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

% Reserved on: 02.06.2021
Pronounced on: 23.08.2021

\+ W.P.(C) 5127/2021

MONTECARLO LIMITED & ANR. .....Petitioners

Through: Mr. Saurabh Kirpal, Sr. Adv. with Mr. Parth J. Contractor, Mr. Monish Panda, Mr. Mrinal Bharat Ram, Advs.

versus

NATIONAL HIGH SPEED RAIL CORPORATION LIMITED .....Respondent

Through: Mr. Sachin Datta, Sr. Adv. with Mr. Gagan Anand, Ms. Sadiqua Fatima, Mr. Shahbaz Ahmad, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T OF THE COURT

CM APPL. 17072/2021-*(EXEMPTION)*

Allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 5127 & CM APPLs 15722/2021 & 17071/2021

1. The present writ petition has been filed by the Petitioner to assail the rejection of its bid in relation to the Bid Package No. MAHSR-8 issued by the Respondent for the *"Design and Construction of Civil and Building Works for the Depot on Design Build Lump Sum Price Basis for Double Line High Speed Railway involving works*

for Site Formation, Abutment, Retaining Walls, Roadbed for track, Box Culvert, Roads, Cable Duct, Foundations of OHE Masts, Piping, Drainage, Water Supply, Water Harvesting, Fire Fighting, Land-scraping, Boundary Wall, General Inspection Train Shed, Maintenance Depot and other Associated Works at Sabarmati between MAHSR Km. 507.599 and MAHSR Km. 509. 726 in the State of Gujarat for the Project of Construction of Mumbai-Ahmedabad High Speed Rail", (hereinafter referred to as "the Project") at the technical stage, vide communication dated 27.04.2021 and 28.04.2021. The petitioner also assails the Notification dated 28.04.2021 whereby the results of the Financial Bid Opening was notified. The petitioner seeks a direction to the respondents to consider its bid for the aforesaid Package.

2. The case set up by the Petitioner No.1 is that the Petitioner No.1 is a company incorporated under the Companies Act, 1956 and is engaged in the business of infrastructure, construction and development with operation diversified across highways, railways, buildings and factories, mining, energy, infrastructure etc. Petitioner No.2 is the Director of Petitioner No.1. The Respondent, National High Speed Rail Corporation Limited has been incorporated with the object to finance, construct, maintain and manage the High upcoming Speed Rail Corridor in India, and is a "Special Purpose Vehicle" (SPV) with equity participation from the Central Government – through Ministry of Railways, Government of Gujarat, and Government of Maharashtra.

3. The Respondent issued the Tender Notice on 22.10.2020 calling for bids from bidders for the Project. The timelines indicated and prescribed by the Respondent were as under:

"b.

- *Bid Due Date (Online) – 18.02.2021 up to 1500 hours*
- *Bid Due Date (Physical) – 18.02.2021 up to 1500 Hours*
- *Bid Opening Date (Technical) – 19.02.2021 at 1530 Hours*
- *Bid Opening Date (Financial) – 28.04.2021 at 1100 hours"*

4. The Petitioner No.1 submitted its bid in the prescribed manner on 18.02.2021 through the online portal and also in the physical format. In terms of the Bid Document, the evaluation of the bids were to be done in five stages as under:

i. *Stage 1 – Evaluation of Administrative Requirements*
ii. *Stage 2 – Evaluation of Compliance and Responsiveness*
iii. *Stage 3 – Evaluation of Compliance with the Qualification Requirements*
iv. *Stage 4 – Technical Evaluation*
v. *Stage 5 – Financial Evaluation*

5. The technical bids submitted by various bidders including the Petitioner, were opened on 19.02.2021 and on 27.04.2021, the Petitioner No.1 received a communication informing it that is bid, along with that of 4 other bidders, were rejected at the technical stage. The Petitioner No.1 wrote to the Respondent on 28.04.2021 seeking reasons for the rejection. The said letter was replied by the Respondent informing the Petitioner No.1 that its bid was found to be "Non-Responsive". The price bids of the qualified bidders were opened on 28.04.2021, and SCC-VRS (JV) was declared as the lowest bidder. It is this action of the Respondent which is under challenge before us.

6. Before proceeding further, at this stage itself, we may notice the reason disclosed by the respondents in their counter affidavit – for the first time, for considering the petitioner's bid as non-responsive. The respondents state that

two of the Forms that the bidders were required to fill up and sign, viz. Form CON 2.0 – which requires the bidder to make a declaration about pending litigations, and Form CON 3.0 – which requires the bidder to make a declaration about litigation history, were not signed by the petitioner. The position on record in this regard is that these Forms were filled up and stamped by the petitioner, but it omitted to affix the signature of its authorised signatory on these two Forms. The petitioner also owns up the information filled up in these Forms as physically submitted. The question that arises for determination is: Whether – in the overall facts and circumstances which are taken note of hereinafter, the respondents were legally justified in rejecting petitioner's Technical Bid, and; Whether – considering the manner in which the respondents have proceeded to evaluate and treat other bidders during Technical Bid, the petitioner has been discriminated against.

7. As per the Petitioner, the Respondent has failed to adhere to the evaluation criteria prescribed in the Bid Document. It has further been alleged that the Respondent is acting in a non-transparent and arbitrary manner and is treating Petitioner No.1 unfairly, unjustly and in a discriminatory manner.

8. Mr. Kirpal, learned Sr. counsel for the Petitioner has argued that initially no reasons were given for declaring the bid of Petitioner No.1 as "Non-Responsive". The reasons for the same became apparent only when the counter affidavit was filed by the respondents. Hence, the Petitioner filed a detailed rejoinder dealing with the reasons given for rejection of the bid of the Petitioner. We shall advert to the contents of the rejoinder later in our judgment after dealing with the case set up by the respondents.

9. In response to the said case set up by the petitioner, the Respondent has filed a counter affidavit. To justify the non-communication of the grounds for technical rejection of the petitioner's bid, the respondent has relied on Clause-E of Option-A 'Instructions to Bidders' (ITB) which reads as under:

> *"Option A - Section I. Instructions to Bidders*
>
> *Clause E. Evaluation and Comparison of Bids*
>
> *28. Confidentiality*
>
> *"28.1 Information relating to the evaluation of Bids and recommendation of Contract award, shall not be disclosed to Bidders or any other persons not officially concerned with such process until information on Contract award is communicated to all Bidders in accordance with ITB 42.*
>
> *Clause F. Award of Contract*
>
> *42. Notification of Award*
>
> *42.5* ***After notification of award, unsuccessful Bidders may request, in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected. The Employer shall promptly respond, in writing, to any unsuccessful Bidders who, after the notification of award in accordance with ITB 42.1, request a debriefing****."*(emphasis supplied)

10. The reasons given by the Respondent for incorporating such a clause in the Bidding Documents is to avoid multiple litigation at the stage of evaluation of bids, as, in case of rejection of a bid before the award of contract, the unsuccessful bidder may approach a court of law and start a litigation – like in the present case, and delay the award of the contract.

11. Learned counsel for the respondent submits that the bidding process was conducted in accordance with applicable guidelines for Procurement under the Japanese ODA Loans as prescribed by Japan International Corporation Agency (JICA), and Japan International Consultant Consortium (JICC). JICC was appointed as the General Consultant (GC) for the project by JICA. JICA has made JICC, who are reputed international consultants, responsible for evaluation (Technical and Financial) of bids as per applicable guidelines, being "the Guidelines for Procurement under the Japanese ODA Loans published in April, 2012".

12. Mr. Dutta further submits that Technical Bid Evaluation Report (TBER) was prepared by JICC as per the evaluation and qualification criteria set out in Section-III of Para 1 of the Bidding Document. As per the evaluation and qualification criteria, the evaluation of technical bids were carried out in four stages as under:

i) *State-1: Evaluation of Administrative Requirements*
ii) *Stage-2: Evaluation of Compliance & Responsiveness*
iii) *Stage-3: Evaluation of Compliance with Qualification Requirements*
iv) *Stage-4: Technical Evaluation*

13. He further submits that as per TBER, the Petitioner's bid suffered from material deviations, and hence stood disqualified. The Petitioner could not pass Stage-1 evaluation and, consequently, no further evaluation of the Petitioner's bid was carried out by JICC after Stage-1. As per the respondent, there was no need for Stage-2 or later stage evaluation of the Petitioner as they failed to pass the Stage -1 evaluation.

