

ORISSA HIGH COURT: CUTTACK

AFR

W.P(C) NO. 20645 OF 2022

In the matter of an application under Articles 226 and 227
of the Constitution of India.

A.K. Das Associates Limited Petitioner

-Versus-

Odisha Power Transmission
Corporation Limited (OPTCL)
and others Opp. Parties

For Petitioner : Mr. Laxmidhar Pangari,
Senior Advocate along with
M/s. S. Mishra and A. Sahoo,
Advocates,

For Opp. Parties : Mr. A. K. Parija, Sr. Advocate
along with M/s. A. Behera
and A. Mohanty, Advocates
(O.P. Nos.1 to 3)
&
M/s. Sreejit Mohanty,
H.M. Panigrahi and S.K. Mishra,
Advocates.
(O.P. No.4)

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE B.P. SATAPATHY**

Date of Hearing: 24.11.2022 :: Date of Judgment : 02.12.2022

DR. B.R. SARANGI, J. A.K. Das Associates Limited, which is a company registered under the Companies Act, 1956 and is engaged in construction of Extra High Voltage (EHV) Projects comprising of supply-civil installation and erection of electrical sub-stations and tower lines on total turnkey basis, has approached this Court by means of this writ petition with a prayer to declare the decision of Orissa Power Transmission Corporation Limited (OPTCL)-opposite party no.1 in awarding the contract for the work "*Design, Engineering, Supply, Erection and Commissioning of (i) 2 x500 MVA, 400/220/33 KV Gas (SF6) Insulated Sub-station (GIS) with SAS and 1X125 MVar (400 KV) bus reactor with control at Ersama, Paradeep. (ii) 400KV AIS feeder bay extension with SAS (to be integrated with the existing SAS) and 2 nos. 80 MVar (400 KV) line reactors with suitable NGR & its control (One dia) at 400KV New Duburi gird sub-station for connectivity with proposed GIS S/S at Ersama, Paradeep, on turnkey contract basis*" in favour of opposite party no.4-M/s. Bharat Heavy Electricals Limited (BHEL) as illegal, arbitrary and contrary to the conditions of the tender, and to quash the resolution of the Board of Directors of opposite

party no.1 under Annexure-13 dated 16.07.2022 approving the decision of the tender committee to issue LOA in favour of opposite party no.4, and further to issue direction to opposite party no.1 to conduct a fresh tender in respect of the very same work, as mentioned above.

2. The facts leading to filing of this writ petition are that the Orissa Power Transmission Corporation Limited (OPTCL)-opposite party no.1, a Government of Orissa Undertaking and a Transmission Licensee under the Electricity Act, 2003, which is engaged in transmission of power in the State of Orissa on behalf of the State Government, floated a tender vide NIT No. 36/2020-21 dated 24.12.2020 under Annexure-2 for *“Design, Engineering, Supply, Erection and Commissioning of (i) 2 x500 MVA, 400/220/33 KV Gas (SF6) Insulated Sub-station (GIS) with SAS and 1X125 MVar (400 KV) bus reactor with control at Ersama, Paradeep. (ii) 400KV AIS feeder bay extension with SAS (to be integrated with the existing SAS) and 2 nos. 80 MVar (400 KV) line reactors with suitable NGR & its control (One dia) at 400KV New Duburi gird sub-station*

for connectivity with proposed GIS S/S at Ersama, Paradeep, on turnkey contract basis.”

2.1 As per the Instruction to Bidder (ITB), a joint venture or consortium of two qualified firms as partners can bid in the tender. Accordingly, the petitioner entered into a joint venture agreement with M/s Siemens Limited and participated in the tender process, besides seven other bidders including opposite party no.4-M/s Bharat Heavy Electrical Limited (BHEL), pursuant to the NIT No. 36/2020-21 dated 24.12.2020 under Annexure-2.

2.2 Under clause-4.1.1(i) of the NIT it was provided that to be qualified for the tender, the bidder must have successfully executed and commissioned two numbers of 400 KV or higher voltage class GIS (SF6) Grid sub-station on turnkey contract basis including Engineering, Design with Supply, Erection and Commissioning and the said work should have been completed during the last seven years reckoned from the date of the opening of bid in India. Opposite party no.4-M/s Bharat Heavy Electrical Limited (BHEL) in its bid submitted the documents in the Schedule-

IV of the NIT, which included two performance certificates, one from SJVN Ltd, a Government of Himachal Pradesh Undertaking, and the other from NHPC. Of the two performance certificates submitted by opposite party no.4 in support of the declaration in Schedule-IV, the certificate obtained from SJVN Ltd. although indicates that opposite party no.4 had completed commissioning of 400 KV sub-station on 04.10.2014, but the same does indicate that the said project was completed on turnkey contract basis, which is an essential and mandatory requirement of the NIT.

