

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment reserved on: 05.01.2021
% Judgment delivered on: 23.03.2021
+ **W.P.(C) 8845/2020 and CM APPL. Nos.28416/2020 & 33281/2020**

DSPC ENGINEERING PVT LTD Petitioner

Through: Mr. Raman Gandhi, Advocate.
versus

MECON LTD Respondent

Through: Mr. Sanjay Jain, ASG along with
Ms.Manmeet Arora, Ms. Pavitra
Kaur, Mr. Harkirat Singh &
Mr.Yuvraj Sharma, Advocates for
respondent No.1.
Mr. Sacchin Puri, Senior Advocate
with Ms. Purnima Maheshwari,
Advocate for respondent No.2/ GAIL.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

J U D G M E N T

VIPIN SANGHI, J.

1. The issue that arises for consideration in this writ petition under Article 226 of the Constitution of India is: Whether the policy decision of the Government of India, which requires that any bidder from a Country which shares land border with India should register with the Competent Authority, is attracted in the case of the petitioner. The above issue arises for consideration in the following background:

2. The petitioner company is registered with the Registrar of Companies, Delhi, also having registration under the Micro, Small and Medium

Enterprises Development Act, 2006. It carries on its business of executing contracts for installation of pipelines for oil and gas sector in India, for Indian Oil Corporation Limited. The case of the petitioner is that the respondent namely, Mecon Ltd. – which is a project management consultant of GAIL India Limited, issued an advertisement inviting bids for E-Tender No. 8000016825 for laying pipeline, and associated works of 36” Inches x 112.500 km under Dhamra-Angul Pipeline Project of Jagdishpur-HaldiaBokaro- Dhamra Pipeline Project (JHBDPL) PH-II, on or about 02.07.2020. The tender work was split into 3 Sections, namely Section I, II and III. The petitioner submitted its bids for Section II, with which we are concerned.

3. The case of the petitioner is that Section II of the invitation to bid, “Clause A”, relates to Technical Criteria. It, *inter alia*, lays down the Experience Criteria. Admittedly, the petitioner claimed technical competence to offer its bid by relying on the Explanatory Note (iii) to Clause A in the Technical Criteria. Since the same is relevant, we reproduce the Technical Criteria contained in Clause A, as well as the “*Note to A*” which reads as follows:

**“BID EVALUATION CRITERIA & EVALUATION
METHODOLOGY**

A. Technical Criteria

A.1 *The bidder should have successfully executed / completed in last 10 (Ten) years to be reckoned from the bid due date, at least one single contract (*) involving laying / installation, testing of buried cross country hydrocarbon steel Pipeline of diameter and length as given below for qualifying for the quoted section(s):*

<i>For Section-I</i>	<i>Minimum 16 Km of Dia. 18" OD or above in a single stretch.</i>
<i>For Section-II</i>	<i>Minimum 14 Km of Dia. 18" OD or above in a single stretch.</i>
<i>For Section-III</i>	<i>Minimum 15 Km of Dia. 18" OD or above in a single stretch.</i>

() In case more than one contract are emanating against one tender, these contracts are to be considered as single contract for evaluation of credentials of a bidder for meeting their experience criteria.*

Bidders who intend to qualify for more than one section shall meet the qualifying requirement on cumulative basis for the quoted section(s).

- A.2 *In case the bidder has an experience as a consortium member and such a member has executed earlier a job within its scope as a member of the consortium, which is required as experience as per the qualification criteria in clause no. A.1, will be considered. Appropriate documentary evidence to establish this is to be submitted towards such experience.*

A.3 EQUIPMENT DEPLOYMENT CRITERIA

Bidder shall meet the minimum construction equipment requirement as specified in Annexure-9A of the bidding document. Bidders who intend to qualify for more than one Section shall meet the cumulative requirement for construction equipment specified for individual section.

Note to A:

- (i) *A Job executed by a Bidder for its own plant/ project cannot be considered as experience for the purpose of meeting BEC of this Tender Document. However, jobs executed for Subsidiary/Fellow subsidiary/ Holding*

company will be considered as experience for the purpose of meeting BEC subject to submission of tax paid invoice (s) duly certified by Statutory Auditor of the Bidder towards payments of statutory tax in support of the job executed for Subsidiary/Fellow subsidiary/Holding company. Such Bidders to submit these documents in addition to the documents specified to meet BEC.

- (ii) Consortium bids are not acceptable.*
- (iii) Eligibility criteria in case bid is submitted on the basis of technical experience of FOREIGN BASED ANOTHER COMPANY(SUPPORTING COMPANY) which holds more than fifty percent of the paid up share capital of the bidder company or vice versa:*

Offers of those bidders (not under consortium arrangement) who themselves do not meet the technical experience criteria as stipulated in the BEC and are quoting based on the experience of Foreign based another company (Supporting Company) can also be considered. In such case the supporting company should hold more than fifty percent of the paid up share capital of the bidding company or vice versa.

However, the supporting company should on its own meet the technical experience as stipulated in the BEC and should not rely on any other company or through any other arrangement like Technical collaboration agreement.

In that case as the bidding company is dependent upon the technical experience of another company with a view to ensure commitment and involvement of the companies involved for successful execution of the contract, the participating bidder should enclose the following Agreements/ Guarantees/ Undertakings along with the techno-commercial bid:

- (i) *An Agreement (as per format enclosed at Format F-24) between the bidder and the supporting company.*
- (ii) *Guarantee (as per format enclosed at Format F-25 & 25 A) by the supporting company to GAIL for fulfilling the obligation under the Agreement.*
- (iii) *Undertaking by Supporting Company to provide a Performance Bank Guarantee (as per format and instructions enclosed at Format F-26), equivalent to 50% of the value of the PBG which is to be submitted by the bidding company, in case of being the successful bidder.*

In cases where foreign based supporting company does not have Permanent Establishment in India as per Indian Income Tax Act, the bidding company can furnish Performance Bank Guarantee for an amount which is sum of PBG amount to be submitted by the bidder and additional PBG amount required to be submitted by the supporting company subject to the condition that supporting company have 100% paid up equity share capital of the bidder either directly or through intermediate subsidiaries or vice versa.