14. The Respondent has argued that Stage-1 contemplates the evaluation of administrative requirements and stipulates as under:

> ***"1.1. General***
>
> *a) The Stage 1 Evaluation will consist of checking the Bids to confirm whether they are substantially responsive to the administrative requirements of the Bidding Documents.*
>
> *b) The following administrative items will be checked:*
>
> *i) Whether the Technical Bid is in accordance with ITB 11.2. Bid security submitted [Ref ITB 21.11;*
>
> *ii) Whether the power of attorney for the Bid signatory is in the correct form [Ref. ITB 22.2 and ITB 22.3];*
>
> ***iii) Whether all Bid Forms have been signed by the Authorised Representative [Ref. ITB 22.2 and ITB 22.3];***
>
> *iv) Whether all data* to *be entered* by *the Bidder has been provided [Ref. ITB 12.1];*
>
> *v) Whether any alterations are initialled by Authorised Representative [Ref ITB 22.4];*
>
> *vi) The duly filled Checklist of Submission of Documents for Technical Bid."* (emphasis supplied)

15. Learned Senior Counsel for the Respondent has further argued that the tender has mandatorily prescribed that the bid forms – to be submitted by the bidder, should be signed by the bidder. In this regard, Learned Senior Counsel drew the attention of the Court to specific stipulations in Section III of the bidding document, which specifically deals with "Evaluation and Qualification

Criteria". The relevant clauses read as under:

> *"A. 4 (b) All Forms contained in the Bid documents must be fully and properly completed and all the forms must be returned, as they will be reviewed exactly as submitted and errors or omissions may count against the Bidder."*

16. Clauses 1.1 (b) (iii) and 22.2 of the Bid Document have also been relied upon to submit that they instruct the bidder to sign all Bid forms and to check whether all the Bid forms have been signed.

17. Learned Counsel for the Respondent further argued that Bid Forms are prescribed in Section-IV of the Bid Document. 'Forms CON' deals with Contract Non-Performance, and Litigation. This Form CON has 3 separate forms. Form CON 1.0 is in respect of "History of Non-Performing Contract"; Form CON 2.0 is in respect of "Pending Litigation", and; Form CON 3.0 in respect of "Litigation History".

18. Each of the forms clearly indicate the requirement of being signed at the designated place. It is submitted that the requirement to sign on the prescribed bid form is the most basic and mandatory requirement. It is only when the duly signed Bid Form is received, clarification or confirmation may be sought from the bidders, and queries may be raised with regard to the contents of the Bid Form. Without meeting this basic requirement of signing on the prescribed Bid Form, the requirement of Stage-1 is not fulfilled.

19. It is the contention of the Respondent that 'signing of all Bid Forms' is an essential condition of the Bid Document, which has been the consistent stand of

the Respondent. Another bidder had omitted to sign on Form FIR-1, and was also disqualified for the same reason. Learned Senior Counsel for the Respondents submits that the failure to submit the duly signed Bid Form is inherently deliberate, and cannot be condoned. It is inherent mischief if a bidder omits to sign on a relevant Bid Form which requires disclosure of information regarding Pending Litigation and Litigation History. Even though it is not pleaded in the counter affidavit, it is argued that an internet search revealed that the Petitioner is embroiled in multifarious litigations – both Civil and Criminal, as a result of which it was an intentional and deliberate omission on the part of the Petitioner.

20. The submission of the Learned Senior Counsel of the Respondent is that the Respondent has followed a uniform policy, which is fair, transparent and consistent in their evaluation process. The Respondent submits that there are 4 tiers of tender evaluation, namely:

(i) At the level of the Consultant viz, the Japan International Consultants Consortium (JICC). JICC prepared the Technical Bid Evaluation Report (TBER) in the present case. Appendix 3 C thereof clearly sets out the reasons for the disqualification of certain bidders (including the Petitioner) due to material non-conformities.

(ii) The TBER prepared by JICC is thereafter scrutinized and analysed by a multimember Tender Committee. In the present case, the Tender Committee, after due deliberation and after specifically examining the case of the Petitioner, has approved the TBER prepared by JJCC,

(iii) Thereafter the matter is placed before the concerned ED of NI-ISRCL, who is the "Accepting Authority". In the present case, the "Accepting Authority" has affirmed the decision of the Tender Committee.

> *(iv) Thereafter the matter is sent for the concurrence of JICA (i.e. the Japan International Cooperation, Funding Agency), which has also accorded no objection to the analysis of technical proposal in the present case.*

21. The Respondent has further argued that only 12 forms were required to be filled and signed by the authorised representatives of the bidder. The Petitioner has signed/ initialled all forms, except two, namely, Form CON i.e. 2.0 Pending Litigation and 3.0 Litigation History, and an adverse inference should be drawn against the petitioner for not signing the same.

22. The Respondents state in the counter affidavit that JICC made recommendations in its TBER, which were considered, deliberated and duly accepted by the Tender Committee on 09.04.2021. The observations made by the Tender Committee qua the petitioner are as under:

> ***"Form CON (i.e., 2.0 Pending Litigation & 3.0 Litigation History) have not been signed by the Authorised signatory of the Bidder and stamped.***
>
> ***Due to the following material deviation in this bid, it is recommended not to ask for clarifications and that the Bidder be disqualified.***
>
> *The Bidding Forms 2.0 Pending Litigation and 3.0 Litigation History which clearly indicate the need for the signature of the Bidder's Authorised Representative, have not been signed in violation of ITB 22.2. These forms are important for gauging a Bidder's existing legal liabilities and work performance.* ***Without this signature, it is unknown whether it has been submitted with the Bidder's knowledge and approval and therefore cannot be accepted.*** *Therefore, the bid is not substantially responsive to the requirements of the Bidding Documents and considered as rejected as per ITB 33.4."* (emphasis supplied)

23. The respondent has also argued that the scope of judicial scrutiny in tender matters is limited, and must be left to the commercial wisdom of the

tender floating authority. The constitutional courts should only be concerned with lawfulness of a decision, and not its soundness. The respondents have relied on the following decisions in support of their submission:

(i) Central Coalfield Limited & Anr v SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622 [paragraphs 38, 43, 47, 48]

(ii) Municipal Corporation, Ujjain & Anr v BVG Limited & Ors (2018) 5 SCC 462[paragraphs 15, 16, 17, 20, 27]

(iii) Yogiraj Powertech Pvt Ltd v State of Maharashtra, Through Its Secretary & Ors SCC Online Bom 5800 [paragraph 39]

(iv) Jalgaon Golden Transport Pvt Ltd v Union of India & Ors 2020 SCC Online Born 7460 [paragraph 53]"

24. Learned senior counsel for the Respondent has argued that the party issuing the tender has a right to punctiliously and rigidly enforce the terms of the tender. The Court cannot substitute its view for the employer, who has interpreted the terms of the bid document, and seeks its mandatory compliance. Whether the term of the bid document is essential, or not, is the decision to be taken by the employer which must be respected by the Courts while exercising judicial scrutiny. The Respondents have argued that the scope of judicial scrutiny in tender matters is limited, and must be left to the wisdom of the tender floating authority.

25. Mr Saurabh Kirpal, Learned Senior Counsel appearing for the Petitioner has advanced his submissions in rejoinder. Mr. Kirpal submits that since the reasons for rejection have only been made known to the Petitioner upon filing of the counter-affidavit, he is entitled to deal with the respondents' defence *in extenso*. He argues that undisputedly, Form CON 2.0 and Form CON 3.0 have been duly stamped but, inadvertently, not signed. The entire electronic bid

submitted by the Petitioner, through the online mode had been digitally signed at the time of being uploaded online. The fact that all the Forms have been duly submitted with the knowledge and approval of the Petitioner is evident from the check list and Form ACK, which is part of the bid submitted by the Petitioner. The relevant extract of Form ACK relied upon by the petitioner reads as follows:

"Form ACK

Acknowledgement of Compliance with Guidelines for Procurement under Japanese ODA Loans

*A) I, **Mitesh Shah**, being duly authorized by **Montecarlo Limited** (hereinafter referred to as the "Bidder") to execute this Acknowledgement of Compliance with the Guidelines for Procurement under Japanese ODA Loans, hereby certify on behalf of the Bidder and myself that:*

*(i)**all information provided in the Bid submitted by the Bidder and its subcontractors** for the Project for Construction of Mumbai-Ahmedabad High Speed Rail, name of the Contract "Design and Construction of Civil and Building Works for the Depot on Design Build Lump Sum Price Basis for Double Line High Speed Railway involving works for Site Formation, Abutment, Retaining Walls, Roadbed for track, Box Culvert, Roads, Cable Duct, Foundations of OHE Masts, Piping, Drainage, Water Supply, Water Harvesting, Fire Fighting, Landscaping, Boundary Wall, General Inspection Train Shed, Maintenance Depot and other Associated works At Sabarmati between MAHSR Km. 507.599 and MAHSR Km. 509.726 in the State of Gujarat for the Project for Construction of Mumbai-Ahmedabad High Speed Rail" [Package No. MAHSR-C-8], and number oflot(s) is one (1), **is true, correct and accurate to the best of the Bidder's and my knowledge and belief;** and*

(ii) the Bidder or any of its subcontractors has not, directly or indirectly, taken any action which is or constitutes a corrupt or fraudulent practice and is not subject to any conflict of interest as stipulated in the relevant section of the Guidelines and the Bidding Document.

B) I certify that the Bidder has NOT been debarred by the World Bank Group for more than one year since the date of issuance of Invitation for Bids.

C) I certify that the Bidder will not enter into a subcontract with a firm which has *been barred by the World Bank Group for a period more than one year, unless on the date of the subcontract at least three (3) years have passed since the date of such debarment decision.*

D) I certify, on behalf of the Bidder and its subcontractors, that if selected to undertake works and services in connection with the Contract, the Bidder and its subcontractors shall carry out such works and services in continuing compliance with the terms and conditions of the Contract.