2.3 In the meeting held on 03.11.2021, the Purchase Sub-Committee (PSC) deliberated on the Techno Commercial Report and recommended that the price bid of opposite party no.4 may not be opened, as it is techno-commercially non-responsive and does not meet the qualifying requirement. Hence, six numbers of bidders, including the petitioner-company, participated in the tender process. On qualifying as the top 50% of the responsive bidders, the petitioner participated in the e-reverse auction and was found to be the lowest bidder. Accordingly, the PSC

in its meeting held on 25.11.2021 recommended for issuance of LoA in favour of the petitioner on turnkey contract basis.

2.4 But the PSC in its meeting held on 29.11.2021 recommended to cancel the NIT under Annexure-2 and to go for a fresh bid. In the 125th meeting of the Board of Directors of opposite party no.1-OPTCL, the Board of Directors approved the recommendation of PSC. As a consequence thereof, the OPTCL-opposite party no.1 issued a fresh NIT vide No.CPC-49 of 2021-22 for the same project for which the NIT vide No. CPC-36 of 2020-21 was issued. In response to the NIT vide No. CPC-49 of 2021-22 under Annexure-9, the petitioner as well as M/s BHEL-opposite party no.4 and three other companies participated in the tender process and submitted their respective bids along with requisite documents, including the performance certificates in respect of previous work orders completed as per Clause 4.1.1(i) of the NIT.

2.5 In terms of Clause-4.1.1(i) of the NIT, M/s BHEL-opposite party no.4, along with its bid documents submitted

the performance certificate issued by the SVJN limited, which indicates that the project for installation of 400 KV GIS at Rampur was completed and commissioned on 27.10.2015. In view of Schedule-IV of the NIT, the bid of M/s. BHEL-opposite party no.4 has to be disqualified and should have been rejected on the ground that the facts indicated in the format and performance certificate attached thereto do not disclose that it had executed the project of SVJN Ltd. at Rampur on turnkey project basis, which is the mandatory requirement as per Clause-4.1.1(i) of the NIT and for which the bid of opposite party no.4, which was submitted in pursuance of the 1st NIT under Annexure-2, was disqualified. In the certificate furnished in the previous tender it was indicated that the date of completion of Rampur Project was 04.12.2014, whereas in the certificate submitted in the present tender under Annexure-10 series, the date of completion has been indicated to be 27.10.2015. The petitioner downloaded from the website of the said company, i.e. SJVN Ltd., the details of the project in respect of the certificate obtained, which confirms that at Rampur, opposite party no.4 has executed the project not on turnkey

basis but on a simple supply contract and the project was completed on 04.12.2014. Thereby, for having not met the requirement under Clause 4.1.1 of the NIT, the opposite party no.4 has become in-eligible for the second tender. Therefore, its bid should have been rejected. But the financial bid of opposite party no.4 was opened by opposite party no.1 for price evaluation, where it was found that opposite party no.4 had quoted Rs.209,82,28,002/-, which was 4.75% more than the revised estimated cost, i.e., Rs.200,31,49.600/- and Rs.9.00 crores more than the L1 price offered by petitioner in the first tender. Therefore, the bid submitted by opposite party no.4 should have been rejected and, as such, the petitioner raised protest against such illegality and requested opposite party No.2 to take a fair and just decision in conducting of the tender process. The authenticity of the performance certificate issued by the SVJN Ltd. in respect of the project for installation of 400 KV GIS at Rampur which was submitted by M/s BHEL-opposite party no.4 for the tender process under Annexure-9 has been ignored. The inconsistency in the details regarding the date of completion of the above project has

also been ignored. More so, M/s BHEL-opposite party no.4 does not meet the qualifying requirement as stated in Clause-4.1.1 of the NIT, as the earlier work executed by the M/s BHEL-opposite party no.4 was not on turnkey contract basis, which is an essential and mandatory condition of the qualifying requirement for bidders under Clause 4.1.1 for the NIT. In the 129th meeting of the Board of Directors of opposite party No.1-Corporation, the Board of Directors ignoring the qualifying requirements in respect of M/s. BHEL-opposite party no.4, approved the proposal for issuance of LoA in favour of M/s. BHEL-opposite party no.4. Hence, this writ petition.

3. Mr. L. Pangari, learned Senior Counsel appearing along with Mr. S. Mishra, learned counsel for the petitioner vehemently contended that the acceptance of the bid submitted by M/s. BHEL-opposite party no.4 by taking the decision in the Board of Directors' meeting of opposite party no.1 for issuance of LoA is arbitrary, unreasonable and contrary to the provisions of law. The performance certificate dated 07.08.2017 and the performance certificate dated 22.12.2021 are identical and issued on the self-same

subject-matter. When the first certificate dated 07.08.2017 had not been accepted, the second certificate in respect of the same subject-matter ought not to have been accepted, as the performance certificate dated 22.12.2021 did not envisage a turnkey project that was executed by opposite party no. 4, which is the requirement in the NIT bearing No. CPC-49/2021-22. It is further contended that the NIT bearing No. CPC-49/2021-22 includes execution of civil work within the scope of the project. The performance certificate submitted by opposite party no. 4 does not certify that it has conducted any civil work in execution of such project.