In such case bidding company shall furnish an undertaking that their foreign based supporting company is not having any Permanent Establishment in India in terms of Income Tax Act of India.

- (iv) *Undertaking from the supporting company to the effect that in addition to invoking the PBG submitted by the bidding company, the PBG provided by supporting company shall be invoked by GAIL due to non-performance of the bidding company.”* (emphasis supplied)

4. The petitioner claimed to achieve the Technical Criteria for Section II on the premise that its 100 % subsidiary company – M/s. Shandong Kunyu Pipeline Engineering Co. Ltd. (SKPECL) has the requisite Technical Experience. Consequently, while making its bid, the petitioner produced the requisite agreements/ undertakings in Format F-24 between the petitioner and the supporting company, namely SKPECL; the guarantee as per the Format F-25; and, Format F-25A by the supporting company SKPECL to GAIL for fulfilling the obligations under the agreement. The petitioner also gave the undertaking by the supporting company to provide a Performance Bank Guarantee as per the Format and instructions contained in Format F-26, equivalent to 50 % of the value of the PBG which was required to be submitted by the petitioner – being the bidding company. The petitioner claims to have fully complied with the requirements of “*Note to A (iii)*” aforesaid.

5. The respondent issued a Corrigendum dated 04.08.2020 to the tender in question, whereby a new clause was introduced regarding “*provision for procurement from a bidder which shares a land border with India*”. The petitioner states that as per this order released by the Ministry of Finance, Government of India, any bidder from a country which shares land border with India will be eligible to bid in the tender, only if the bidder is registered with the Competent Authority.

6. The respondent vide communication dated 09.09.2020 sought clarification/ confirmations/ documents in relation to the petitioner’s bid. The respondent stated that in respect of the petitioner’s experience, it had submitted documents to claim experience in “*Guizhou Province Zunyi-*

Hehang Natural Gas Branch Pipe Project (Section-I) of M/s Bijie Kunlun Natural Gas Co. Limited". The respondent went on to state "Please note that as per submitted Format F-1 (Bidder's General Information) Bidder's name is M/s DSPC Engineering Private Limited. However, all the documents related to technical BEC are in the name of M/s Sichuan Sedar Energy Development Co. limited (Main Contractor)/ M/s Shandong Kunyu Pipeline Engineering Co. Ltd. (Sub-contractor). Please Clarify.

- *Please Clarify the relation between M/s DSPC Engineering Private Limited and M/s Sichuan Sedar Energy Development Co. limited (Main Contractor)/ M/s Shandong Kunyu Pipeline Engineering Co. Ltd. (Sub-contractor).*
- *Eligibility criteria of foreign based supporting company does not meet to the BEC Requirement as per BEC Note A(iii)."*

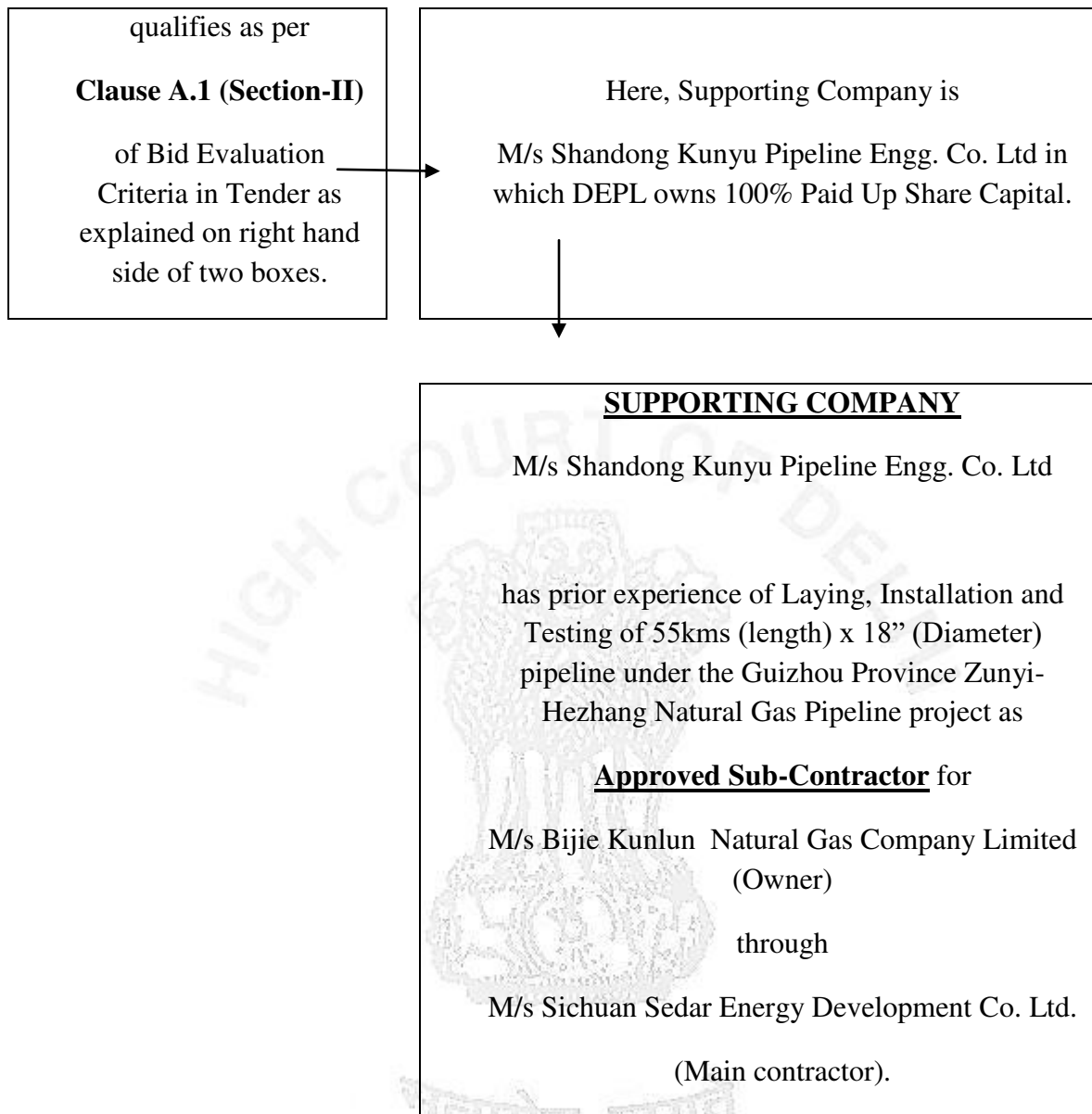
7. The petitioner states that it responded to the said communication on 15.09.2020, and even thereafter, and the stand taken by it was that the requirement introduced by the Corrigendum was not attracted in its case, since the petitioner is an Indian Company. SKPECL was only a Supporting Company in terms of the tender requirement. The petitioner, inter alia, stated as follows:

