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

Reserved on: 22nd November, 2018
Pronounced on: 15th January, 2019

\+ W.P.(C) 9151/2018 with CM APPL. 35293/2018, CM APPL. 47952/2018 & CM APPL. 47954/2018

L AND T HYDROCARBON ENGINEERING LTD. ..... Petitioner

Through: Dr. A.M. Singhvi, Sr.Adv. with Mr.Rishi Agrawala, Mr. Karan Luthra & Ms.Nidhi Ram, Advs.

versus

OIL AND NATURAL GAS CORPORATION LTD. AND ORS. ..... Respondents

Through: Mr. Sandeep Sethi, Sr. Adv.with Mr.Sunil K. Jain & Mr.Punya Garg, Advs.
Mr.Salman Khurshid, Sr. Adv. with Mr.Manu Seshadri, Mr. Arjun Syal, Mr.Samarth Chowdhary, Ms.Tanvi Rana, Mr.Shreyan Das, Ms.Mitali Chauhan & Ms.Sakshi, Advs. for R-2.
Mr.Aryama Sundaram, Sr. Adv. with Mr.Rahul P. Dave & Mr.Sumit Chopra, Advs. for R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

MR.JUSTICE PRATEEK JALAN

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1. This writ petition concerns a tender floated by the first respondent, Oil and Natural Gas Corporation Ltd.(hereinafter, "ONGC") for the design, engineering, construction, fabrication,

installation and commissioning of various facilities (including a Central Processing Platform and Living Quarters and Utilities) at one of its offshore platforms. The petitioner, L&T Hydrocarbon Engineering Ltd. (hereinafter, "L&T") is part of a consortium (with the fourth respondent, McDermott Asia Pacific Pvt. Ltd.) which participated in the tender. The second and third respondents, Afcons Infrastructure Ltd. (hereinafter, "Afcons") and Sapura Fabrication SDN BHD (hereinafter, "Sapura") formed another consortium. By way of this petition, L&T contends that the Afcons/ Sapura consortium (hereinafter, "ASC") was not technically qualified to participate in the tender, and its bid ought to have been rejected at the threshold.

2. The tender was issued on 24.11.2016, and amended on 06.04.2017 in accordance with circulars dated 01.03.2017 and 03.04.2017 issued by ONGC. Three parties (the petitioner's consortium, ASC and one other bidder) participated. (Although the petitioner's bid was initially not accepted, it was ultimately permitted to participate by virtue of an order of this Court dated 25.05.2018 in W.P. (C) No. 1429 of 2018.) By a letter dated 28.08.2018, ONGC stated that the petitioner's consortium and ASC had been shortlisted for opening of their price bids. This communication has been challenged by L&T in the present petition.

3. The stipulation of the tender documents relevant for the adjudication of this petition are referred to below:

(a) Clause 14.1 of the Instructions to Bidders:

"14.0EXPERIENCE/CAPABILITY OF THE BIDDER

14.1 TECHNICAL

Bidder is required to comply with the requirements of Section A-2 of Bid Evaluation Criteria at Appendix-A6 for this section. The bidder shall submit the documentary evidence in support of his experience/capability as required above along with technocontractual (Unpriced) bid."

(b) Clause 23.1 and 23.2 of the Instructions to Bidders:

"23.0 EVALUATION

23.1 The Company wishes to finalize the award of work of the facilities covered under this Bidding Documents within a limited time schedule. ONGC expects bidders to confirm compliance to tender term, conditions & Specifications, which shall stand frozen after Pre-Bid Conference, failing which the Bids are liable to be rejected. Hence the bidders in their own interest are advised to submit their bids complete in all respects conforming to all terms and conditions of the bid document.