3.1 It is further contended that once on the basis of the documents submitted by M/s BHEL-opposite party no.4 in the first tender, the PSC found that the bid of opposite party no.4 was techno-commercially non-responsive, for the second tender having the same scope of work and same qualifying requirement, the documents submitted by M/s BHEL could not have been accepted. Furthermore, on receipt of the bid, opposite party no.1 having sought for information from opposite party no.4 pertaining to techno

commercial evaluation and asked to submit complete order copy along with the BOQ for supply, erection and civil contract of the Rampur Hydro Power Station and to submit credentials/documents/evidence in support of turnkey project executed, and as per the said query, opposite party No.4 in its reply vaguely mentioned that M/s BHEL fully meets the OPTCL QR as far as the turnkey scope is concerned. According to him, not being satisfied with the explanation of M/s BHEL-opposite party no.4 that it had completed the Rampur GIS S/S on turnkey basis, opposite party no.1 through e-mail made query from SJVN Ltd. to the effect that “whether both first and second contract executed by M/s BHEL-opposite party no.4 has been awarded under turnkey contract basis for 400 KV GIS S/S”. In reply to the said query, SJVN clarified that the contract for Rampur Hydro Electric Project was awarded to M/s BHEL covering engineering, design, supply, storage, erection, testing and commissioning scopes lying with M/s. BHEL (including 400 KV GIS Switchyard scope), but did not mention that the contract was executed under turnkey contract basis.

3.2 It is further contended that PSC of opposite party no.1 in its proceeding took sudden U-turn and recommended that M/s BHEL-opposite party no.4 is meeting both technical and financial qualifications stipulated in the bid documents by intentionally ignoring the fact that opposite party No.4 has not submitted any document to indicate that they have completed any 400 KV GIS S/S on turnkey basis with associated civil work. Though the scope of the work of the subject tender includes massive civil construction, for which the bidders were required to submit proof, that they have executed similar type of contracts on turnkey basis with associated civil works, but ignoring the same the Board approved the proposal for issuance of LoA in favour of M/s BHEL-opposite party no.4. That itself vitiates the acceptance of bid of opposite party no.4, which was otherwise disqualified for non-compliance of the QR, and the decision of opposite party no.1 is arbitrary, unfair and illegal.

3.3 It is also contended that M/s BHEL-opposite party no.4 was disqualified for not having met the techno commercial requirement of the tender. In the first tender,

the petitioner was the lowest bidder having quoted Rs.2,00,63,35,946/-. Considering the same, in the second tender opposite party no.1 had fixed the estimate cost of the package for Rs. 200.31 crore on turnkey contract basis. But opposite party no.1 decided to award the contract in favour of opposite party no. 4 at Rs. 209.32 crore at the cost of public exchequer, which cannot sustain, and accordingly contended that the same should be quashed. It is further contended that the decision taken by opposite party no.1 to award the contract in favour of opposite party no.4 is arbitrary, illegal, discriminatory and smacks favoritism which is against public policy and rule of law. It is also contended that the basic principles of turnkey project has not been understood, therefore, award of the contract in favour of opposite party no.4 cannot sustain. According to him, "turnkey" means "turn the key" and open and enter into the house. Meaning thereby, to complete the work in all respect and allow the awardee of the contract to enter into the house. The same having been lacked in this case, the award of contract in favour of M/s BHEL-opposite

party no.4 cannot sustain and the same is liable to be quashed.

To substantiate his contention, reliance has been placed by the learned Senior Counsel appearing for the petitioner on the cases of **West Bengal State Electricity Board v. Patel Engineering Co. Ltd and others**, (2001) 2 SCC 451 : AIR 2001 SC 682, **Kanhaiya Lal Agrawal v. Union of India (UOI) and others**, (2002) 6 SCC 315 :AIR 2002 2 SC 2766 and **Poddar Steel Corporation v. Ganesh Engineering Works and others**, (1991) 3 SCC 273 : AIR 1991 SC 1579 and also Black's Law Dictionary 8th Edition and Cambridge Business English Dictionary and Wikipedia for explaining the meaning of turnkey.

4. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. Arnav Behera, learned counsel for opposite party no.1 contended with vehemence that the performance certificates dated 07.08.2017 and 22.12.2021 are different in context and issued in verification of different scopes of work, and are also issued for different purposes. To clarify the same, the performance certificate dated

07.08.2017 was issued for certification that M/s BHEL Ltd. had designed, manufactured, supplied, tested, erected and commissioned six (6) numbers of Hydro Generating Sets for participating in future hydro tenders. Whereas, the performance certificate dated 22.12.2021 was issued in respect of complete design, engineering, supply, inland transportation, insurance, delivery, handling, storage, erection, testing and commissioning of all equipments required for 400 KV GIS Switchyard. This clearly satisfies the 'turnkey' requirement under the tender. It is also contended that the certificate dated 22.12.2021 clearly states that the date of commissioning of 400KV GIS Switchyard was 27.10.2015, which is within a period of 7 years on the date on which the NIT was issued, i.e., on 07.01.2022. Opposite party No.1 sought clarifications from opposite party no. 4 regarding the issuance of performance certificates dated 07.08.2017 and 22.12.2021 vide email. Opposite party no. 4 on 05.03.2022 clarified in clear terms that the performance certificate dated 22.12.2021 is specifically for 400 KV GIS Switchyard portion for complete Rampur HEP (412 MW) E&M package which was

successfully commissioned by M/s BHEL as an EPC contractor on 27.10.2015. On the other hand, the performance certificate dated 07.08.2017 was issued by SJVN Ltd. for Generating Units. M/s. BHEL further clarified that the performance certificate dated 22.12.2021 was issued for “Engineering, Design, Erection and Commissioning” of the Project which was the pre-requisite as per tender definition for a turnkey contract.

4.1 It is further contended that opposite party no. 1 sought clarifications from SJVN Ltd., which were confirmed vide E-mail dated 14.03.2022, thereby, so far as non-execution of civil work is concerned, that is completely a misconceived one. The NIT at Clause 2.2 (ix) (G), (H) and (I) identifies the civil work to include, inter alia, construction of control room building & other systems like illumination of building, ventilation, ceiling, air conditioning, firefighting & smoke detection facility as per specification. Therefore, the submission that M/s BHEL-opposite party no.4 had not executed any civil work even though the same was required by the NIT, is not tenable. In so far as the allegation that the project executed by M/s BHEL Ltd. was

not on a turnkey basis is concerned, the same does not stand on any legal footing.

4.2 To substantiate his contention, reliance has been placed on the definition of “turnkey” as laid down by the apex Court in the **Indure Ltd. & Anr. v. Commercial Tax Officer & Ors.** (2010) 9 SCC 461, **Director of Income Tax-II (International Taxation) New Delhi and Anr. v. Samsung Heavy Industries Company Ltd**, (2020) 7 SCC 347. Reliance is also placed on **Black's Law Dictionary** (8th edn.) at page 1555.

4.3 Further, it is contended that the scope of judicial review in respect of award of tenders is very limited and interference can only be made if a clear-cut case of arbitrariness, mala fide, or bias or irrationality is made out. To substantiate the same, reliance is placed on the cases of **Pratap Chandra Sahu v. State of Odisha and others**, 2020 (II) OLR 126; **Utkal Suppliers v. State of Odisha & Ors.** 2020 SCC OnLine Oni 670, **Silppi Constructions Contractors v Union of India & Anr**, (2020) 16 SCC 489, **Uflex Limited v. Government of Tamil Nadu and others**,

(2022) 1 SCC 165 and **N.G. Projects Limited v. Vinod Kumar Jain & others**, (2022) 6 SCC 127. Thereby, it is contended that there is no infirmity in the decision making process, nor is the decision of opposite party no.1 to award tender in favour of opposite party no.4 arbitrary, illegal or contrary to the conditions of the tender so as to warrant interference by this Court.

4.4 It is further contended that the petitioner has abandoned his bid being not participated in the E-Reverse Auction by not reducing his bid price. Therefore, the petitioner has no *locus standi* to maintain the present writ petition. The petitioner, having abandoned his bid by not participating in the E-Reverse Auction by not reducing his price, is not a "Person Aggrieved" and, therefore, has no *locus* to challenge the grant of tender to opposite party no. 4. Accordingly, he contended that the writ petition is liable to be dismissed.

5. Mr. S. Mohanty, learned counsel appearing for opposite party no.4 very fairly contended that M/s BHEL is the beneficiary of the decision taken by opposite party no.1-

OPTCL and whatever argument has been advanced by Mr. A.K. Parija, learned Senior Counsel appearing for the opposite party no.1 is being adopted by it. In addition to the same, it is contended that the petitioner was a constituent of an unincorporated joint venture led by M/s Siemens Ltd. The said unincorporated joint venture, which is a legal entity, was the bidder. But the instant writ petition has been filed by the petitioner alone who, on its own, is not qualified as a bidder. It is contended that the petitioner, being ineligible to bid on its own, cannot have any independent cause of action to file this writ petition. Thereby, seeks for dismissal of the writ petition.