"TECHNICAL

Pertaining to BEC

1. Clause A of BEC, regarding Technical Criteria is complied with as under:

<u>BIDDER</u> DSPC Engineering Private Limited (DEPL)	Clause A. Technical Criteria/ Note To A(iii): Eligibility criteria in case bid is submitted on the basis of technical experience of FOREIGN BASED ANOTHER COMPANY (SUPPORTING COMPANY)
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That basis the above schematic we accordingly confirm the roles of the company as per the trailing table for clarity:

S.No.	Name of Company	Role of Company
1	DSPC Engineering Pvt. Ltd.	Bidder
2	Shandong Kunyu Pipeline Engg. Co. Ltd	Foreign Based Another Company (Supporting Company) of Bidder (S.no 1) & Approved Sub

		Contractor For S.no 3 and 4.
3	Bijie Kunlun Natural Gas Co.Ltd.	Owner for whom previous pipeline work experience credential has been submitted.
4	Sichuan Sedar Energy Development Co. Ltd	Main Contractor for S.No 3.

That we have submitted all documents required as per tender in context of the above chain and clarify that we meet the Bid Evaluation Criteria (Technically) as explained in the above table and schematic as per BEC Note A(iii).”

8. It appears that the respondents proceeded to open the financial bids and, apparently, despite the petitioner being the lowest bidder, it was not awarded the contract. Consequently, the petitioner sent a communication on 30.10.2020, wherein the petitioner stated as follows:

“That vide your technical clarification letter dated 09.9.2020 you had mentioned under TECHNICAL, Pertaining to BEC, Para 1 that M/s Shandong Kunyu Pipeline Engineering Co. Ltd (Supporting Company) was interpreted by your office as our "Sub-Contractor" which is totally misconceived and grossly misrepresented as nowhere in the Format F-1 we had mentioned any such thing.

That vide reply dated 15.9.2020 we had specifically clarified the facts and corrected interpretation of Format F-1 stating that the said Company M/s Shandong Kunyu Pipeline Engineering Co Ltd is our Supporting Company as permitted in Bid Evaluation Criteria Clause Note to A Para (iii) of Tender IFB Section II and is not our Sub-Contractor. We have also provided additional clarification vide letter dated 29.9.2020.

That in view of the Original Bid submitted it is crystal clear that M/s Shandong Kunyu Pipeline Engineering Co Ltd is our supporting Company and also we have full management control including 100% shareholding of M/s Shandong Kunyu Pipeline Engineering Co Ltd.

That accordingly, we fully qualify as per the Bid Evaluation Criteria as stipulated in the tender conditions but we are shocked to know from the market that you have opened the Price Bids yesterday i.e 29.10.2020 without accepting our Bid wherein the L1 Bidder for Section II is about 12% above than our Price Bid whereas our quoted price is within your estimated Price Range. Kindly communicate the reason as to why our Bid has not been accepted by you and oblige please.”

(emphasis supplied)

9. The respondent replied to the petitioner on 02.11.2020, wherein it states as follows:

“Dear Sir,

With reference to trailing mail, following may be noted:-

a) Evaluation of offer of M/s DPSC Engineering (P) Ltd., has been carried as per tender terms and condition.

b) M/s Shandong Kunyu Pipeline Engineering Co. Ltd. (Supporting Company), is incorporated in China and is not meeting the Provision for procurement from a bidder which shares a land border with India, therefore, bid has not been accepted.

Hope above clarifies the issue.

Regards”

(emphasis supplied)

10. In the aforesaid background, the petitioner has preferred this petition wherein substantive reliefs sought by the petitioner are as follows:

“(a) Issue a writ in the nature of mandamus thereby giving a direction to quash the process of evaluation of bids and to direct the Respondent to take necessary action to reevaluate/review the tender evaluation report for the Etender No 8000016825 for Laying and associated works of 36" x 112.500 KM under Dhamra-Angul Pipeline Project of Jagdishpur-Haldia- Bokaro-Dhamra Pipeline Project (JHBDPL) PH-II of GAIL India Ltd. (Section II) and open the Price Bid of the Petitioner.

(b) Direct Respondent to not to proceed with Award of the work to the alleged L-1 bidder whose Price Bid has been opened by Respondent”

11. Before we proceed to record and discuss the submissions of the parties, it is considered necessary to set out the Corrigendum issued by the respondent to the tender conditions. The same has been annexed as Annexure F to the writ petition and it reads as follows:

**“CLAUSE REGARDING PROVISION FOR PROCUREMENT
FROM A BIDDER WHICH SHARES A LAND BORDER WITH
INDIA**

1. Order (Public Procurement No. 1) dated 23.07.2020, Order (Public Procurement No. 2) dated 23.07.2020 and Order (Public Procurement No.3) dated 24.07.2020, Department of Expenditure, Ministry of Finance, Govt. of India refers. The same are available at website <https://doe.gov.in/procurement-policy-divisions>.