E) I further certify, on behalf of the Bidder and its subcontractors, that if the Bidder and any of its subcontractors is requested, directly or indirectly, to engage in any corrupt or; fraudulent practice under any applicable law, such as the payment of a rebate, at any time or any stage of a process of procurement such as negotiations, execution or implementation of contract (including amendment thereof), the Bidder shall report all relevant facts regarding such request to the relevant section in JICA (details of which are specified below) in a timely manner.

JICA's information desk on fraud and corruption (A report can be made to either of the offices identified below.)

(1) JICA Headquarters: Legal Affairs Division, General Affairs Department
URL: https://www2.jica.go.jp/en/odainfo/index.php
Tel: +81 (0)3 5226 8850

(2) JICA India Office
16th Floor, Hindustan Times House
18-20, Kasturba Gandhi Marg, New Delhi-110001, India
Tel: 011-4909-7000

The Bidder acknowledges and agrees that the reporting obligation stated above shall NOT in any way affect the Bidder's responsibilities, obligations or rights, under relevant laws, regulations, contracts, guidelines or otherwise, to disclose or report such request or other information to any other person(s) including the Employer or to take any other action, required to or allowed to, be taken by the Bidder. The Bidder further acknowledges and agrees that JICA is not involved in or responsible for the procurement process in anyway.

F) If any of the statements made herein is subsequently proven to be untrue or incorrect based on facts subsequently determined, or if any of the warranties or covenants made herein is not complied with, the Bidder will accept, comply with, and not object to any remedies taken by the Employer and any sanctions Imposed by or actions taken by JICA. (emphasis supplied)

26. It is further submitted by Mr. Kirpal that, in any event, non-signing of Form CON 2.0 and CON 3.0 would not constitute a material deviation as defined under Clause 33 of the ITB. A clarification could very well have been sought from the Petitioner in terms of Clause 29.1 of ITB, as has been done in the case of several other bidders for more serious and material omissions and deviations. Thus, the respondents have not treated the petitioner fairly and on an even scale. The petitioner also makes out a case of discrimination.

27. The Petitioner further relied upon Clause 34.1 and 34.2 of the *Instruction to Bidders*, highlighting that: where there is a non-material non-conformity, the Respondent could waive the same. Clause 34.2 enables the Respondent to call for such information or documentation as may be necessary to rectify non-material non-conformity in the Technical Bid related documentation. Relying on the two Clauses, the Respondent could have always called upon the Petitioner to rectify the same, which the respondent failed to do in respect of the petitioner, while invoking the same clauses in favour of other bidders for the reasons best known to them.

28. Mr. Kirpal has submitted that even if the respondent was of the view that the non-signing of Forms CON 2.0 and 3.0 was an omission, the tender conditions contained provisions of seeking clarification and also to permit the bidder to submit the necessary information or documentation within a reasonable period of time, and to rectify non- material non-conformities in the technical bid. In this regard, he has placed reliance on Clauses 29, 33 and 34 of the ITB extracted hereinabove. Clause 29 permits the respondents to seek a clarification of its bid by the bidder to assist the respondents, inter alia, in the

examination and evaluation of the technical, as well as the price bids. The only limitation is that while offering the clarification, the bidder cannot make a change in the substance of the technical bid, or the price bid. Had the petitioner been given an opportunity to clarify whether it stands by its declaration made in Forms CON 2.0 and 3.0, the petitioner could have clarified the position and put the matter to rest. The petitioner could have made up the so called deficiency by submitting signed copies of the said two Forms. Such clarification would not have involved any change whatsoever in the content/ substance of the declarations contained in Forms CON 2.0 and 3.0 and, thus, it would have no bearing on the substance of the technical bid, or the price bid. Similarly, the respondents could have had resort to Clause 34 of the ITB, as extracted hereinabove. Pertinently, the respondents have not stated that they have found the technical bid of the petitioner to be non-responsive for any other reason. In fact, the petitioner's technical bid has been held to be non-responsive at the very threshold only on the ground that Forms CON 2.0 and 3.0 do not bear the physical signatures of the petitioner. However, if the respondents were to proceed to technically evaluate the petitioner's bid on all other relevant parameters, and were to find the same to be substantially responsive (minus the two omissions in physically signing Forms CON 2.0 and 3.0), the respondents could, by resort to Clause 34 of the ITB could have permitted the petitioner to rectify the non-material non-conformities i.e. lack of signatures on the physical copies of the two forms i.e. Forms CON 2.0 and 3.0.

29. To meet the argument that the bid submitted by the petitioner bore digital signature, and that was sufficient compliance of the condition requiring signatures of the condition requiring signatures on Form CON 2.0 & 3.0,

learned senior counsel for the Respondent has argued that the digital signatures were only required for the purpose of uploading the 'Bid Documents', and cannot be understood as signature on the prescribed Bid Forms.

(DISCUSSION & CONCLUSION)

1) Firstly, we may deal with the justification provided by the respondents for not communicating the reasons for disqualification of the petitioner soon after the said decision was taken. The reliance placed by the respondent on Clause 2 of Option A – Section I Instruction to bidder, is of no avail. Clause 28 under Clause (e) of Option A Section I states that information relating to the evaluation of bids and recommendation of contract award shall not be disclosed to bidders, or any other persons, until information on contract award is communicated to all the bidders in accordance with ITB 42. Clause (f) provides that after notification of award, unsuccessful bidder may request, in writing, to the employer a debriefing seeking explanation on the grounds on which their bids were not selected. The purpose of the clause appears to be to prevent a possible challenge to the multi-stage tendering process mid way.

2) The aforesaid clauses of the tender, in our view, are patently illegal inasmuch, as, they seek to curtail the right of the bidders to challenge the rejection of their bid in a multi-stage bidding process, at the earliest, and before the award of the contract. If such a clause is permitted to be adopted, the respondent would ensure that, even a bidder – who has a justifiable grievance and who may have been illegally ousted from the bidding process, would be left with a *fait accompli,* and would not be in a position to challenge the rejection of its bid at an appropriate time.

3) In our view, our jurisprudence does not permit this mechanism to be

adopted, as every action of the State, *inter alia*, in relation to the initiation, processing and award of a tender – which is a public largess, is open to judicial scrutiny. In our view, to permit the said mechanism to be adopted in respect of public tenders would tantamount to giving a *carte blanch* to the tender inviting authority to proceed as per its own whims and prejudices, and it would take away the valuable right of the bidders to question the acts and omissions of the tender inviting authority at an appropriate time, which if permitted, would prevent an illegal, and possible whimsical, arbitrary and biased approach in the matter of initiation, processing and award of the tender. This clause restricts the right of the bidders to seek judicial scrutiny of the tendering process, within the realms it is permitted by law. Scrutiny of State action in the matter of State Largess – within permissible scope and limits, ensures that the process remains free from serious lacunas. The State is obliged to act in a transparent manner while distributing State Largess. Such scrutiny is essential in the Public Interest.

4) We are of the view that the respondent and all other instrumentalities of the State – which invite public tenders, are bound to maintain transparency in their actions at all times, and cannot claim a right to complete the multi-stage process of tendering without keeping all the bidders informed about the status at every stage. Whenever the bid of a bidder is rejected – for whatever reasons, the reasons are bound to be conveyed to the bidder concerned, so that he may avail of his remedies, if he feels aggrieved.

5) We may state that the Courts exercising extraordinary Constitutional writ jurisdiction, while dealing with such challenges, do not interfere with the tendering process for the asking. Only when the petitioner is able to establish that it has approached the Court without any delay or laches, and that he has a

strong *prima facie* case on merits, the writ petition is entertained and such protective relief is granted, so as would not render the petition infructuous, while keeping in mind the balance of convenience. Non-disclosure of the reasons for declaring any bidder/ tenderer as "disqualified", in fact, proves to be counter–productive, as an aggrieved bidder – when he approaches the Court firstly raises the grievance of not knowing why he has been disqualified and, since he is not aware of the reasons, he is not in a position to place those reasons before the Court. If the reasons were to be communicated at the appropriate stage, the bidder may choose not to challenge the same after evaluating their worth and, even if he chooses to challenge the same, the Court would – even at the stage of preliminary hearing, have those reasons before it to assess whether a case for entertainment of the petition is made out, or not. The Court would also be better placed to assess whether the bidding process needs interference at that stage. On the other hand, in the absence of reasons, the Court would invariably call for the reasons and may have to protect the interests of the petitioner before it, lest the petition becomes infructuous, which may result in obstruction in the tendering process. Thus, we disapprove of the mechanism adopted by the respondent to deny the reasons for disqualification to the bidders at the stage at which the bidder is disqualified. The petitioner should have been communicated the reasons for disqualification soon after the petitioner's disqualification.

6) We now proceed to consider the primary issue arising for our consideration in this case. We have heard learned Counsels for the parties and gone through the pleadings and judgments relied upon. The record relating to evaluation/ processing of the Technical Bids of all the bidders produced by the respondents under our directions has also been carefully perused. The moot

point for consideration before us, firstly, is whether the respondents are justified in taking the view that the Non-Signing of Form CON: 2.0 Pending Litigation, and 3.0 Litigation History in the physically submitted bid by the authorised representative of the Petitioner, constitutes a material breach to hold the Petitioner's bid as Technically Non-Responsive. Secondly, the issue that arises for consideration is whether the respondents have adopted a uniform criteria/ procedure while evaluating the Technical Bids, or whether the Petitioner has been discriminated against.