5.1 It is further contended that opposite party no. 4 fulfills the requirements stipulated in Clause-4.1.1 of the NIT on the basis of the performance certificates issued in respect of the work executed for Gujarat State Electricity Corporation Ltd. and SJVN Ltd. at Rampur Project. Therefore, the allegation made, that Rampur Hydroelectric Project of SJVN Ltd. was not executed by opposite party no.4 on turnkey basis, cannot sustain in the eye of law. It is contended that the employer of the said project i.e., SJVN

Ltd., a PSU has expressly certified vide performance certificate dated 22.12.2021 that opposite party no.4 has done “complete design, engineering, supply, inland transportation, insurance, delivery, handling, storage, erection, testing & commissioning of all equipment required for 400 KV GIS Switchyard”. Thereby, the term “turnkey” is explained in dictionary to mean “complete and ready to use immediately”. This term has varied meaning as per the definitions in legal dictionaries. Clause-4.1.1 (i) of the NIT employs the term “turnkey contract” in the context of specifying the qualifying requirements of the bidders. As such, the term “on turnkey contract” in sub-clause-(i) of Clause-4.1.1 of the NIT is preceded by the words, **“Engineering, Design, Erection and Commissioned of:** (i) two nos. of 400 KV or higher voltage class GIS (SF6) Grid sub-station with minimum (Three) Bays in each S/S”. Therefore, it is contended that the word preceding the phrase “on Turnkey Contract” lend colour to the term “on turnkey contract”. As M/s BHEL-opposite party no.4 had executed the work of different nature, that fulfills the requirement of “on Turnkey Contract” as per Clause-4.1.1

(i) of the NIT. Thereby, no illegality or irregularity has been committed in settling the contract in its favour. According to him, if at all there is any ambiguity in construing the meaning of the term “on Turnkey Contact” at Clause-4.1.1.(i) of the NIT, then the interpretation of the said term by the author of the NIT, namely, OPTCL- opposite party no.1 deserves primacy. Opposite party no.1-OPTCL having examined the information and documents furnished by M/s BHEL-opposite party no.4, who was fulfilling the qualifying requirement as per the NIT, has also sought clarification and opposite party no.4 has responded to such request by furnishing explanation with supporting material, and opposite party no.1 has cross-checked the correctness of the explanation furnished by opposite party no.4 from SJVN Ltd. and only after deliberating on the clarification furnished, proceeded to qualify the opposite party no.4. As such, the petitioner cannot raise objection on such decision and also in exercise of power of judicial review, the Court should not interfere with the said decision making process, as there is no arbitrariness, unreasonableness by reaching

such conclusion. Thereby, he prayed for dismissal of the writ petition.

5.2 To substantiate his contention, reliance has been placed on ***Gammon India Limited v. Commissioner of Customs, Mumbai***, (2011) 12 SCC 499 and ***Consortium of Thermopads Pvt. Ltd v. National Aluminum Company Ltd***, MANU/OR/0441/2022.

6. This Court heard Mr. L. Pangari, learned Senior Counsel appearing along with Mr. S. Mishra, learned counsel for the petitioner and Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. A. Behera, learned counsel for the opposite parties no.1 to 3, and Mr. S. Mohanty, learned counsel appearing for opposite party no.4 in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned Counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. On the face of the factual matrix as well as the rival submissions of the parties, as delineated above, the

following issues are framed for effective adjudication of the case:-

- (1) Whether the decision taken for issuance of LoA by the OPTCL-opposite party no.1 in favour of BHEL-opposite party no.4 on the basis of the performance certificate furnished by it satisfying the requirement of “Turnkey Contact”, pursuant to the NIT No. CPC 49/2021-22 is justified or not ?
- (2) Whether the petitioner has locus to file the present writ petition or whether the writ petition filed at the behest of the petitioner is maintainable or not ?
- (3) Whether the petitioner is a person aggrieved or not?

8. **Issue No.1.**

To answer this issue in proper perspective, it is worthwhile to take note of the relevant conditions stipulated in the E-Tender Notice No.CPC-49/2021-22 for Package-49/2020-21 under Annexure-9.

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“ODISHA POWER TRANSMISSION CORPORATION LTD. invites bids (in e- tendering mode only) under single stage two-envelop system from reputed EPC/Turnkey Contractors for Design, Engineering, Supply, Erection and Commissioning of:

(i) 2x500 MVA, 400/220/33KV Gas (SF6) Insulated Sub-station (GIS) with SAS and 1X125 MVA (400 KV) bus reactor with control at Ersama, Paradeep.

(ii) 400KV AIS feeder bay extension with SAS (to be integrated with the existing SAS) and 2 nos. 80 MVA

(400 KV) line reactors with suitable NGR & its control (One dia) at 400KV New Duburi gird sub-station for connectivity with proposed GIS S/S at Ersama, Paradeep.

at an Estimated Cost of the Package for Rs. 200.31 Crore on **“Turnkey CONTRACT BASIS”**.