2. Any bidder from a country which shares a land border with India will be eligible to bid in this tender only if the bidder is registered with the Competent Authority. For details of competent authority refer to Annexure I of Order (Public Procurement No. 1) dated 23.07.2020.

Further the above will not apply to bidders from those countries (even if sharing a land border with India) to which the Government of India has extended lines of creditor in which the Government of India is engaged in development projects.

Updated lists of countries to which lines of credit have been extended or in which development projects are undertaken are given in the website of the Ministry of External Affairs, Govt. of India

*3. **"Bidder"** (including the term 'tenderer', 'consultant' 'vendor' or 'service provider' in certain contexts) for purpose of this provision means any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.*

*4. **"Bidder from a country which shares a land border with India"** for the purpose of this:*

- a. **An entity incorporated, established or registered in such a country; or***
- b. **A subsidiary of an entity incorporated, established or registered in such a country; or***
- c. **An entity substantially controlled through entities incorporated, established or registered in such a country; or***
- d. **An entity whose beneficial owner is situated in such a country; or***
- e. **An Indian (or other) agent of such an entity; or***
- f. **A natural person who is a citizen of such a country; or***
- g. **A consortium or joint venture where any member of the consortium or joint venture falls under any of the above.***

*5. **"Beneficial owner"** for the purpose of above (4) will be as under:*

- i. **In case of a company or Limited Liability Partnership, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more***

juridical person(s), has a controlling ownership interest or who exercises control through other means.

Explanation –

- a) *"Controlling ownership interest" means ownership of, or entitlement to, more than twenty-five per cent of shares or capital or profits of the company;*
- b) *"Control" shall include the right to appoint the majority of the directors or to control the management or policy decisions, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;*
- ii. *In case of a partnership firm, the beneficial owner is the natural person(s) who, whether acting alone or together, or through one or more juridical person, has ownership of entitlement to more than fifteen percent of capital or profits of the partnership;*
- iii) *In case of an unincorporated association or body of individuals, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen percent of the property or capital or profits of such association or body of individuals;*
- iv) *Where no natural person is identified under (i) or (ii) or (iii) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;*
- v) *In case of a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen percent or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.*

6. "Agent" for the purpose of this Order is a person employed to do any act for another, or to represent another in dealings with third persons

7. SUBMISSION OF CERTIFICATE IN BIDS:

Bidder shall submit a certificate in this regard as Form-I. If such certificate given by a bidder whose bid is accepted is found to be false, this would be a ground for immediate rejection of the bid/termination and further action as per "Procedure for Action in case of Corrupt/Fraudulent/ Collusive / Coercive Practices" of tender document.

8. The registration, wherever applicable, should be valid at the time of submission of bids and at the time of acceptance of bids. In respect of supply otherwise than by tender, registration should be valid at the time of placement of order. If the bidder was validly registered at the time of acceptance / placement of order, registration shall not be a relevant consideration during contract execution.

9. PROVISION TO BE IN WORKS CONTRACTS, INCLUDING TURNKEY CONTRACTS:

The successful bidder shall not be allowed to sub-contract works to any contractor from a country which shares a land border with India unless such contractor is registered with the Competent Authority. The definition of "contractor from a country which shares a land border with India" shall be as in Para 4 herein above. A Certificate to this regard is to be submitted by bidder is placed at Form-II" (emphasis supplied)

12. The submission of learned counsel for the petitioner, Mr. Gandhi is that the conditions introduced by the said Corrigendum are not attracted for the simple reason that it is the petitioner which is the bidder. The petitioner is an Indian company registered in India, and the Public Procurement Order Nos. 1, 2 & 3 dated 23.07.2020 and 24.07.2020 issued by the Government of India cannot be invoked in the case of a "Supporting Company", since the Supporting Company is not the bidder.

13. Mr. Gandhi submits that “Supporting Company” is an expression which is used in Section II –“*Bid Evaluation Criteria and Evaluation Methodology*”, Clause A, “*Note to A (iii)*”. A “Supporting Company” is a foreign based company which is different from the bidder, which either holds more than 50 % of the paid up share capital of the bidder company or, wherein, the bidder company holds more than 50 % of the share capital. The “Supporting Company”, therefore, cannot be construed as the “bidder” and, on that premise, the Governmental Orders dated 23.07.2020 and 24.07.2020 cannot be invoked merely because the “Supporting Company” is a Company incorporated in a country which shares land border with India.

14. On the other hand, Mr. Sanjay Jain, the learned ASG – who has appeared on behalf of the respondent Mecon Ltd, has defended the action of the respondent in declaring the petitioner as disqualified, since the “Supporting Company” of the petitioner bidder does not fulfil the requirements of Orders dated 23.07.2020 and 24.07.2020 in the matter of Public Procurement, issued by the Department of Expenditure, Ministry of Finance, Government of India. Mr. Jain has submitted that on a conjoint reading of the requirements laid down by the aforesaid three Public Procurement Orders dated 23.07.2020 and 24.07.2020, and the conditions contained in Clause (iii) “*Note to A*”, it is clear that the “Supporting Company”, namely SKPECL, is liable to be construed as the “bidder”, and it was essential for the “Supporting Company”, namely SKPECL to register itself with the Competent Authority in terms of Annexure 1 to the order (Public Procurement Order No.1) dated 23.07.2020.

