavit filed before the Gujarat High Court refers to the documents forming part of the tender documents bearing the signatures and stamps of respondent No. 2, and the effect of the same is that both respondent No. 2 and the petitioner agreed and undertook to comply with all the conditions of the tender documents.
18. Mr. Jain submits that there is no infirmity in the decision-making process of respondent No. 1. Reliance has been placed on the original tender document submitted by respondent No. 2 which was examined and returned with the letter of price bid in the format provided in the tender document and duly signed by respondent No. 2. The same document was submitted with the blanks as it was only a format, however, the blanks were filled up and duly submitted with the financial bid and which is an admitted document containing the figures which were to be provided in the letter of price bid; the Evaluating Committee at the RITES merged the two documents. The conditions of letter of intent mentioned in the undertaking bearing the signatures of respondent No. 2 and the blanks which were to contain the price figures

have been accepted from a separate document, which forms part of the price bid. The said separate document, at page 541, is scanned and produced below:-

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(114)

Project: Construction of Saharanpur RRTT Terminal for
 Shriharpur-Kanwarwal High Speed Railway Project
 Package No. HHRCL/CO/SB/HUB/28187

Bidding Documents - Volume 3-3G
 Section 3: Financial Submittal

4.3 Schedule No. 3: Grand Summary

General Summary		Amount(INR)
Schedule No. 1: Net Bid Price (Para 4.1 above)	(A)	328,00,00,000.00
Schedule No. 2: LUMP SUM PROVISIONS - Additional Works (Para 4.2 above)	(B)	4,50,00,000.00
Bid Price (A+B)	(C)	332,50,00,000.00

Subject: The above amount is in Rupees only. The Bid Price quoted above is as per Clause 5.1.7 of Price Schedule.

Bidder's Representative:

Signature: 
 Name: PRADEEP SHARMA
 Position: AUTHORIZED SIGNATORY
 Date: 17th October, 2018
 Company: B.L. KASHYAP AND SONS LTD.
 Company stamp: 

19. It is submitted that the above scanned document, indisputably shows the signatures of one Shri Pradeep Sharma along with the rubber stamp, whereas this very document handed over in court, along with the horizontal sheets, shows three rubber stamps and two signatures on the

submitted that the allegations made with regard to stamps being missing or documents accepted from the backdoor are false and scandalous as respondent No.1 is a Public Sector Undertaking. Mr. Jain also relies upon the format of payment schedule, which was part of the tender document and submits that although this format was filed as blank, however, the schedule No.1 of this document, was filed with the final bid and it is for this reason that the three layer Scrutinizing Committee declared the bid of respondent No. 2 as substantially responsive. Mr. Jain relies on Clause 18.3 which we reproduce below: -

“To submit that it was option for a bidder to add breakdown of items and provide the prices in each price schedule included in Section 4 of the bidding form. In the case of the Respondent No. 2, the Respondent No. 2 had provided the lump sum amount.”

21. Mr. Jain, has placed reliance on ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another***, (2016) 16 SCC 818, to submit that while exercising power of judicial review, the courts would be slow to interfere with the decision unless the decision is arbitrary or irrational. Reliance is also placed on paragraphs 11, 15, and 16 as reproduced as under:

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is

intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

Xxx

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."*

22. In support of aforementioned contentions, reliance is placed on the case of ***Central Coalfields Limited and Another vs. SLL-SML (Joint***

Venture Consortium) and Others, (2016) 8 SCC 622, more particularly para 43, which is reproduced as under: -

“43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. 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.”

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517], SCC p. 531, para 22)

“22. ... 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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

23. Mr. Jain also placed reliance on para 66(v) of ***B.S.N. Joshi & Sons Ltd*** (*supra*) to highlight the scope of judicial review in comparison to the public interest, public money involved and also the power of general relaxation. Relevant para 66 is reproduced as under: -

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(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;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court

otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

24. Reliance is also placed on para 22 in the case of ***Mandal vs. State of Orissa***, (2007) 14 SCC 517, to highlight that it is not for the Court to decide whether the decision taken is sound and the job of the Court is only to examine whether the decision taken is lawful. Para 22 reads as under: -

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. 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. 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";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving

blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

25. Reliance is also placed on paragraphs 19, 20 and 25 of a recent decision of the Apex Court in the case of ***The Silppi Constructions Contractors v. Union of India and Anr*** reported at 2019 SCC Online 1133 Reliance is also placed on ***M/s Selex Sistemi Integrati, SPA v. Union of India & Ors.***, reported at 2011 SCC Online Del 4210, para 33, which is reproduced hereunder: -

“33. In State of NCT of Delhi v. Sanjeev (alias Bitto), (2005) 5 SCC 181, while dealing with the scope of judicial interference in matters of administrative decisions, the Apex Court has held that the authority must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.”

26. Mr. Jain submits that once the letter of intent was issued as far back on 09.01.2019 in favor of respondent No. 2 and thereafter on 09.04.2019, the work was awarded. Mr. Jain further submits that as respondent No. 2 has already commenced the foundation work and have released more than six crores, it would certainly not be in public interest to delay the project, assuming without admitting that there is any procedural infirmity in awarding the tender.