The contents of the NIT are as follows:-

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Sl. No.	Particulars	Page No	
		From	To
1.	Tender Notification		
	Notice Inviting Tender (NIT)	2	2
2.	Bid Documents		
	VOLUME-I (Free View)	5	8
	Section-I- e-Notice Inviting Tender (e-NIT)	9	42
	Section-II: Instruction to Bidder (ITB)	43	98
	Section-III : General Conditions of Contract	99	113
	Section-IV: BID PROPOSAL SHEET (BPS)	114	148
	Section-V: ANNEXURE		
	For Participant Bidder (s)		
	VOLUME-II : (ENCLOSED SEPARATELY)		
	Section-I: SCOPE OF WORK, TECHNICAL SPECIFICATIONS.		
	Section-II: GUARANTEED TECHNICAL PARTICULARS (GTP)		
3.	For Participant Bidder (s)		
	Bid Forms (In. XLS Formats): (AVAILABLE IN THE E-TENDER PORTAL OF OPTCL)		
	Section-I: TECHNICAL SCHEDULES.		
	Section-II : PRICE SCHEDULES.		

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VOLUME-I

- Section-I: e-Notice Inviting Tender (e-NIT)
- Section-II: Instruction To Bidder (ITB)
- Section-III: General Conditions of Contract (GCC)
- Section-IV: BID PROPOSAL SHEET (BPS)
- Section-V : ANNEXURES.

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Instruction to Bidder (ITB)

2.0 Brief Scope of Package (s)/ Works:

2.1 Package (s)/ Work No.: <49/2021-22>

2.2 Scope of Works: Design, Engineering, Supply, Erection and Commissioning of:

(i) 2x500 MVA, 400/220/33KV Gas (SF6) Insulated Sub-station (GIS) with SAS and 1 X125 MVar (400 KV) bus reactor with control at Ersama, Paradeep.

(ii) 400KV AIS feeder bay extension with SAS (to be integrated with the existing SAS) and 2 nos. 80 MVar (400 KV) line reactors with suitable NGR & its control (One dia) at 400KV New Duburi gird sub-station for connectivity with proposed GIS S/S at Ersama, Paradeep.

i)	Supply of all equipment & materials for the sub-station including 2x500 MVA, 400/220 KV ICTs & 125MVar (400 KV) Bus Reactor and 80MVar (400 KV) Line Reactors with NGR etc as per Price Schedule & Technical Specification
	xxx xxx xxx
vii)	Execution of civil works as per schedule for erection of Building (S/S), equipment foundation(S/S), construction of earth mat, cable trench, drainage system, Boundary Land Scaping, approach roads, inside roads, Main Gate etc. etc. as per Price Schedule & Technical Specification
	xxx xxx xxx
ix)	Name of the work: Construction of 2x500 MVA, 400/220/33 KV Gas (SF6) Insulated Sub-station (GIS) with SAS at Ersama, Paradeep and 125 MV Ar bus reactor. <u>Details of Provisions to be kept in the Sub-station are as follows:</u> <u>Scope of work for GI sub-station:</u> xxx xxx xxx (E) Supply, installation, testing & commissioning of Sub-station automation system including protection panels as per specification. The SAS architecture shall be on PRP (Parallel Redundancy Port) based, therefore accordingly all the LED's (IEC 61850) shall be selected for the GIS station.

	(F) Supply and installation of equipment & materials as per BPS (including all civil works) (G) Construction of 400KV & 220 KV GIS room building with BOT crane & other system like illumination of building, ventilation system with separate AHU unit, Air conditioning for panel rooms, firefighting & smoke detection facility etc. as per specification and BPS. Provision of Building, lightning protection. The outer & internal painting shall be suitable to resist from the effect of saline & chemical as Paradeep is near sea coast. (H) Construction of Control room building & other system like illumination of building, ventilation, Ceiling, Air conditioning, firefighting & smoke detection facility etc as per specification and BPS. Provision of Building lightning protection. The outer & internal painting shall be suitable to resist from the effect of saline & chemical as Paradeep is near sea coast. (I) Provision of store shed, earthing, fencing, roads, drains, gates, security shed, water arrangement, Lighting cum Lightning Masts, Switchyard illumination and all other civil works etc as per specification and BPS. xxx xxx xxx (M) Other requirement as indicated below for both the GIS sub-stations: 1. Construction of GIS and Control room building. Construction of other building as indicated in the price schedule. Paintings of the buildings. 2. Provision of equipment foundations, erection of structures & equipment. Store shed, Boundary wall & its painting, earth mat & earth pits & provision of water to the earth pits, fencing, roads, drains, gates, security shed, Bore wells for water arrangement, provision of PHED system, Lighting cum Lightning Mast, Switchyard illumination, switch yard building & other
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	<i>building illumination, Transformer foundation, oil sump pit for the transformer, Fire wall, street lighting, and all other civil works etc. as per specification.</i> 3. <i>Testing and commissioning of Substation equipment & accessories.</i> 4. <i>Contractor is advised to procure the equipment & materials sequentially as per the requirement at field, to avoid unnecessary dumping at the site. Therefore. prioritization of such procurement shall be carried out in consultation with the Engineer in Charge.</i> 5. <i>Successful testing, commissioning & inspection of the installations as per Govt. rule to be considered.</i> 6. <i>Commissioning of the Sub-station & detail material reconciliation.</i> 7. <i>Handing over of the completed system to the Owner.</i>