15. In this regard, Mr. Jain has, firstly, drawn our attention to the definition of the expression “Bidder” contained in the Corrigendum. He points out that the expression “Bidder” has been defined “*for the purpose of this provision*”, meaning thereby, that the grammatical meaning of the expression Bidder cannot be invoked, and the “Bidder” would be one who is covered by the expanded definition contained in the Corrigendum. For the purpose of the Corrigendum, the “Bidder” is one who falls within the four corners of the definition contained in the Corrigendum itself. As per the Corrigendum, the “Bidder” means “***any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.***”

(emphasis supplied)

16. Mr. Jain submits that a Bidder includes any agency, branch or office controlled by such person participating in a procurement process. The expression “Agent”, for the purpose of the Governmental Procurement Orders is defined as “*a person employed to do any act for another, or to represent another in dealings with third persons*”. Clause 7 of the Governmental Orders/ Corrigendum requires the bidder to submit a certificate, namely the certificate of registration with the Competent Authority. The registration, wherever applicable, should be valid at the time of submission of the bid and at the time of acceptance of bids.

17. Mr. Jain has then drawn our attention to Clause (iii) to “*Note to A*”. Mr. Jain submits that offers of bidders – who themselves do not meet the technical experience criteria as stipulated in the BEC, and are quoting based on the experience of the foreign based another company (Supporting Company) can also be considered. As aforesaid, in such cases, the Supporting Company should hold more than 50 % of the paid up share capital of the bidding company, or vice versa.

18. Mr. Jain highlights that in a case where the bidding company is dependent upon the technical experience of another company (Supporting Company), with the view to ensure commitment and involvement of the “Supporting Company” for successful execution of the contract, the participating bidder should include the enlisted agreement/ guarantees/ undertakings along with the techno – commercial bid. We have already extracted hereinabove Clause (iii) of “*Note to A*”, which enumerates the agreement/ guarantee/ undertaking required to be submitted in Format F-24, F-25, F-25A and F-26.

19. Mr. Jain has then drawn our attention to these Formats to submit that a perusal of these Formats shows that the Supporting Company assumes the role of a co-bidder, and its liability is co-extensive with that of the bidder in the matter of performance of the contract. The Supporting Company also acts as the Agent of the bidder. We shall refer to the various clauses of the Formats in F-24, F-25, F-25A and F-26 later in our discussion. Thus, Mr. Jain submits that the disqualification of the petitioner was justified for non-compliance of the terms contained in the Corrigendum dated 04.08.2020 qua the Supporting Company SKPECL.

20. Mr. Puri has put in appearance on behalf of the Gas Authority of India Limited (GAIL). He has not only supported the submissions of Mr. Jain, the learned ASG, but has gone a step further to point out – by placing reliance on the documents filed by the petitioner itself, that the petitioner company, admittedly, was a subsidiary of a Chinese Company – i.e. a company registered in a country sharing land border with India, and the beneficial interest in the petitioner company/ its shareholding was, admittedly, earlier held by the Chinese. According to him, there is reason to believe that it continues to be held by the Chinese even now. Therefore, the Petitioner Company was itself obliged to register with the Competent Authority in the light of the Corrigendum and the Governmental orders, referred to. Mr. Puri has argued that though the petitioner claims that its majority shareholding is held by a Canadian entity, a scrutiny of the documents placed on record by the petitioner itself would show that the transfer of the shareholding in the petitioner company from Chinese hands to Canadian hands is an eye wash, and has been resorted to only with a view to circumvent the requirement of the Corrigendum. He has, therefore, sought to raise a serious doubt on the *bona fides* of the petitioner in approaching this Court, without making a full and complete truthful disclosure about itself.

21. Learned counsel for respondent No.2 points out that Dezhou Shengli Pipeline Crossing Engineering Co. Ltd. [(DSPCECL), China] is a Chinese Company, incorporated in China – in the year 1999. On 07.08.2009, the Shandong Kunyu Pipeline Engineering Co. Ltd. (SKPECL) was incorporated in China. 95% shares of SKPECL were held by one Ms. Lyu Mei. The remaining 5% shares were held by Mr. Lyu Jainfeng.

22. The petitioner company, namely Dezhou Shengli Pipeline Crossing Engineering India Pvt. Ltd. [(DSPCEPL), India] was incorporated as a wholly owned subsidiary of (DSPCECL), China on 28.02.2017. The directors of the petitioner then were one Mr. Dinesh Lalwani and another Mr. Devesh Lalwani. On 01.03.2017, Mr. Lyu Jainfeng and Ms. Lyu Mei (daughter of Mr. Lyu Jainfeng) were appointed as directors of the petitioner company.

23. On 20.04.2018, an agreement was entered into between the petitioner company, M/s. SKPECL, Ms. Lyu Mei and Mr. Lyu Jainfeng, to make M/s. SKPECL a wholly owned subsidiary of the petitioner company.

24. On 27.03.2019, a share purchase agreement was entered into between the petitioner company, M/s. SKPECL and Ms. Lyu Mei for share transfer of 50,000 equity shares (100%) of M/s. SKPECL in favour of the petitioner company. On the same day, Equity Transfer Agreement was entered into between the transferor Ms. Lyu Mei and the transferee i.e. the petitioner company. The authorised share capital of the petitioner company was raised to Rs. 30 Lakhs with 3 Lakh equity shares on 01.07.2020. On 07.07.2020, the name of the petitioner company was changed to DSPC Engineering Private Ltd.

25. On 30.07.2020, the Board of Directors of the petitioner company raised the authorised equity share capital of the petitioner company from 50,000 to 3 Lakhs. On 11.08.2020, Mr. Lyu Jainfeng resigned from the post of Director of the petitioner company. On 13.08.2020, 90% of the shares held in the petitioner company were shown to be transferred to M/s Shawn Coulter Consulting, Canada (SCCC).