7) At this stage, it will be relevant to reproduce some relevant instructions to bidders.

> ***"29. Clarification of Bids***
>
> *29.1* ***To assist in the examination, evaluation, and comparison of the Technical and Price Bids, and qualification of the Bidders, the Employer may, at its discretion, ask any Bidder for a clarification of its Bid, giving a reasonable time for a response****. Any clarification submitted by a Bidder that is not in response to a request by the Employer shall not be considered. The Employer's request for clarification and the response shall be in writing.* ***No change in the substance of the Technical Bid or prices in the Price Bid, including any voluntary increase or decrease in the prices, shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the Bids, in accordance with ITB 36****."* (emphasis supplied)

> ***"32. Qualification of the Bidders***
>
> *32.1* ***The Employer shall determine to its satisfaction whether Bidders meet the qualification criteria specified in Section III, Evaluation and Qualification Criteria, during the evaluation of Technical Bids.*** *However, if prequalification was carried out prior to the bidding process, the Employer may carry out the assessment of the qualification criteria specified in Section III, Evaluation and Qualification Criteria, for the Bidder who submitted the lowest evaluated and substantially responsive Bid only.*

32.2 ***The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB 15***.

32.3 ***An affirmative determination shall be a prerequisite for award of the Contract to the Bidder. A negative determination shall result in disqualification of the Bid, in which event the Employer shall return the unopened Price Bid to the Bidder***.

If the assessment of the Bidder's qualification is conducted for the lowest evaluated Bidder only, in accordance with ITB 32.1, and the result of such assessment is negative, the Employer shall proceed to the next lowest evaluated Bid to make a similar determination.

32.4 *The capabilities of the manufacturers and Subcontractors proposed in its Bid to be used by the Bidder will also be evaluated for acceptability in accordance with Section III, Evaluation and Qualification Criteria. Their participation should be confirmed with a letter of intent between the parties, as needed. Should a manufacturer or Subcontractor be determined to be unacceptable, the Bid will not be rejected, but the Bidder will be required to substitute an acceptable manufacturer or Subcontractor without any change to the Bid Price. Prior to signing the Contract, the corresponding Appendix to the Contract Agreement shall be completed, listing the approved manufacturers or Subcontractors for each item concerned."* (emphasis supplied)

33. Bids

33.1 The Employer's determination of a Technical Bid's responsiveness is to be based on the contents of the Bid itself, as defined in ITB 11.2.

33.2 "A substantially responsive Technical Bid is one that meets the requirements of the Bidding Documents without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

(a) if accepted, would:

(i) affect in any substantial way the scope, quality, or performance of the the Works specified in the Contract; or

(ii) limit in any substantial way, inconsistent with the Bidding Documents, the Employer's rights or the Bidder's obligations under the proposed Contract; or

(b) if rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive Bids"

33.3 The Employer shall examine the technical aspects of the Technical Bid submitted in accordance with ITB 17, in particular, to confirm that all requirements of Section VI, Employer's Requirements have been met without any material deviation, reservation, or omission.

33.4 If a Technical Bid is not substantially responsive to the requirements of the Bidding Documents, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

"34. Nonmaterial Nonconformities

34.1 Provided that a Technical Bid is substantially responsive, the Employer may waive any nonconformity 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 nonconformities in the Technical Bid related to documentation requirements. Requesting information or documentation on such nonconformities 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.

34.3 Provided that a Technical Bid is substantially responsive, the Employer shall rectify quantifiable nonmaterial nonconformities related to the Bid Price. To this effect, the Bid Price shall be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using the method indicated in Section III, Evaluation and Qualification Criteria."

8) We are conscious of the fact that judicial scrutiny of evaluation done by the tender floating authority – of compliance of the tender conditions, and the interpretation of tender conditions by the tender floating authority, should be only within permissible limits. The Court cannot question the decision of the tender inviting authority on merits. The Courts concern is only to see that the tender process is fair, reasonable, non-arbitrary and bonafide. The Supreme Court *in* ***B.S.N. JOSHI & SONS LTD. Vs. NAIR COAL SERVICES LTD. AND OTHERS***, *(2006) 11 SCC 548* has laid down the legal principles

applicable to award government contracts/ tenders, which read as under:

> ***"61.*** *Law on the similar term has been laid down in Poddar Steel Corporation v. Ganesh Engineering Works and Others [(1991) 3 SCC 273] in the following terms:*
>
> > *6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said noncompliance deprived the Diesel Locomotive Works of the authority to accept the bid.* ***As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. 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."***
>
> ***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 of 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."*

9) In these proceedings, we are concerned: whether the acts/ omissions of the respondent in the matter of evaluation of the technical bid of the petitioner are violative of Article 14 of the Constitution of India.

10) The omission on the part of the petitioner that we are concerned with, relates to the signatures/ initials not being affixed on two Forms i.e. Form CON 2.0 and Form CON 3.0, in the physically submitted bid document wherein the petitioner was obliged to declare particulars and details of pending litigations and litigation history. As already noticed above, there is no denial of the fact that these Forms have been duly filled and stamped by the petitioner. However,

the signatures/ initials have not been affixed on the physically submitted bid– according to the petitioner, due to over sight.

11) Consequently, though the respondents were provided with the requisite information as desired in these Forms; the Forms were also stamped, and; a general declaration was also made by the petitioner with regard to all its statements/ information being true, (in Form ACK) the physically submitted bid lacked the signatures of the authorised signatory only on these two forms. We have extracted herein above the declaration made by the petitioner in Form ACK, which is to the effect that "*all information provided in the Bid submitted by the bidder is true, correct and accurate to the best of the Bidders' and my knowledge and belief*". The entire bid submitted by the petitioner electronically – which included Form CON 2.0 and 3.0 was digitally signed.

12) Are the respondents, in the above background, even justified in claiming that any part of the bid document – including Form CON 2.0 and 3.0 were not signed by the petitioner? In our view, the view formed by the respondents that Form CON 2.0 and 3.0 were not signed/ initialled cannot be said to be a reasonable view.

13) Despite the respondents having adopted the modern ways of dealing with the tendering process i.e. through the electronic mode – which requires the submission of e-bid electronically with due authentication i.e. with digital signatures, the mindset of the respondents has not progressed and moved on to recognise and accept the effect of the technological advancement which they have themselves adopted. Once the entire bid is digitally signed, it results in authentication of each and every document comprising the e-bid document/ electronic record, by the bidder as his submission. After all, the purpose of

stipulating the condition that the bid should be signed by the party, is to bind him down to his bid. The signing of the bid, or any form forming part of it, is to fix the ownership of the document to the party signing the same. The digital signatures – like hand subscribed signatures, are unique to the party executing the same. Therefore, once the entire bid of the Petitioner was digitally signed – which included Form CON 2.0 and 3.0, the said Forms also stood digitally signed and authenticated. Moreover, the execution of Form ACK also had the effect of the petitioner owning up the information filled in and provided in Forms CON 2.0 and 3.0, and authenticating Form CON 2.0 and 3.0. The further stipulation that the said physically submitted Forms should be signed/ initialled can only be described as a surplussage, and nothing more.

14) The Parliament enacted the Information Technology Act, 2000 with a view to provide legal recognition to transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and in that light to amend the provisions of, inter alia, the Evidence Act.

15) Section 3 is pertinent and it, *inter alia*, provides that subject to the provisions of the Section, "*any subscriber may authenticate an electronic record by affixing his digital signature.*" Therefore, the law enables the subscriber to authenticate an electronic record by affixing his digital signature.

16) Section 4 states that where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then,

notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form; and is accessible so as to be usable for a subsequent reference.

17) Section 5 seeks to carry further the mandate of Section 3 and 4 by providing that where any law provides that information or any other matter shall be authenticated by affixing the signature, or any document shall be signed, or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

18) Section 6, *inter alia,* states:

> "*6. **Use of electronic records and electronic signatures in Government and its agencies**.–(1) Where any law provides for—*
> *(a) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner;*
> *(b) the issue or grant of any licence, permit, sanction or approval by whatever name called in a particular manner;*
> *(c) the receipt or payment of money in a particular manner,*
> *then, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic form as may be prescribed by the appropriate Government.*"

19) We may, at this stage, note that the Government of India has framed the General Financial Rules (GFRs) which are a compilation of Rules and Orders to be followed by all while dealing with matters involving public finances. There are Executive instructions to be observed by all Departments and Organisations

under the Government and specified bodies, except otherwise provided for in the said Rules. The aim of these Rules is to provide a framework within which an organisation manages its business in a financially prudent manner without compromising its flexibility to deal with various situations. Rules 159 and 160 of the GFRs are relevant for our purpose, and they provide as follows:

> *"**Rule 159 E-Publishing***
>
> *(i) It is mandatory for all Ministries/Departments of the Central Government, their attached and Subordinate Offices and Autonomous/Statutory Bodies to publish their tender enquiries, corrigenda thereon and details of bid awards on the Central Public Procurement Portal (CPPP).*
>
> *(ii) Individual cases where confidentiality is required, for reasons of national security, would be exempted from the mandatory e-publishing requirement. The decision to exempt any case on the said grounds should be approved by the Secretary of the Ministry/Department with the concurrence of the concerned Financial Advisor. In the case of Autonomous Bodies and Statutory Bodies' approval of the Head of the Body with the concurrence of the Head of the Finance should be obtained in each such case. Statistical information on the number of cases in which exemption was granted and the value of the concerned contract should be intimated on a Quarterly basis to the Ministry of Finance, Department of Expenditure.*
>
> *(iii) The above instructions apply to all Tender Enquiries, Requests for Proposals, Requests for Expressions of Interest, Notice for pre Qualification/Registration or any other notice inviting bids or proposals in any form whether they are advertised, issued to limited number of parties or to a single party.*
>
> *(iv) In the case of procurements made though DGS&D Rate Contracts or through any other Central Procurement Organizations (CPOs) only award details need to be published.*
>
> *(v) These instructions would not apply to procurements made in terms of provisions of Rules 154 (Purchase of goods without quotations) or 155 (Purchase of goods by purchase committee) of General Financial Rules.*

Rule 160 E-Procurement

(i) ***It is mandatory for Ministries/Departments to receive all bids through e-procurement portals in respect of all procurements.***

(ii) Ministries/Departments which do not have a large volume of procurement or carry out procurements required only for day-to-day running of offices and also have not initiated e-procurement through any other solution provided so far, may use e-procurement solution developed by NIC. Other Ministries/Departments may either use e-procurement solution developed by NIC or engage any other service provider following due process.