27. We have heard learned senior counsels for the parties and have carefully examined the terms and conditions of the tender and the rival contentions of the learned senior counsels appearing in the matter.
28. The law is well settled that Courts intervention in a decision rendered by administrative bodies is warranted only if the said decision suffers from arbitrariness or irrationality. Reliance is placed on the decision of the Supreme Court in the case of ***The Silppi Constructions Contractors*** (supra), more particularly paras 19 and 20, which are reproduced as under:

“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.”

29. Mr. Dewan, learned Senior Counsel for the petitioner has labored hard to contend that in spite of the fact that respondent No.2 was the lowest bidder, the tender could not have been awarded to respondent No.2 for the reason that the bid of respondent was non-responsive. Mr. Dewan has submitted that submission of letter of price bid with seal and signature of the bidder is an essential condition of the tender and not having submitted the same would make the bid non-responsive. It is also the case of the petitioner that the documents which are sought to be produced are not reliable as the document initially produced had one stamp while the document subsequently produced contains two stamps. It is also contended that there is contradiction in the counter affidavit

filed before the Gujarat High Court and the stand taken by the respondent in this Court.

30. Mr. Jain, learned Senior Counsel for the respondent has fairly submitted that although the letter of price bid was not submitted by respondent No.2, however, in a multi-layer examination system, respondent No.2 being L1, was declared substantially responsive and was awarded the tender. LOA was issued as far back as on 09.01.2019. Mr. Jain has explained that the original tender documents of respondent No.2 was returned with the letter of price bid in the format provided in the tender document and was also duly signed by respondent No.2. The same document was submitted blank as it was only a format. However, the blanks were filled subsequently and the document was duly submitted with the financial bid containing figures which were to be provided in the letter of price bid. The Evaluation Committee at RITES examined the two documents together. The conditions of letter of intent mentioned in the undertaking bears the signatures of respondent No.2 and the blanks which were to contain the price figures have been accepted from a separate document, which forms part of the price bid. The documents relied upon have been scanned in aforementioned paras 17 and 18.
31. The decision-making process has been examined by this Court as is reflected in the Minutes of the Evaluation Committee, which examined the documents in the Financial Evaluation Committee Meetings held on 22.12.2018 and 27.12.2018 at RITES Gurgaon. At the cost of repetition, we extract the relevant part of the Minutes, which reads as under:

“2.2.1 Part I Evaluation

- v) *All the Price Bids does not include any alternation to the basic terms and does not constitute an alternative offer.*
- vi) *All Forms and Price Schedules have not been altered.*
- vii) *As per financial bid opening details (Appendix-3), M/s. B.L. Kashyap and Sons Ltd. have not submitted letter of PRICE BID and CD for the offer, as per ITB 22.1 and Stage 5 of Vol I (1/3) Pg 32. TEC observed that M/s. B.L. Kashyap and Sons Ltd. have submitted tender documents duly signed on all pages as token of acceptance of tender conditions. He has submitted Section 5 – Financial submission of tender documents containing PRICE BID letter, price schedule and Payment schedule, duly signed. Hence, they have accepted all the term and conditions of the price bid. As per letter of Technical bid, bid validity of 120 days along with Addendum No. 1 and Corrigendum 1,2 & 3 have been accepted. There are no other special conditions in letter of PRICE BID. As they have submitted the PRICE BID rates duly signed. Tender evaluation committee feels financial submission as acceptable. They have not submitted CD for the financial offer, which is also not a major omission to bypass the offer.*

The above omissions have also been represented by M/S Cube Construction Engineering Ltd. (3/5) vide their letter Package No. NHSRCL/CO/SBI-HUB/2018/10 dated 14.12.2018 (Appendix-4). Tender evaluation committee (TEC) has gone through the contents of the letter and deliberated. As discussed above by TEC, it is felt that financial

submission by M/s B.L. Kashyap and Sons Ltd is complete and acceptable.

viii) M/S Cube Construction Engineering Ltd. (3/5) has not submitted CD along with copy of Price bid. CD has been submitted with Original Bid. This is acceptable.”

32. We find the explanation given by the learned senior counsel of the respondent to be reasonable and acceptable and find no fault in the decision-making process which would require interference in these proceedings. In the case of ***Central Coalfields Limited and Another*** (supra), which has been extracted in para 21 above, the Supreme Court, in para 43, has held that “*if an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation.*”
33. We are unable to accept the contention of Mr. Dewan that the documents are not authentic and reliable. We have scanned the documents in aforesaid paras 17 and 18. In para 17, the document shows one stamp, while in para 18 the document shows two stamps. We find force in the explanation rendered by Mr. Jain that the document such as Document ‘B’, scanned in para 18, is the final document and forms part of the contract. In view of the above discussion, we find no infirmity in the decision-making process, which would require interference.

34. For all the reasons stated above, we find the writ petition to be without any merit, the same is accordingly dismissed.

CM. Appls 16007/2019, 19560/2019 & 33954/2019

35. In view of the order passed in the writ petition, the applications stand dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

NOVEMBER 19, 2019

pkb/pst//