26. Respondent No.2 points out that the website of DSPCECL, China when accessed, shows the name of the said company as SKPECL. It is also submitted that “Shandong Kunyu” appears to be the trade name used for the Dezhou Shengli Pipeline Crossing Engineering Group Companies. The address of both SKPECL and DSPCECL, China is the same i.e. No.6 Jinhao Road, Xinhua Industrial Park, Dezhou City, Shandong Province. Moreover, the Unified Social Credit Code Number of SKPECL, which is 9137140069312593X5, is reflected on various certificates found on the website of DSPCECL, China. Mr. Lyu Jainfeng is the General Manager of DSPCECL, China and SKPECL, and was Director, along with his daughter Ms. Lyu Mei in DSPCEPL, India till 11.08.2020.

27. Ms. Lyu Mei is the daughter of Mr. Lyu Jainfeng, and is also the Director of DSPCEPL, India. Pertinently, the key persons in the petitioner company i.e. DSPCEPL, India continue to be the same even after the alleged transfer of the overwhelming majority shares of the petitioner company to SCCC. The directors of the petitioner company, even after the alleged transfer, continue to be Mr. Dinesh Lalwani and Mr. Devesh Lalwani and Ms. Lyu Mei. Even Mr. Lyu Jainfeng resigned only on 11.08.2020 – a fact which has no relevance, since SCCC does not appear to have replaced the 3 other Directors of the petitioner company despite the alleged take over, with its own Directors.

28. Learned counsel for respondent No.2 further points out that the so called agreement for transfer of shareholding in the petitioner company in favour of SCCC also appears to be highly suspect. He has drawn our attention to the agreement claimed to have been executed on 20.04.2018 at

New Delhi between the petitioner, SKPECL, Ms. Lyu Mei and Mr. Lyu Jainfeng. He points out that this agreement acknowledges that the petitioner company was an Indian wholly owned subsidiary of DSPCECL, China; that SKPECL is a company incorporated in China; the valuation of SKPECL was fixed at Rs.10 Crores, which was to be acquired by the petitioner company.

29. Learned counsel points out that the purported agreement dated 25.01.2020 claimed to have been entered into between DSPCECL, China and SCCC appears to be a sham. Though, under the said agreement SCCC purports to acquire the majority shareholding in the petitioner company as held by DSPCECL, China, consideration amount is not mentioned. It merely states that SCCC will invest an amount equivalent to INR 2 Crores over the next 15 months from the date of signing of the agreement and, in the meantime, it would acquire majority shareholding in the petitioner company.

30. He points out that with a view to mask the true identity of the petitioner company as being a wholly owned subsidiary of a Chinese Company, the name of the petitioner was also to be changed “*to any other English name which can be used for Business worldwide because the words 'Dezhou Shengli' appears to represent the home town of the Party No.1.*”

31. Learned counsel further points out that despite the valuation of the petitioner’s 100% owned Chinese subsidiary i.e. SKPECL being put at Rs.10 Crores, the 45,000 equity shares of the petitioner company were purported to be transferred to SCCC for a paltry amount of \$6,000, which itself demonstrates that the said transaction is a camouflage and a farce.

32. Learned counsel also points out that the agreement entered into between SCCC and DSPCECL, China dated 25.01.2020 is also doubtful considering the fact that SCCC got incorporated in February 2020. Thus, if the documents of the petitioner were to be believed, the transfer in favour SCCC took place even before SCCC came to be registered on 14.02.2020.

33. Lastly, learned counsel points out that the Supporting Company SKPECL continues to use the trade name of DSPCECL, China, even after the so called transfer of the said company in favour of the petitioner, which itself is purported to have been transferred to SCCC – a Canadian Company.

34. In response to the aforesaid submissions of learned counsel for respondent No.2, the submission of learned counsel for the petitioner is that the registration obtained by SCCC on 14.02.2020 was only in respect of the trade name. Learned counsel submits that the petitioner company was incorporated in 28.02.2017 with DSPCECL, China holding 49,999 shares – through its nominee Mr. Devesh Lalwani, and one share being held by Mr.Dinesh Lalwani. Admittedly, the petitioner was then a wholly owned subsidiary company of DSPCECL, China. The petitioner claims that it has been doing business in India since 2017, and has bagged 6 to 7 major projects of Indian Oil Corporation. On 20.04.2018, the petitioner acquired SKPECL, i.e. the Supporting Company. The petitioner discloses that it paid consideration of Rs. 9.09 Crores plus Rs.1.0229041 crore for acquisition of 100% shares of SKPECL. Thus, the submission of respondent No.2 that the petitioner paid in excess of Rs.10 Crores to acquire SKPECL – its Supporting Company, is admitted by the petitioner itself. The petitioner also states that DSPCECL, China entered into an agreement with SCCC, Canada

on 25.01.2020 whereafter the name of the petitioner was changed to DSPCEPL, India in July, 2020. The petitioner claims that another tender was invited by the respondents on behalf of Gail India Limited in July, 2020, for which the petitioner submitted its bids. Despite the issuance of the Corrigendum premised on the Governmental Orders above referred to, the petitioner's bid was entertained after seeking clarification. The petitioner states that on 10.08.2020, the shareholding in the petitioner company to the extent of 90% was held by SCCC; 9.95% shares were held by DSPCECL, China and 0.02% shares were held by Mr. Dinesh Lalwani. Thus, the petitioner cannot be said to a Chinese Company, or a company held by promoters in a country which shares land borders with India.

35. We have considered the rival submissions of the parties.

36. Admittedly, the petitioner is claiming technical eligibility in respect of the tender in question on the basis of the technical experience of a foreign based company (Supporting Company) i.e. SKPECL, which is claimed to be a 100% owned subsidiary of the petitioner company. Even according to the petitioner, the Supporting Company SKPECL is incorporated in and has gained technical experience of carrying out works in China which is a country sharing land border with India.