(iii) These instructions will not apply to procurements made by Ministries/ Departments through DGS&D Rate Contracts.

(iv) In individual case where national security and strategic considerations demands confidentiality, Ministries/Departments may exempt such cases from e-procurement after seeking approval of concerned Secretary and with concurrence of Financial Advisers.

(v) In case of tenders floated by Indian Missions Abroad, Competent Authority to decide the tender, may exempt such case from e-procurement." (emphasis supplied)

20) Thus, it is mandatory for Ministry/ Department to receive all bids through e - Procurement Portals in respect of all procurements subject to Clause (iii) of Rule 160.

21) We may also, at this stage, take note of the Guidelines issued by the Government of India called "*General Guidelines for e-Procurement under Central Public Procurement Portal*", dated 07.06.2019. These guidelines, insofar as they are relevant, read as follows:

GENERAL GUIDELINES FOR e-PROCUREMENT UNDER CENTRAL PUBLIC PROCUREMENT PORTAL

(**https://eprocure.gov.in**)

7th June 2019

Office memorandums dated 30th March, 2012, 9th Jan, 2014 & 21st January 2016 and other OMs (please refer 'Instructions related to CPPP' at eprocure.gov.in) issued by the Department of Expenditure, Ministry of Finance mandates all Ministries / Department of Central Government their attached and subordinated offices, Central Public Sector Enterprises (CPSEs) and Autonomous / Statutory Bodies to commence e-Procurement in respect of all procurements with estimated value of Rs. 2 lakhs or above w.e.f 1.4.2016 by selecting eProcurement service provider of their own choice.

Also refer Rule 159 and Rule 160 of GFR 2017 regarding publication of tender related information on CPPP as well as receipt of e-bids.

NIC facilitates Ministries/ Departments/others in complying with above guidelines thru application modules available under Central Public Procurement viz e-Publishing (eprocure.gov.in/epublish/app), e-procurement (eprocure.gov.in/eprocure/app) and XML data transfer.

Ministries/Departments/others which obtain bids in physical format may use ePublishing module of CPPP for publishing of tender related information.

Ministries/Departments which do not have a large volume of procurement or carry out procurements required for day to day running of offices and also have not initiated e-Procurement through any other solution provider may use the e-Procurement solution developed by NIC, if desired. The same is available under the Central Public Procurement (CPP) Portal at URL: eprocure.gov.in/eprocure/app. Ministries/Departments with large volume of procurement other than of the nature mentioned above may either use the e-Procurement solution developed by NIC or engage any other service provider by following due process.

Ministries/Departments, which are already carrying out e-Procurement through other service providers or have developed e-Procurement solutions in house, may continue to do so, ensuring that conditions/guidelines provided in the above OMs of DoE / GFRs are fulfilled. They may publish tender related information on CPPP using XML data transfer. For further details, pl refer the XML Help Document at available at https://eprocure.gov.in/cppp/sites/default/files/eproc/XMLStepbyStepDocument.pdf or mail to cppp-nic@nic.in

The table below shows the key differences between e-Publishing module and e-Procurement module of NIC accessible through the CPP Portal.

e-Publishing module	*e-Procurement module*
1. Entails publishing of all tender enquiries, corrigenda thereto and awards of contract thereon on the CPP Portal. *Under e-Publishing, the User Organisations will continue to invite bids in paper based format.*	*1. Covers the complete tendering process starting from online publishing of tender enquiries, online bid submission by the bidders, online bid opening, uploading of bid evaluation results and publication of award of Contract.* *Under e-Procurement, the complete tendering, including the submission of bids by the bidders, will be online.*
2. Under the e-Publishing module, the User Organisations are required to define two roles for their officials authorised to use this module, viz. *a. **Tender Creator/Procurement Officer Admin** - responsible for filling up and uploading the details of a tender enquiry / corrigenda / award of Contract on the CPP Portal.* *b. **Tender Publisher** - responsible for publishing the tender enquiry / corrigenda / award of contract created by the Tender Creator on the CPP Portal.*	*2. Under the e-Procurement module, the User Organisations will be required to define two additional roles apart from the Tender Creator and Tender Publisher as in e-Publishing, viz.* *a. The role of **Bid Opener** is Critical for e-Procurement. Bid openers should be identified for each tender at the time of publishing of the tender Enquiry.* *b. **Bid Evaluator** - authorised to upload the results of the various stages of bid Evaluation on the CPP Portal.* *c. Minimum of 4 Bid openers must be configured against each tender to avoid any issues in tender opening* *d. It is suggested to have minimum 5 Digital Signature Certificates to start with.*
3. All authorised department users, from the User Organisations, can login using a login ID and	*3. All authorised department users, from the User Organisations, will be required to*

password assigned to them, to operate the e-Publishing module of the CPP Portal. They do not need any Additional mode of authentication.	*have valid Digital Signature Certificates (DSCs), in addition to their user ID and password, to be able to operate the e-Procurement Module.*
4. e-Publishing does not require the bidders to enrol on the CPP Portal, since the bids will continue to be submitted in the paper based format.	***4. e-Procurement requires the bidders to enrol on the CPP Portal, using a valid Digital Signature Certificate (DSC) and Valid email address. The bidders will be required to submit their bids online on the e-Procurement module.***

(emphasis supplied)

22) From the above, it is clear that the e-Procurement Module mandatorily requires, inter alia, the bidders to enrol on the CPP Portal, using valid Digital Signature Certificate (DSC), and valid email address. The bidders are required to submit their bids online on the e-Portal Module – which has been done in the present case.

23) As noticed above, Section 3 of the IT Act gives the right to any subscriber to authenticate an electronic record by affixing his digital signatures. This right of the subscriber is subject only to the provisions contained in the said Section. The right conferred on the subscriber of digital signatures to authenticate an electronic record by affixing his digital signatures is not conditional upon the person/ authority before whom the electronic record is submitted, recognising the digital signatures as an acceptable and valid mode of authentications of the electronic record. Thus, digital signatures on an electronic record have been accorded the same status as the affixation of physical signatures by the concerned person/ subscriber on a physical document/ record, and digital

signatures on the electronic record obviate the need to affix the physical signatures by the concerned person/ subscriber in hand, on the physical document. As noticed hereinabove, in the present case, the respondents have themselves stipulated that the electronic record/ bid submitted by the bidder should bear digital signatures. In this regard, we may take note of the relevant instructions for submission of online bid contained in the NIT. The same provides "*The Bidders are required to submit soft copies of their bids electronically on the e-procurement portal of NIC (CPP Portal) https://etenders.gov.in/eprocure/app, using valid Digital Signature Certificates. The Instructions given below are meant to assist the bidders in registering on the CPP Portal, prepare their bids in accordance with the requirements and submitting their bids online on the CPP Portal.*". It further provides in ITB 1.3 under the heading "submission of bids" as follows:

a. *Bidder should log into the website well in advance for bid submission so that they can upload the bid in time i.e. on or before the bid submission time. Bidder will be responsible for any delay due to other issues.*
b. ***The Bidder has to digitally sign and upload the required bid documents one by one as indicated in the bidding document. The Digital signature (DSC) used for uploading of the bid submission should be in the name of the person to whom the power of attorney (POA) have been issued.***" (emphasis supplied)

24) This is in terms of the requirement laid down under the GFRs read with the General Guidelines for e-Procurement under Central Public Procurement Portal.

25) Though Section 5 of the IT Act opens with the words "*Where any law*

provides...........", in our view, for the purpose of the said Section, the GFR can be construed as a law, since it is compilation of Executive instructions issued by the Government of India from time to time and, therefore, the respondents are certainly bound by the GFRs.

26) The fact that the electronic bid/ record submitted by the petitioner was affixed with the petitioner's digital signature, was sufficient compliance of the requirement of all the Forms forming part of the electronic bid/ record being "signed", and the mere omission on the part of the petitioner to affix the signatures in hand on the two Forms in question, namely Form CON 2.0 and 3.0 submitted physically as well, could not lead to the conclusion that the said Forms were not "signed" by the bidder.