Bids shall be evaluated based on the information/documents available in the bid. Hence bidders are advised to ensure that they submit appropriate and relevant supporting documentation along with their proposal in the first instance itself. Bids not complying to the requirements of bid documents are liable to be rejected. Bidders are advised to fill up Appendix A-9 carefully and provide reference to all relevant documents given in their bid offer. Bidders are advised to note that the sub-contractors/ agencies/barges listed in the bidder's Bid, shall be evaluated in terms of the experience criteria stipulated in the BEC. Therefore, the bidders in their own interest are requested to select the subcontractors/agencies/barges conforming to the criteria stipulated therein. Prior to opening of price bids of short listed bidders, the acceptable subcontractors/

agencies/ barges shall be intimated to the respective bidders and the decision of Company shall be final. Any exception to this information shall render their offer disqualified and in such an event their bid bond shall be forfeited.

23.2 Apart from commercial and technical requirements set forth in the Bidding Documents, the evaluation of bids shall be carried out on the basis of Bid Evaluation Criteria at Appendix-A-6 of Bidding Documents."

(c) The technical parameters for evaluation of the bid were contained in Section A-2 of the Bid Evaluation Criteria (Appendix A-6). Clauses 5.1 to 5.4 thereof provided as follows:

"5.1 The Bidder must possess, prior to the dead line of submission of bids, experience of having executed as EPC turnkey contractor at least one (1) new Offshore Oil or Gas process Platform and successfully accomplishing activities such as project management, design & detail engineering, procurement, fabrication, transportation, installation, hook-up, testing pre-commissioning and Commissioning. These project related activities should have been completed in one or more than one EPC projects with following complexities in last ten years:

1. The jacket with four or more legged configuration and major topside facilities similar to that of Central process platform in the tender document.

5.2 The Bidder (being either a single Bidder or a Consortium / Joint Venture comprising of two or more partners being jointly and severally liable to the Company) must himself (and not through collaboration agreement or other subcontracts) have the experience for project management and for at least one of the following main activities in a *new offshore Oil or Gas Process Platform Project, having the jacket with four or more legged configuration and major topside facilities similar to that of the central process platform in the tender document:*

a. Fabrication of Jacket or Deck of process platform.
b. Installation of Jacket or Deck of process platform. (Specific to the option offered at Clause A-2.2.0 above)

5.3 The overall responsibility of project management of entire project shall be that of the Contractor. Contractor shall also be required to perform by themselves and not through subcontracts, project management and at least one of following main activities based on which they are seeking their qualification:

a) Fabrication of jacket or deck of process platform.
b) Installation of jacket or deck of process platform (Specific to the option offered at Clause A-2.2.0 above).

5.4 Save as sub Para 5.3 above, for the purpose of assessment of experience and capability of executing the Work, the experience and capability of the executing agencies i.e. main bidder, Consortium/Joint Venture partners, sub-contractors, back-up Consultants, if any, in executing the aforesaid activities listed in sub-para 5.1 above and indicated in Appendix B5 and Appendix B6 for the respective Scope of Work, shall be evaluated.

The respective agencies are required to have relevant experience as indicated in Para 5.2 above."

(d) By an internal circular dated 03.04.2017, ONGC modified the provisions relating to experience criteria to be incorporated in lump sum turnkey contracts. Pursuant to this circular, on 06.04.2017, it amended some of the technical evaluation criteria in the subject tender. With regard to consortium bids, Clause 14.0 was added to Section A-2 of Appendix A-6, which was in the following terms:

14.0	***<u>Consortium Bids</u>***
14.1	*Where consortium bids are allowed, leader of consortium should himself meet the major portion of the experience criteria covering the activities of work to be performed by him in term of bid value in comparison to other members of the consortium, on its own and not through any other arrangement like through Supporting Company, Parent / Subsidiary /Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub-contracting. (e.g. in case of a Consortium bid having two members, the consortium member who has more than 50% stake (in terms of the bid value) shall be the leader of the Consortium, and in case of a Consortium bid having three members, the leader of the Consortium should have more than 33.33% stake (in terms of bid value) in the Consortium). Necessary documentary evidence to this effect should be submitted with techno-commercial bid.* *For this purpose the role and scope of work of each consortium member including the percentage of work to be performed by the respective consortium members should be attached/annexed with the Memorandum of Understanding in the un-priced bid.* *Other consortium partner(s) shall have relevant experience pertaining to the activities of work to be performed by them*