37. The corrigendum issued by the respondent to the NIT in question, dated 04.08.2020, has been extracted by us in paragraph 11 hereinabove. The issue is: Whether the rigor of the said corrigendum is attracted in the case of the petitioner, since its Supporting Company is founded and based in China, which is a country sharing land border with India. For that purpose, we proceed to analyse the requirements of the Corrigendum which is

founded upon the orders issued by the Department of Expenditure, Ministry of Finance, Government of India being Public Procurement Order No. 1 dated 23.07.2020, Public Procurement Order No. 2 dated 23.07.2020, and Public Procurement Order No. 3 dated 24.07.2020. Clause 2 of the Corrigendum states that any bidder from a country which shares a land border with India will be eligible to bid in the tender only if the bidder is registered with the Competent Authority. The submission of the petitioner is that the petitioner is a company incorporated in India and, therefore, the stipulation contained in Clause 2 of the Corrigendum is not applicable to it. To examine this submission, we need to see as to what is the meaning of expression “Bidder” in terms of the Corrigendum.

38. Clause 3 defines bidder, *“for the purpose of this provision to mean any person or firm or company, including any member of a consortium or joint venture, every artificial juridical person not falling in any of the descriptions of bidders, including any agency, branch or office controlled by such person, participating in a procurement process.”*

39. Thus, the intent clearly was to define the expression “Bidder” for the purpose of Governmental Orders/ Corrigendum and, therefore, the meaning of the expression “Bidder” as generally understood, would not limit the meaning of the said expression for the purpose of construing the Governmental Orders/ Corrigendum.

40. Clause 3 of the Governmental Order/ Corrigendum shows that the expression “Bidder” includes person not falling in any of the description of bidders stated in the said Corrigendum, and includes any agency controlled

by the person participating in the procurement process. Therefore, an agent of the bidder is also construed as a bidder.

41. The NIT provides that where the bidder relies on the technical experience of the Supporting Company, the bidder should submit the agreements/ guarantees/ undertakings prescribed in the NIT itself along with the techno-commercial bid. Mr. Jain has referred to the agreement dated 12.08.2020 entered into between the petitioner on the one hand, and SKPECL i.e. the Supporting Company on the other, submitted by the petitioner with its techno-commercial bid. Clause (g) of the said agreement stipulates that the *“supporting company shall be jointly and severally responsible to GAIL for the performance of works during contract period and for the satisfactory execution of the contract, and for all the consequences for nonperformance thereof.”* Thus, the liability undertaken by the Supporting Company i.e. SKPECL is joint and several with that of the petitioner.

42. He has then drawn our attention to the guarantee executed by the Supporting Company in Format F-25 dated 13.08.2020 in favour of M/s. GAIL (India Ltd.), for and in the context of the bid submitted by the petitioner.

43. Clauses 1 and 3 of the said guarantee provides that the guarantor i.e. SKPECL unconditionally agrees that in case of non-performance by the bidder i.e. the petitioner, of any of its obligations in any respect, the Guarantor shall, immediately on receipt of notice of demand by GAIL, take up the job without any demur or objection, in continuation, and without loss of time and without any cost to GAIL and duly perform the obligations of

the bidder to the satisfaction of GAIL. Clause 3 provides that the Guarantor shall be jointly and severally responsible to GAIL for satisfactory performance of works during contract period and for the satisfactory execution of the contract, and for all consequences for non-performance thereof.

44. The submission of Mr. Jain is that keeping in view the aforesaid obligations undertaken by the Supporting Company, it can be said that the Supporting Company is a company which is participating in the procurement process and, therefore, it satisfies the definition of “Bidder” contained in the Public Procurement Order No.1 dated 23.07.2020. Moreover, the Supporting Company i.e. SKPECL, while undertaking the obligations above referred to in the agreement and the Guarantee Deed in Format F-25, is clearly acting as the Indian agent of the petitioner bidder and, therefore, qualifies as “bidder from a country which shares land border with India” defined in Clause 8(e) of Public Procurement Order No.1 dated 23.07.2020. The expression “Agent” itself is defined in Clause 10 of Public Procurement Order No.1 dated 23.07.2020 to read as follows:

““Agent” for the purpose of this Order is a person employed to do any act for another, or to represent another in dealings with third persons.”

45. Undoubtedly, SKPECL – the Supporting Company has undertaken to perform the contract on behalf of the petitioner bidder in its dealings with the respondents. From the above Clauses contained in the Public Procurement Orders, above referred to, as well as from the obligations undertaken by the Supporting Company i.e. SKPECL as reflected in the agreement and the Guarantee Deed in Format F-25, it is absolutely clear to

us that the Supporting Company qualifies as a “Bidder” for the purpose the said Public Procurement Orders. Consequently, it was obligatory on the part of the petitioner and its Supporting Company i.e. SKPECL to satisfy the requirement of registration with the Competent Authority as stipulated in Clause 1 of Public Procurement Order No. 1 dated 23.07.2020, which was made applicable by the Corrigendum to the NIT in question. Admittedly, neither the petitioner, nor its Supporting Company SKPECL obtained the registration from the Competent Authority, despite the fact that the Supporting Company is a company incorporated in a country which shares land borders with India. Therefore, we have no hesitation in concluding that the respondents have rightly disqualified the petitioner while evaluating the technical bid of the petitioner, which is founded upon the technical experience of its Supporting Company. On this ground itself, the writ petition is liable to be dismissed.

46. We may now proceed to consider the other aspect argued by Mr. Puri, learned counsel appearing for the respondent GAIL. His submission is that the petitioner itself is bound to register with the Competent Authority in terms of Public Procurement Order No.1 dated 23.07.2020, since it appears to be a wholly owned Chinese company and the claim of the petitioner that it is primarily held by a Canadian company appears to be highly doubtful. In this regard, we have set out in detail, the aspects pointed by both Mr. Puri, appearing for the respondent GAIL, and Mr. Gandhi, learned counsel for the petitioner. The position which emerges on the record is that, admittedly, the petitioner company was entirely owned by DSPCECL, China at the time of its incorporation on 28.02.2017. Even the petitioner admits that 49,999

shares of the petitioner company were held at the time of its incorporation by DSPCECL, China through its nominee Director Devesh Lalwani, and one share was held by Mr. Dinesh Lalwani. On the following day, i.e. on 01.03.2017, Mr. Lyu Jainfeng and his daughter Ms. Lyu Mei were appointed as Directors of the petitioner company.