27) We may also take note of a decision of the Punjab and Haryana High Court in Civil Writ Petition No. 2440 of 2016 (O & M), titled ***Shree Balaji Tranport Corporation (Regd.) v. Food Corporation of India, Panchkula and others***, decided on 18.02.2016.

28) The ground on which the petitioner's tender was rejected in this case was that the petitioner had failed to duly sign each page of the annexure, and appendixes of the Model Tender Format, and to sign and upload the same on the e-procurement portal. However, the petitioner had signed the same by way of Digital Signature Card (DSC). The stand of the respondent authority was that the expression "Duly Signed" used in the tender conditions referred only to physical signature, and not to digital signatures with the use of DSC. Like – in the present case, the tender conditions required the bidder to possess DSC for submission of the bid.

29) The Division Bench answered the question: whether the bid documents

could be said to be duly signed by the bidder upon use of the DSC, in the affirmative. The Division Bench held that the words "Duly Signed" and "Signed" had not been defined in the tender conditions and, therefore, their meaning should be derived on a reading of the NIT as a whole. The Division Bench held that the bidders were permitted to use DSC for submission of their bids. The instructions to bidders required the bidders to submit soft copies of their bid electronically on the CPP Portal using valid DSC. The bidders were required to digitally sign and upload the documents one by one, as indicated in the tender document. These clauses were a clear indication that the bidders were entitled to digitally sign all the documents. The Division Bench observed "*Even assuming that the bidders were entitled to physically sign the documents, it would not make any difference, for, they were, in view of the above clauses, entitled to also sign the documents digitally*". The Division Bench also took note of the definition of "Digital Signature" contained in the IT Act. The Division Bench observed that even if it is assumed that the provisions of the IT Act were not applicable "*However, it is reasonable to presume that parties understood the words 'digital signatures' to have the same meaning as in the IT Act. The parties have not stated what they took these words in the tender documents to mean. It is not denied that the DSC used by the petitioner falls within the definition of a digital signature in Section 2 (p) and (q) of the IT Act. It is reasonable to presume that what the parties meant by digital signatures was a digital signature as defined in the IT Act. Moreover, in any event, the parties were supplied the Digital Signature Card by respondent No.1 and it is that which has been utilized by the petitioner to place the digital signatures.* "

30) Consequently, the Division Bench quashed the decision of the

respondents rejecting the petitioner's bid.

31) We may note that the submission of the petitioner that the entire bid –as submitted electronically, was digitally signed by the petitioner, has not been controverted by the respondents. In fact, on the said aspect, the respondents have not advanced any submission whatsoever.

32) Even if we were to proceed on the basis that the failure on the part of the petitioner – to physically affix signatures on Forms CON 2.0 and 3.0 (which were physically submitted), was an omission on the part of the petitioner, it needs examination whether the respondents were reasonable in their approach in treating the said omission as fatal to the petitioner's bid, or, the said omission was a non-material non-conformity in the technical bid of the petitioner. The first of these issues needs examination in the context: whether the respondents have adopted a uniform procedure while dealing with the petitioner's bid vis-à-vis other bidders.

33) Clause 33.2 of the Instructions to Bidders states that a substantially responsive technical bid is one that meets the requirements of the bid documents, "***without material deviation, reservation, or omission*". A material deviation, reservation, or omission is one that, if accepted, would either affect, in any substantial way, the scope, quality, or performance of the works specified in the contract, or limit, in any substantial way – inconsistent with the bidding documents, employers right or the bidder's obligation under the proposed contract, or, if rectified, would unfairly affect the competitive position of other bidders presenting substantial responsive bids.

34) Therefore, the question to be asked is that, if the omission of the petitioner in not signing the physically submitted Forms CON 2.0 and 3.0, were

to be accepted, (i.e. overlooked, condoned, or the petitioner were to be given an opportunity to clarify the position or make good the deficiency), whether it would lead to any one of the consequences enumerated in Clause 33.2 of the ITB? The answer to this question, in our view, is a plain "NO". The respondents could have called for a clarification from the petitioner in terms of Clause 29 of the ITB, which permits the respondents to call for clarifications "*to assist in the examination, evaluation, and comparison of the technical and price bids, and qualification of the bidders*………", giving a reasonable time for response. The petitioner could have been asked: if they stand by the declarations made by them in Forms CON 2.0 and 3.0, and their signatures could have been obtained on the said Forms. If the same had been done, the same would have no bearing on "*substance of the Technical Bid or prices in the Price Bid*". The failure on the part of the petitioner to physically sign these two Forms, even if accepted as an omission for the sake of argument, the acceptance/ waiver of the said omission would have absolutely no effect, much less in a substantial way on the scope, or performance of the works specified in the contract, since the information contained in these Forms does not relate either to the scope, or to the quality, or to the performance of the works specified in the contract. The waiver of the said omission also does not relate, in any way, much less, in a substantial way, the rights of the employer i.e. the respondent, or the obligations of the bidder i.e. the petitioner under the proposed contract. Even if the said omission (for the sake of argument, if it is accepted, is an omission), is rectified, it would not unfairly effect the competitive position of the other bidders presenting substantially responsive bids.

35) The information called for, and furnished by the petitioner in Forms CON

2.0 and 3.0 was information in relation to the pending litigation and litigation history, which are historical facts qua the bidder. It is not that the petitioner had hid those facts. The petitioner had filled up Forms CON 2.0 and 3.0, and even stamped them on the physical copy, apart from signing a declaration and Form ACK, and also submitting the electronic bid, including Forms CON 2.0 and 3.0, bearing the digital signatures of the petitioner. The omission on the part of the petitioner to physically sign the said two Forms was a mere omission of no consequence.

36) The tender conditions themselves show that the intent of the respondents could not have been to trap or fault a bidder on a minor oversight which did not materially affect the substance of the technical or commercial bid submitted by the bidder. Clause 34 of the ITB enables the respondent to waive any non-material non-conformity in the bid, that does not constitute a material deviation, reservation, or omission. As aforesaid, the omission attributed to the petitioner, even if there is one, is not a material omission.

37) We may notice a decision of this Court in ***Siemens Healthcare Private Ltd. & Anr. V. DGHS, Central Procurement Agency***, W.P.(C) No. 3452/2020, decided on 19.01.2021. In this decision, authored by one of us (*Vipin Sanghi, J*), the Division Bench observed:

> *"17. In our view, the respondents have resorted to hairsplitting, and taken a hyper technical view of the matter to non-suit the petitioner. The approach of the respondents cannot be described as either fair or reasonable. The respondent cannot sit with a magnifying glass while examining the bid document, with the objective of disqualifying the bidders on some or the other ground, howsoever petty or whimsical it may be. If there is a clear non-compliance of a mandatory condition, the Tender Evaluation Committee would be justified in rejecting the bid. At the same*

time, it cannot adopt an approach to unreasonably disqualify an otherwise qualified bidder. The purpose of scrutiny of a tender document submitted by a bidder should not be to non-suit the bidder on such hyper technical issues. Such exclusion on hyper technical approach would not be in public interest as it would curtail competition. The whole purpose of procuring goods and services by public authorities through the process of tender/ auction is to get the most competitive bids for the best product offered. Pertinently, in the present case, apart from the bidder, there was only one other tenderer, and exclusion of the petitioner was certainly not in public interest, since the said exclusion was founded upon completely unjustified grounds."

38) We may also take note of another decision rendered by a Division Bench of this Court ***in Macpower Cnc Machines Limited V. Union Of India, Through Development Commissioner Ministry Of Micro Small And Medium Enterprises (MSME)***, W.P.(C) 3942/2020, decided on 24.12.2020. This Court in this decision held, in relation to public tenders, inter alia, as follows:

"81 *The entire process of inviting bids in respect of a public tender is an expensive and time consuming process. The whole process, even in the present case, started way back in July, 2019 and the respondents sought to reject, inter alia, the petitioner's bids for Lots 4,5 and 6 in June, 2020. Substantial expenditure would have been incurred not only by the Government in the process of inviting the bids, but also by all the bidders in meeting the terms and conditions of the bid, preparing their bids, and submitting their bids. They had to shell out substantial monies towards earnest money deposit. The respondents cannot treat their bids lightly. They have a right to fair examination of their bids. If the respondents are allowed to conduct themselves in arbitrary and whimsical manner in the matter of examination of the bids, the public bidding process would lose is credibility, which would be detrimental to public interest. The respondents are accountable to the bidders, and merely because they have a right to reject any bid, and the discretion whether, or not, to call* *for clarification, it does not mean that the said powers can be exercised in an arbitrary and whimsical manner. The exercise of any discretion by a public authority has to be guided by the object and purpose for such powers being vested in the authority in the first place. Thus, in our view, even if the respondents genuinely entertained any doubt with regard to the technical bids submitted by the petitioner and other bidders, the respondents could not have lightly and casually rejected all the bids as technically disqualified, and that too on the basis of an unfounded and whimsical assumption as noted hereinabove, and they should have given a chance to the bidders to clarify the doubts, if any. Pertinently, the TEC called for clarification in numerous instances, but denied this opportunity to the petitioner unfairly.*

82. Our aforesaid view is fortified by Clause 30 of the ITB which provides that a bid which is substantially responsive may not be rejected on account of non-conformity, or omission, which is non-material. We have extracted Clause 30.1 and 30.2 in paragraph 22 hereinabove which states that in respect of a bid which is substantially responsive the Purchaser may waive any nonconformity in the Bid. It also provides that in respect of a substantially responsive bid, the purchaser, i.e. the respondent may request the bidder to submit the necessary information or documentation within a reasonable period of time to rectify non-material, non-conformities or omissions in the bid related to documentation requirements.