	on their own and not through any other arrangement like through Supporting Company, Parent / Subsidiary / Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub-contracting, (other than the activity to be performed by leader of consortium).Necessary documentary evidence to this effect should be submitted with techno-commercial bid.
14.2	*The leader of the consortium should confirm unconditional acceptance of full responsibility of executing the entire 'Scope of work' of this tender. This confirmation should be submitted along with the techno-commercial bid.*
14.3	*A constituent of the Consortium shall not be permitted to participate either in an individual capacity as a bidder or as a member of another Consortium in the same tender.*
14.4	*Only that consortium member who has undertaken a particular activity in execution of a contract shall be considered as having technical experience of that particular activity.*
14.5 *14.5.1* *14.5.2*	*The overall responsibility of project management of entire project shall be that of the leader of the consortium.* *Successful bidder/Contractor shall be required to perform by themselves (and not through any other arrangement like through Supporting Company, Parent / Subsidiary / Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub contracting) project management and at least one of main activities based on which they are seeking their qualification.* *In case of Consortium bids, all consortium partner(s), other than the Leader of consortium, shall also be required to perform by themselves (and not through any other*

	arrangement like through Supporting Company, Parent / Subsidiary / Sister Subsidiary / Co-Subsidiary / Technical Collaboration / Sub-contracting) one of the project activities on which they are 14.5.2 seeking their qualification (other than the activity(ies) indicated by the Leader of consortium to be performed by Leader).

(e) A further circular dated 23.02.2018 was issued by ONGC after the last date for submission of bids in the subject tender, viz. 05.02.2018. By this circular, the minimum fulfillment required of the leader of a consortium bidder was reduced from 50% of the contract value to 26%. Some provisions relating to the required documentation for this purpose were also modified.

4. The principal contention urged by Dr. Abhishek M. Singhvi and Mr. Gourab K. Banerji, learned Senior Counsel for L&T, was that Afcons, as the leader of ASC, did not possess the requisite experience of the main activities within the scope of work of the tender, and also was not entrusted with these tasks in terms of the ASC bid. They submitted that, on a proper interpretation of the above-referred provisions of Appendix A-6, the special provisions of Clause 14 ought to prevail over the general provisions of Clause 5; consequently, the leader of the consortium was required to possess more than 50% stake in the experience and the execution of the work under the subject tender. They expressed an apprehension that ONGC had in fact applied the subsequent circular dated 23.02.2018 to the present case as well, and thus qualified ASC on the basis that 26% of the experience

criteria and the scope of work was required to be fulfilled by the leader of a consortium, rather than 50%.

5. Mr. Sandeep Sethi, learned Senior Counsel appearing for ONGC, on the other hand, submitted that the "stake" referred to in Clause 14.2 means value of the work required to be preferred by the leader of the consortium. He referred to the counter affidavit filed by ONGC to contend that Afcons, which was designated as the leader of ASC, did in fact have experience in the work of project management, and Sapura in fabrication of the jacket or deck of the process platform. According to ONGC, ASC thus met the requirement of Clause 5.2. Mr. Sethi also produced the original record to demonstrate that the process of evaluation was undertaken in accordance with the published evaluation criteria, and not by applying the subsequent circular dated 23.02.2018. In his submission, it was only the documentation criteria contained in the said circular that was made applicable to pending tenders (by another circular dated 19.04.2018), and not the substantive eligibility conditions. Mr. C.A. Sundaram and Mr. Salman Khurshid, learned Senior Counsel appearing for Sapura and Afcons respectively, supported the submissions advanced by Mr. Sethi, and also emphasized that the tender had been awarded to ASC at a substantially lower price than that offered by the L&T-led consortium.