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4.0 QUALIFYING REQUIREMENTS (QRs) OF BIDDER(S):

4.1 Technical Qualification:

This bid is open to any EPC/Turnkey Contractor domicile in India independently or in Joint Venture/Consortium, who meets the following Technical qualifying requirement;

4.1.1 The bidder, as a Principal Contractor must have successfully executed and Engineering, Design, Erection and commissioned of:

- (i) Two nos. of 400 KV or higher voltage class GIS (SF6) Grid sub-station with minimum 3 (Three) Bays in each S/S on Turnkey Contract-*

- (ii) *Erection and Commissioning of at least one no. of ICT of capacity 315 MVA (400/220 KV) or above.*
- (iii) *Must have successfully executed and Commissioned of Two nos. of 400 KV or higher voltage class Bay (AIS) on Turnkey Contract basis including Engineering, Design with Supply, Erection and Commissioning.*
- (iv) *The GIS must be offered from Indian Manufacturer, who meets the requirement mentioned at 4.1.2.*

On Turnkey Contract basis in India for,

- *Any Transmission/Generation Utility State Govt. / Central Govt. / any PSU.*

OR

- *Any Associated Transmission System for IPPs (Independent Power Producers) having installed capacity of 500MW or above in India.*

OR

- *Any agency awarded in a Tariff Based Competitive Bidding (TBCB) by any State Govt. / Central Govt. / PSU in India.*

❖ *The above work should have been completed during last 7 (Seven) years reckoned from the date of opening of Bid(s) in India.*

❖ *The above work should have been under successful operation for a minimum period of one year reckoned from the date of opening of Bid(s).*

(Page-99 &100 of the Brief)

4.1.3 Other Technical Qualification:

4.1.3.2 The Bidder must upload copies of the relevant Work Orders along with Handing Over and Taking over Certificate or Client certified copies of Completion Certificate in proof of successful execution of Works and

Performance Certificates duly signed by the competent authority of the Principal employer in proof of successful operation of the above quantum of work's. The works experience schedule shall be as per proforma given here under.

Table: Tech-1
Work Experience Schedule

Work Ref.	Order	Sub-Stations/Lines Installed, Erected Commissioned				
<i>Sl. No</i>	<i>FY</i>	<i>Name of the Client</i>	<i>Work Order Ref (No. & Date)</i>	<i>Qty (No. of Sub-Stations/ Kms of Lines) Installed/ Erected</i>	<i>Date of Completion of Commissioning</i>	<i>Documents provided in proof of having completed the works and/ or of successful operation as the case may be. (As Attachment)</i>

Note:

1. The Tech-1 (Work Experience Schedule) is in XIS format as Schedule-IV of Technical bid hosted in the Tender portal and the same shall be keyed in by the bidder(s).

2. Supporting documents in favour of the above mentioned requirement shall have to be submitted/ uploaded by the Bidder as an attachment to the e-tender folder (Attach 3.pdf).

3. Failure to furnish/upload any or all information as required as a part of Bid document in all respect will be at the Bidder's risk and may result in rejection of the Bid.

4.2 Bidder's Performance Qualification:

xxx

xxx

xxx

4.2.4 The bidder must not been declared Insolvent or referred to National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code (IBC), 2016. In such case the bid shall also be rejected. In this respect one undertaking from the bidder that they are not declared as Insolvent or referred to NCLT under IBC shall be submitted along with the bid. Non-disclosure of this fact by the bidder will lead to rejection of the bid or termination of the contract with forfeiture of EMD/CPBG.

Note:

1. The intending bidder shall furnish/upload the undertaking to this effect in the prescribed format enclosed to the e-tender.

2. Failure to furnish/upload any or all information as required as a part of Bid document in all respect will be at the Bidder's risk and may result in rejection of the Bid.

(Page-103-104 of the brief)

4.4 BID CAPACITY QUALIFICATION:

iii.	Bidder's Technical Eligibility	Bidder shall be Technically eligible based on the qualifying requirement mentioned under Clause-4 (Qualifying Requirments (QRs) of Bidder) except Bidders Bid Capacity.
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(Page-110-111 of the brief)

5.5 Documents/ Schedules to be Furnished/ Uploaded/ Keyed-in:

1. Technical Bid-Part-I

(B) Soft Form of Documents (Scanned Copy to be uploaded in the e-Tender Portal of OPTCL):

Following are the Soft form of scanned documents in PDF file to be uploaded on the Official e-Tender Portal of OPTCL www.tenderwizard.com/OPTCL as an attachment.