83. The respondents have sought to place heavy reliance on Clause 16.2 which talks about the obligation of the bidder to submit documentation in support of their technical bid. When Clause 16.2 is read in juxtaposition with Clause 30.2, it emerges that in respect of substantially responsive bids, non-submission of non-material documents can be made good even later. Pertinently, this is how the respondents have viewed and interpreted the aforesaid Clause while dealing with the bids received in respect of Lot 1 of the same Package. That approach of the respondent accords with the letter and spirit of the ITB. There is no reason for the respondents, not to follow suit while examining the technical bids in respect of Lots 4, 5 and 6."

39) Pertinently, it is not that the respondent has not operated Clause 29 and 34 of the ITB while examining the technical bids of the other bidders. As our further discussion would show, the respondent has called for clarifications, and by resort to Clause 34 of the ITB, permitted other bidders to provide detailed information on certain aspects, which, we dare say, may even have a bearing on the commercial bids of the bidders and may not be labelled as mere non-material non-conformities.

40) During the course of hearing held on 31.05.2021, we had required the respondents to file an affidavit, placing before us, the nature of clarifications sought from the 4 bidders, namely:

i) Bidder 1/9 – M/s M.S. Khurana Engineering Limited
ii) Bidder 3/9 – M/s ISGEC Heavy Engineering Limited
iii) Bidder 7/9 - M/s SCC-VRS (JV)
iv) Bidder 9/9 – M/s Dinesh Chandra R. Agrawal Infracon Pvt. Ltd

41) A perusal of the clarifications sought, and opportunities granted to the aforesaid bidders is revealing. We reproduce some of the deviations and the nature of clarifications sought and given by some of the bidders.

Package No. MAHSR-C8

Bidder's Name: ISGEC Heavy Engineering Limited. (BIDDER 3/9)

Annex--A

No.	Technical Bid			Clarification Sought by Employer rom Bidder	Bidder's Clarification
	Bid Submission Reference No.	**Bidding Document Reference**	**Employer's Observation**		
1.	Section IV, Part III, 4.2.1, Site Organisation Chart	Site Organisation	**1. Details of key personnel in not indicated in the organization chart for Head office and Site office.** **2. Details of duties and**	**The Bidder shall confirm that he has understood the requirements and that**	

			responsibilities of personnel is not provided. **3. Mobilization and demobilization program of key personnel is not provided.**	**he shall comply with the Employer's Requirements.**	
2.	4.2.2 Method Statement I. Earthwork		1. Method Statement for earthworks does not include design method. 2. Method Statement for earthworks does not include temporary works. 3. Method Statement for earthworks does not include inspection and testing. 4. Method Statement for earthworks does not include restoration of the Site. 5. Method statement of works does not include quality assurance and quality control. 6. Ownership status of borrow area is not clear. 7. Method of excavation in the proposed borrow area(s) is not provided. 8. Hauling method and hauling route from borrow area(s) is not provided. 9. Details of restoration of the borrow area(s) is not included. 10. Method Statement does not include arrangement of fill material other than from the Bidder's borrow area(s).	The Bidder shall confirm that he has understood the requirements and that he shall comply with the Employer's Requirements.	

Package No. MAHSR-C8

Bidder's Name: SCC-VRS (JV), (BIDDER 7/9)

Annex-A

No.	**Technical Bid**			**Clarification Sought by Employer rom Bidder**	**Bidder's Clarification**
	Bid Submission Reference No.	**Bidding Document Reference**	**Employer's Observation**		
1.	4.2.1 Site Organisation Chart		1. Indicated in the organization chart for Head office. 2. Bidder's proposed chart indicates that the chart should be read in	The Bidder shall confirm that he has understood the requirements and that he shall comply with the	

			Conjunction with the CVs of personnel provided in the Section of Proposed Personnel. Details of designated roles and responsibilities of the personnel is not indicated. 3. Details of duties and responsibilities of personnel is not provided.	Employer's Requirements.	
2.	4.2.2 Method Statement I. Earthwork		1. Design method for earthwork is not included. 2. Details of temporary work is not included. 3. Location(s) of proposed borrow area(s) is not. 4. Details of ownership of borrowed area(s) is not indicated. 5. Method of selection of suitable fill material at the borrow area(s) is not mentioned. 6. Details of hauling method and hauling route from the borrow area to the Site is not indicated. 7. Details of method of restoration of borrow area(s) is not mentioned. 8. Details of arrangement of fill material other than the Bidder's borrow area is not provided. 9. Method Statement provided by the bidder doesn't include all the items as mentioned in technical specifications of the bidding documents. (For e.g.: Tolerances etc.)	The Bidder shall confirm that he has understood the requirements and that he shall comply with the Employer's Requirements.	

Package No. MAHSR-C8

Bidder's Name: M.S. Khurana Engineering Limited- Ahmedabad. (BIDDER 1/9)

Annex-A

No.	Technical Bid			Clarification Sought by Employer rom Bidder	Bidder's Clarification
	Bid Submission Reference No.	**Bidding Document Reference**	**Employer's Observation**		
1.	4.2.1 Site Organisation Chart	Page 186	1. Organization chart of the head office and the site combined and indicated in a single organization chart and no separate organization chart for the head office and the site is provided. 2. Description of designated duties and responsibilities of key personnel is not included. 3. Mobilization and demobilization program of key personnel is not included.	The Bidder shall confirm that he has understood the requirements and that he shall comply with the Employer's Requirements.	
2.	4.2.2 Method Statement I. Earthwork	Page 187-190	1. Design method for earthwork is not included. Only compaction is covered in method statement. 2. Supply and Storage of material and/or equipment is not included. 3. Details of temporary work is not included. 4. Details of inspection and testing is not included. 5. Details of restoration of Site is not included. 6. Details of Quality Assurance is not included. 7. Location(s) of proposed borrow area(s) is not provided. 8. Details of ownership of borrowed area(s) is not indicated. 9. Details of method of excavation at the borrow area(s) is not mentioned. 10. Method of selection of suitable fill material at the borrow area(s) is not mentioned. 11. Details of hauling method and		

			hauling route from the borrow area to the Site is not indicated. 12. Details of method of restoration of borrow area(s) is not mentioned. 13. Details of arrangement of fill material other than the Bidder's borrow area is not provided. 14. Method Statement provided by the bidder doesn't include all the items as mentioned in technical specifications of the bidding documents. (For e.g.: Tolerances, Materials etc.) 15. Bidder has mentioned that "Compaction shall be done SO as to achieve a dry density of not less than 90% of the maximum dry density........" against 95% required.		

PTO

Bidder's Name: Dineshehandra R. Agrawal Infracon Pvt. Ltd. (BIDDER 9/9) **Annex. -A**

No.	**Technical Bid**			**Clarification Sought by Employer rom Bidder**	**Bidder's Clarification**
	Bid Submission Reference No.	**Bidding Document Reference**	**Employer's Observation**		
1.	Site Organisation Chart, Page 738	Technical Proposal: Site Organisation Chart	**Site Organisation Chart is not signed and stamped by the Authorised Signatory of the Bidder.**	**Although the Bidder should have signed and stamped the form as per ITB 22.2, there is no clear indication in the Site Organization Form of the Bidding Documents in this regard. The Bidder is therefore requested to confirm the content of Site Organization Chart.**	
2.	General Construction Experience, Page 42/55 to 53/55 of 03 Checklist Sr. No.17 to 21	From EXP-1 & Sub-Cl 3.2 (d)(i), Section III, Part-1 of Bidding Documents	In Form EXP-1, the Bidder shows the ending year of the project "Construction of ROB cum Flyover at Ranichak" as 2020. Whereas in the Client certificate it is mentioned that an extension is recommended up to 17-02-2021.	The Bidder is requested to provide documentary evidence that extension for this work has been granted up to 17-02-2021, which is required to satisfy the criteria for this evaluation Or Bidder to submit the documentary evidence for Form EXP-1 by referring to those stated ongoing works mentioned in Form FIR-2.	
3.	Form FIR-1: Financial Resources Page 125 Page 131	From FIR-1: Financial Resources	In the column 2 of Form FIR-1, the Bidder has mentioned the values in "Million INR'. But the Annual Reports submitted by the Bidder, shows that the values of Net Worth are in "INR" not in 'Million INR'. Therefore, other values stated in the Form FIR-1 by the Bidder are in 'INR" not in 'Million INR'.	Bidder to confirm the 'unit' of values mentioned in the Form FIR-1.	