6. Before examining the clauses of the tender in detail, and applying those to the facts of the case, it is important to outline the scope of judicial review in these matters. Both in the interpretation of

tender conditions, and in the evaluation of bids submitted, it is the tendering authority which is the appropriate decision-maker. The courts' intervention is warranted only in the face of mala fides, or perversity or manifest irrationality in that decision-making process. Four recent judgments of the Supreme Court have placed this proposition beyond debate. In *Central Coalfiels Ltd. and Anr. v. SLL-SML (Joint Venture Consortium) and Ors.,* (2016) 8 SCC 622, the Supreme Courts relied on its earlier judgments in *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 and *M/s Michigan Rubber (I) Ltd. v. State of Karnataka* (2012) 8 SCC 216 and held that the soundness of a decision taken by an employer (tendering authority) may be questioned only if it is irrational or malafide or intended to favour someone or it is a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached". The Supreme Court, therefore, cautioned against the Court's taking over the decision making function of the employee. In *Afcons Infrastructures Ltd. v. Nagpur Metro Rail Corp. Ltd.* (2016) 16 SCC 818, the Court was concerned particularly with a dispute relating to the interpretation of tender documents, and held as follows:-

> *"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."

The judgment in *Afcons* has been followed in *Montecarlo Ltd. vs NTPC Ltd.* (2016) 15 SCC 272 and *Consortium of Titagarh Firema Adler v. Nagpur Metro Rail Corporation Ltd.* (2017) 7 SCC 486. Considering the nature of the work being tendered in the present case, the following observations of the Court in Montecarlo are also apposite:-

> *"26. …… In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review*

would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

7. In the light of these authorities, it is necessary to first appreciate ONGC's interpretation of Clauses 5 and 14, and then to test this interpretation against the parameters laid down by the Supreme Court. For this purpose, we have perused the original record produced by Mr.Sethi, which has also been summarized in the counter affidavit filed by ONGC to the original writ petition and the additional affidavit to the amended writ petition. With regard to Clause 5.2, in its counter affidavit 12.09.2018, ONGC has stated as follows:-

"Therefore, as per the requirement of the aforesaid clause, the above experience is to be met by the consortium partners together in case of a consortium bid. It is submitted that in the present tender, the Consortium consisting of Respondents 2 & 3 are meeting the requirement in the way that the leader i.e. Respondent no. 2 meets the experience requirement of Project Management and the other consortium partner i.e.

> *Respondent no. 3 meets the experience requirement of Fabrication of Jacket of Process Platform. Hence Consortium of Respondents 2 and 3 as a bidder meet the requirement of the clauses."*

Referring to Clauses 5.3, 14.5, 14.5.1 and 14.5.2, the stand taken by ONGC is as follows:-

> *"It is submitted that the term "contractor" in the above clause means the successful bidder and not the lead member of the Consortium. Therefore, the consortium as a whole is required to perform project management and one of main activity based on which it has sought qualification. In the present tender, Respondent no. 2 (as leader of consortium) is to undertake the Overall responsibility of Project Management and Fabrication of jacket of Process Platform is to be carried out by Respondent no. 3. It is further submitted that in accordance with Clause 14.5 of the BEC the bidder has given an undertaking that the leader i.e. Respondent no. 2 will undertake overall responsibility of Project Management of the entire project and for completing the job. It is further submitted that in accordance with clause 14.5.1, Respondent no. 2 is qualified for performing Project Management and Respondent no. 3 is qualified for carrying out Fabrication of jacket and it has been confirmed that they will be carrying out these activities by themselves and hence as a consortium, the bidder meets the requirement as per this clause."*

ONGC has dealt with the requirement of Clause 14.1 by confirming that Afcon's stake (51.7%) is more than 50% of the bid value, as required for the leader of the consortium. In its additional affidavit dated 27.10.2018, ONGC has clarified the position in the following terms:-

"It is submitted that for the purpose of Clause 14.1, what is required to be compared is the activities to be performed as mentioned in Para 5.1 (Appendix-A-6) of the BEC, which the leader of the consortium shall himself perform in comparison with the activities that the other member of consortium shall themselves perform. On such comparison the leader for the purpose of Para 14.1 should be performing himself a major portion of such activities in terms of bid value. In the sense, the portion to be done himself by the leader should be greater than the portion done by other consortium members."