47. It is claimed by the petitioner that DSPCECL, China sold 90% of the shares held in the petitioner company to SCCC on 25.01.2020. Thus, as on 10.08.2020, to the extent of 90% shares in the petitioner company were held by SCCC; 9.95% shares were held by DSPCECL, China, and 0.02% shares were held by Dinesh Lalwani.

48. The simplistic argument advanced by learned counsel for the petitioner to claim that petitioner ceased to be a Chinese held company with transfer of 90% shareholding with Canadian company – SCCC has to be examined in the light of the other relevant aspects highlighted by Mr. Puri. Admittedly, the Supporting Company SKPECL was acquired by the petitioner company. For the said acquisition, the petitioner company, admittedly, paid consideration in excess of Rs.10 crores. It is also pertinent to note that both DSPCECL, China and SKPECL were apparently promoted, controlled and held by the same set of Chinese nationals, namely Mr. Lyu Jainfeng and his daughter Ms. Lyu Mei. Despite the petitioner having acquired SKPECL for a substantial consideration in excess of Rs.10 Crores, SCCC – the Canadian Company, is claimed to have acquired 90% of the shareholding in the petitioner's company for a paltry amount of \$6000 which translates to about Rs.4.34 Lakhs. This, despite the fact that SKPECL is stated to be a running company. Its work experience is being relied upon by

the petitioner to technically qualify for the tender in question. The petitioner itself is claimed to be in the same business since its incorporation, and it claims to have performed 6 to 7 major contracts for the respondents. There is nothing to indicate as to what valuation was assigned to the shares of the petitioner company claimed to have been transferred by DSPCECL, China to SCCC, Canada.

49. Despite the aforesaid aspect being vehemently argued by Mr. Puri, Mr. Gandhi has made no effort to explain as to why and how DSPCECL, China parted with 90% shareholding in the petitioner company for a paltry amount of \$6000 even though the petitioner itself has claimed to be carrying on its business since its inception in India and its 100% owned subsidiary i.e. the Supporting Company is carrying on its business in China. The agreement dated 25.01.2020 entered into between DSPCECL, China and SCCC, Canada merely states that SCCC will invest an amount equivalent to INR 2 Crores over the next 15 months from the date of signing of the agreement. That amount cannot be considered to be the consideration for the transfer of 90% shareholding in the petitioner company in favour of SCCC, Canada, since that amount would be invested in the business of the petitioner company post the transfer of the majority holding, and would not go into the hands of the Transferor DSPCECL, China. In any event, that commitment would still not explain the highly depressed consideration that SCCC, Canada is claimed to have paid for transfer of the 90% shareholding in the petitioner company to DSPCECL, China.

50. We also find force in the submission of Mr. Puri that despite the so-called transfer of majority shareholding in the petitioner company in favour

of SCCC, Canada, the Board of Directors of the petitioner company has not undergone a change inasmuch, as, SCCC, Canada has neither introduced its own nominee Directors, nor removed the pre-existing Directors who were the nominees of DSPCECL, China and which included Mr. Lyu Jainfeng and his daughter Ms. Lyu Mei. We find it difficult to accept that despite acquiring an overwhelming majority of shares in the petitioner company, the Canadian company has continued to allow the petitioner company to be run by the same management Board. This itself puts a serious doubt on the genuineness of the transaction claimed to have been entered into between SCCC, Canada, and DSPCECL, China. Mr. Gandhi has not even attempted to deny the specific submission of Mr. Puri that SKPECL is even now shown as a part of the group to which DSPCECL, China belongs. It cannot be ruled out that the so-called transfer in favour of SCCC, Canada is merely a camouflage, and has been resorted to only with a view to circumvent requirements of registration with the Competent Authority as introduced by the Public Procurement Order No. 1 dated 23.07.2020, and the two other Public Procurement Orders above referred.

51. The submission of Mr. Gandhi that a similar objection was raised in respect of another tender invited by respondents on behalf of GAIL, India Ltd. in July, 2020, and upon receiving the petitioner's clarification, its bid was entertained, is neither here, nor there. We are not concerned with, and are not dealing with the circumstances in which the petitioner's bid was entertained by the respondent for and on behalf of GAIL, India Ltd in another tender process. In this petition, we are concerned with, and examining the issue whether the Corrigendum dated 04.08.2020 – which

enforces the Public Procurement Orders above referred to, is attracted in the case of the petitioner, since its Supporting Company is admittedly a company incorporated in, and doing business in, a country which shares land borders with India. A possible mistake made by the respondents in respect of another tendering process would not give the petitioner a reason to insist that the same mistake should be perpetrated by the respondents in respect of the tender in question.

52. For the aforesaid reasons, we find no merit in this petition, and dismiss the same with costs of Rs.5,00,000/- to be paid to the respondents by the petitioner within 4 weeks.

53. We further direct the Competent Authority in terms of the Public Procurement Order No.1 dated 23.07.2020 to undertake an enquiry into the aspect whether the petitioner company itself qualifies as “*Bidder from a country which shares land border with India*” in terms of Clause 8 of the said Public Procurement Order No.1 dated 23.07.2020.

54. A copy of this judgment be communicated to the Ministry of Finance, Department of Expenditure, Public Procurement Division for onward transmission to the Competent Authority, and for compliance by it.

(VIPIN SANGHI)
JUDGE

(REKHA PALLI)
JUDGE

MARCH 23, 2021
N.Khanna