42) The above tabulation shows that bidder 3/9 had not even submitted the details of the key personnel in the Organisation Chart for the Head Office and Site Office. The details of duties and responsibilities of the personnel were not provided. Secondly, in the undertaking Form ACK submitted by this bidder, certain words/ letters were missing. The respondent gave an opportunity to the bidder to clarify as follows:

> *"The Bidder shall confirm that these missing words/letters are inadvertent on his part and that he acknowledges his compliance with the guidelines for procurement under Japanese ODA loans as per the Form ACK in the Bidding Documents."*

43) Thirdly, the mobilization and de-mobilization program of key personnel was not provided.

44) The first omission on the part of this bidder is far more serious than the omission attributed to the petitioner. In fact, the Organisation Chart would have a bearing on the establishment cost of the bidder, since employment of more, or higher qualified key personnel, would increase fixed costs and expenditure for the bidder while executing the contract. The failure to provide the said details in the Organisation Chart may tantamount to a material non-conformity i.e. a material omission, and the calling of such like information at a subsequent stage may, in fact, have a bearing, in a substantial way, not only on the quality or performance of the works specified in the contract, but also unfairly affect the competitive position of the other bidders presenting substantial responsive bids. Bidder 3/9 was also permitted to clarify the position with regard to Form ACK. Pertinently, Form ACK also forms part of Section 4, namely "Bidding Forms". Thus, Bidder 3/9 was also given an opportunity to make good an omission in

Form ACK. Similarly, the said bidder 3/9 was given an opportunity to clarify, in relation to Clause 4.2.2 – Method Statement I. Earthwork.

45) Same is the position with regard to bidder 7/9 in relation to Organisation Chart. The said bidder was asked to clarify, since the details of designated roles and responsibilities of the personnel were not indicated. Even this bidder did not submit the design method for Earthwork as required by Clause 4.2.2 – Method Statement I. Earthwork.

46) Bidder No. 1/9 submitted the Organisation Chart, which was a combined chart for both the Head Office and the Site Office. The description of designated duties and responsibilities of key personnel was also not included and the mobilization and de-mobilization program of key personnel was also not indicated. This bidder was also required to clarify the position. Even this bidder had not submitted the requisite information in relation to Clause 4.2.2 – Method Statement I. Earthwork.

47) Bidder No. 9/9 submitted an Organisation Chart which was neither signed, nor stamped by the authorized signatory of the bidder. Therefore, the failure on the part of this bidder was clearly more aggravated than the failure of the petitioner who had, at least, affixed its stamp on Forms Con 2.0 and 3.0. Surprisingly, this bidder was permitted to clarify the position by requesting him to confirm the content of the Site Organisation Chart. There were other aspects on which clarifications were sought from bidder 9/9, as set out in the above tabulation, but we need say no more.

48) We wonder as to why the petitioner was treated with discrimination by the respondent. Pertinently, Section IV of the ITB contains the bidding Forms. Site Organisation is dealt with in Clause 3.1 of Section IV, and Forms CON 2.0

and 3.0 are also contained in the same "Section IV Bidding Forms". Clause 3.1 which deals with Site Organisation obliges the bidders to propose, and include their proposed Site Organisation in the bid. The said Organisation should indicate, and include sever aspects. Clause 3.1 may be referred to, and the same reads as follows:

> *"3.1*
> ***Site Organization***
> *The Bidder shall propose and include his proposed site organization in the bid. The Site Organization shall indicate and include the followings:*
>
> > *(1) Organization Chart of the project with the name of key personnel and description of designated duties and responsibilities of every key personnel. (2) Organization Chart of the Head Office with the name of key personnel and description of designated duties and responsibilities of every key personnel. In case of the joint venture, Organization Chart of the Head Office of all members of the joint venture with the name of key personnel and description of designated duties and responsibilities of every key personnel.*

49) The Site Organisation Form is an integral part of the documents which were required to be filled by the bidders, wherein they were required to provide the name of key personnel and description of designated duties and responsibilities of every key personnel. It is indeed difficult for us to understand as to how non-filling and non-signing of a Site Organisation Form could be construed as a non-material non-conformity and, at the same time, the non-signing of Forms CON 2.0 and 3.0 –when the content of the said Forms have been filled and they have been verified under Form ACK, considered as a material deviation.

50) The respondent has adopted extremely allergic attitude towards the petitioner by strictly construing the so-called omission on the part of the

petitioner as material omission, whereas, the above bidders have been treated rather generously by extending a long rope to them. This conduct of the respondent clearly brings out the arbitrary and discriminatory behaviour of the respondent towards the petitioner. In ***Poddar Steel Corporation v. Ganesh Engineering Works & Others,*** (1991) 3 SCC 273, the Supreme Court observed as follows:

> *As a matter of general proposition it cannot be laid down that an authority inviting tenders in bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirement in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility, and the other which are merely ancilliary 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 case 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."*

51) In ***M/s Telecommunications Consultants India Ltd v. M/s Bharat Sanchar Nigam Ltd*** 2014 SCC Online Del 7013, this Court did not approve of the hyper-technical interpretation of the bid documents resorted to by the respondent's tender inviting authority. The Court observed that public interest would be served by widening competition, and not by restricting the same. The Court, inter alia, observed as follows:

> "*Furthermore no malafide can be attributed to the petitioner and prima facie we are of the view that* ***the respondent's conduct in returning the bid security and not waiving this irregularity could***

be regarded as a hyper-technical interpretation of the bid conditions*. It is also important to note that public interest would be served by widening the competition and not by restricting the competition subject to the other bid conditions being complied with. We are of course making it clear that the interim direction would be subject to the final order passed in the writ petition.”*

(emphasis supplied)

52) Thus, the bid submitted by the petitioner could not be described as one which was not substantially responsive merely on the ground that the petitioner had failed to sign Forms CON 2.0 and 3.0 in the physically submitted bid, when the said Forms had been filled, stamped, digitally signed/ and even physically affirmed with the execution of Form ACK. The approach adopted by the respondents in treating the Forms CON 2.0 and 3.0 as not “signed” is in the teeth of the provisions of the I.T. Act and, therefore, in the e-bid, illegal.

53) Learned senior counsel for the respondents, Mr. Dutta has sought to ascribe motives to the petitioner by claiming that the said two Forms i.e. Forms CON 2.0 and 3.0 were deliberately not signed by the petitioner while submitting the physical bid, as if, to conceal some material information from the respondents with regard to the pending litigation and litigation history in which the petitioner was involved. We do not find any merit in this submission of the respondents either, for the reason, that the petitioner has provided all the information in the said two Forms; digitally signed the entire electronic bid which included these two Forms, and also executed Form ACK, as aforesaid. Moreover, the petitioner stands by the information provided in the said two Forms and has never sought to disown them.

54) The list of litigation given by the respondent in their written submissions cannot be looked into by us, as the same was never a part of the counter affidavit and/ or was never put to the Petitioner to respond. Further, the bid of the Petitioner has been found to be non-responsive on account of not signing Form CON 2.0 and Form CON 3.0 only, and not on the ground that the petitioner has made false declarations.

55) The decisions relied upon by the respondent, namely *"(i)* ***Central Coalfield Limited & Anr v SLL- SML (Joint Venture Consortim) & Ors*** *(2016) 8 SCC 622 [paragraphs 38, 43, 47, 48] (ii)****Municipal Corporation, Ujjain & Anr v. BVG India Limited & Ors****. (2018)5 SCC 462[paragraphs 15, 16, 17, 20, 27] (iii)* ***Yogiraj Powertech Pvt. Ltd. V State of Maharashtra, Through its Secretary & Ors,*** *2019 SCC Online Bom 5800 [paragraph 39] (iv)****Jalgaon Golden Transport Pvt. Ltd. v Union of India & Ors*** *2020 SCC Online Born 7460 [paragraph 53]"* do not come to the aid of the respondent in the facts and circumstances of the present case. The respondents have not only adopted an incorrect and illegal approach inasmuch, as, they have disregarded the provisions of the Information Technology Act, particularly Section 3 thereof, but they have also adopted a hyper-technical, and a clearly discriminatory approach against the petitioner.

56) The legal principles laid down by these judgments which have also been highlighted by us, state that the party issuing the tender has a right to *punctiliously and rigidly* enforce the terms of the contract and that the Court cannot substitute its view for that of the employers who have interpreted the terms of the bid document. However, the golden thread and the legal principles running common in all the 4 judgments is that while interpreting the terms of

the tender conditions, the respondents cannot act arbitrarily, whimsically and treat different bidders differently. The principle that has been reiterated in all the above judgments is that the authority issuing tender is bound to adhere to the essential terms, norms, standards and procedures laid down by it and cannot depart or deviate from them arbitrarily or act discriminatorily against one or the other bidder. The goalposts cannot be changed during the bid evaluation process to affect the right of some, or deny a privilege to some. The tender issuing authority could deviate from the terms and the conditions of the tender, but the same standards have to apply to all the bidders alike. So long as the "level playing field" is maintained and it does not result in any arbitrariness or discrimination, the conduct of the tender inviting authority may not be questioned. However, that is not so in the present case, as noticed above.

57) For the reasons as stated above, the writ petition is allowed, and the impugned communications dated 27.04.2021 and 28.04.2021 and notification dated 28.04.21 are quashed. The respondents will now proceed in accordance with law qua the tender process, by further examining the bid of the petitioner.

VIPIN SANGHI, J **JASMEET SINGH, J**

AUGUST 23,2021 / *N.Khanna/'ms'*