According to ONGC, ASC has divided the work of fabrication between Afcons and Sapura; the fabrication of the jacket being within the experience and domain of Sapura, while other fabrication activities were to be performed by sub-contractors of Afcons, whose experience has also been evaluated and found acceptable. This has been further clarified in the additional affidavit dated 27.10.2018 filed by ONGC:-

"Therefore, as per the Clause 5.2 of the BEC, for the above mentioned activities, experience may not be necessarily of the bidder himself. The bidder can choose other agencies having requisite experience to perform the activity which is evaluated as per Clause 5.4 of BEC. In the MoU dated 26.12.2017 (already marked as Annexure P-8; Pg. 526-540) executed between Respondent Nos. 2 and 3, Fabrication activity has been indicated to be within the responsibility of both the partners. In this regard, the responsibility of Fabrication of main activity i.e. Fabrication of Jacket of Process platform along with some of the other fabrication activities have been taken up by the Respondent No. 3, while the remaining fabrication activities have been taken by the Respondent No. 2 through subcontractors having requisite experience,

which is permissible for all bidders including Petitioner as per the tender requirements."

8. We do not find the construction placed on the tender document by ONGC to be irrational or perverse. Clauses 5 and 14 are, in our view, capable of being read in the manner propounded by ONGC for the following reasons:-

(a) Clause 5 relates to the experience and prospective performance by "bidders" or "contractors". As consortiums were permitted to bid in the subject tender, the said clause would apply to the consortium as a whole, and does not place any specific requirement on a particular member of the consortium. For example, Clause 5.1 requires the consortium to have experience of the work stipulated therein. Clause 5.2 specifically refers to consortiums as one of the permissible categories of bidders, and requires that experience of project management and one of the enumerated "main activities" must be possessed by the bidder (i.e. the consortium) and not by a third party (under a collaboration agreement or subcontract). By virtue of Clause 5.3, these activities have to be performed by the consortium itself. Clause 5.4 makes it clear that the experience vis-à-vis any part of the scope of work should be assessed in respect of the agency which is expected to perform that particular part of the work.

(b) In contrast to Clause 5, Clause 14 applies specifically to consortiums and imposes certain requirements specific to consortium bids. The requirement in Clause 14.1 that the experience of the leader should be relatable to the "major" proportion of the bid value has been interpreted by ONGC to mean that the leader's stake in the bid should be higher than that of other consortium partners. This is also a possible construction, and is supported by a reading of the "example" which follows these words in Clause 14.1: so long as the leader of a two-member consortium is the party which has at least a 50% stake in the bid value, it is that member which much possess the corresponding experience. For this purpose, Clause 14.1 also requires consortium bidders to spell out clearly at the outset the role, scope of work, and percentage of bid value which is to be entrusted to each of the members. Clause 14.4 clarifies that the experience requirement would be assessed on the basis of the particular activity in question. Clause 14.5 vests the activity of project management in the leader of the consortium. Clause 14.5.1 reiterates, specifically in the context of consortium bids, the requirements of Clause 5.3. Clause 14.5.2 also requires performance by the consortium members (other than the leader) of the part of the contract on the basis of which they were seeking qualification.

(c) Viewed thus, the provisions of Clauses 5 and 14 are capable of being read together, as ONGC has done. We are, therefore, not required to address the petitioner's contention that Clause 14 would prevail over Clause 5 in cases of consortium bids. The consortium must have experience in the work specified in Clause 5.1. It must itself perform the activities of project management and one of the other enumerated "main activities". These must be executed by the consortium members without reliance on third party arrangements, and each of them must also possess the corresponding experience. The leader of the consortium must have a higher stake in the contract (in terms of bid value) than the other member(s), and itself execute the task of project management. The activities to be undertaken by each of the consortium members must be pre-decided, and experience will be assessed on the basis of the activity in question.

(d) ONGC has specifically evaluated the "stake" of Afcons at more than 50% of the bid value on its interpretation of Clause 14.1. The apprehension of the petitioner that the reduced requirement (26% stake) contained in the subsequent circular dated 23.02.2018 has been applied to the present tender, is therefore misplaced.

9. For the reasons aforesaid, we are of the view that the writ petition is without merit. It is accordingly dismissed, but without any order as to costs.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

JANUARY 15, 2019
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