3.	Following documents/Credential in support of meeting Technical Qualifying requirement: i. Work Orders/LOA (including detailed bill of quantity for supply & erection works with associated civil works) ii. Commissioning Certificate/ Handing Over and Taking Over Certificate/ Client Certified copies of completion certificate in respect of the work orders furnished as above. iii. Performance Certificate in respect of the work orders furnished as above. iv. Valid HT/EHT Electrical License of the EPC/ Turnkey Contractor available from anywhere in India. (In case of Joint Venture/Consortium Valid HT/EHT license available from anywhere in India possesses by the Lead partner).
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8.1 Taking into consideration the above conditions, it is to examine whether M/s. BHEL-opposite party no.4 has satisfied the requirement or not. There is no dispute that earlier opposite party no.1 issued a notice inviting tender bearing NIT No. CPC-36/2020-21 (PACKAGE- 36 (i)/2020-21). But the same was cancelled, pursuant to which the second tender was issued vide NIT No. CPC-49/2021-21 (PACAKGE-49/2020-21) under Annexure-9. Thereby, the

bidder has to satisfy the requirement, as mentioned in the bid documents. For the purpose of adjudication, the relevant portion of the NIT has already been referred to above. On that basis, the petitioner and opposite party no.4 applied for the same. On receipt of the bids, the OPTCL-opposite party no.1 sought clarification from M/s. BHEL-opposite party no.4 pertaining to techno commercial evaluation and also asked to submit complete order copy along with the BOQ for supply, erection and civil contract of Rampur Hydro Power Station and to submit credentials/documents / evidence in support of turnkey project executed vide letter dated 03.03.2022 under Annexure-F/1 and directed that the same should reach before 11.00 A.M. on 07.03.2022.

8.2 The query made was to the following effect:-

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Sl. No.	Requirement as per bid document	Bidders to comply (uploaded the same in tender wizard and also submit hard copy of the same.
	Two nos. of 400 KV or higher voltage class GIS (SF6) Grid sub-station with minimum 3 (Three) Bays in	(i) The bidder have done the E&M works of Rampur HEP (412 MW) including scope of 400kV GIS switchyard of SJVN Ltd. The bidder should submit the complete order

	each S/S on Turnkey Contract.	copy along with the BoQ for Supply, Erection and Civil contract of above work. (ii) Again as per performance certificate issued by AGM/Project Manager (EM Works), Rampur HPS, Bayal against Pkg-36(II)/2020-21, the RAMPUR HPS units along with 420 KV Gas Insulated Switchgear have been commissioned between 19.03.2014 to 04.12.2014. As per Performance certificate, after completing the 420 kV Gas Insulated Switchyard and other Associated work of HPS, Unit-1 Generating Set was put on commercial operation from 19.03.2014. (ii) But now as per the Performance certificate submitted for Pkg-49/2021-22, the commissioning date is 27.10.2015 for same RAMPUR HPS From point (i) & (ii) above, it is not clear how the same 420 KV switchyard can be commissioned in two different dates. Again the performance certificate issued on 22.12.2021 by SJVN Ltd. Is for 400 KV Switchyard. However as per Tender condition you have to submit the credentials for 2 nos. of 400 KV GIS s/s with minimum 3 nos. bays in each S/S on turnkey basis. Please justify the above
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		along with evidentiary documents. Otherwise submit credentials/documents evidence in support of turnkey project executed.
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8.3 In reply to the above query, M/s BHEL-opposite party no.4 submitted under Annexure-G/1 dated 05.03.2022 as follows:-

(Page 201 & 202 of the brief)

Part-i

The complete Order copy of Contract Agreement & NOA has been submitted along with our hid (the same is being enclosed again as Annexure-IA). As desired BOQ/BBU for 400 kV GIS Switchyard at Rampur HEP is being enclosed as Annexure-IB.

It is Submitted that, as per OPTCL Tender specification (Qualification criteria for EPC Bidder for GIS project as per clause 4.1.1 of ITB of tender specification), following is the requirement: -

“The bidder, as a Principal Contractor must have successfully executed and Engineering, Design. Erection and Commissioning of:

- i. Two nos. of 400kV or higher class GIS (SF6) Grid sub-station (with minimum three bays in each S/S on Turnkey contract”*

It is evident from the above that “Engineering, Design, Erection and Commissioning” is the pre-requisite requirement as per tender definition.

In line with above requirement, BHEL had submitted following performance certificates issued by M/S GSECL and M/S SJVN (The same was also submitted

along with our original techno-commercial bid and attached as Annexure-2 with this letter)

a. M/s GSECL for 400 kV GIS Switchyard at 1x800 MW Wanakbori TPS (comprising of 7 nos. of 400 kV GIS bays)

b. M/s SJVN for 400 kV GIS Switchyard at 412 MW Rampur HEP (comprising of 12 nos. of 400 kV GIS bays)

The performance certificate clearly states that the project scope included "Engineering, Design, Erection and Commissioning" in line with OPTCL tender specification requirement.

With the above, BHEL meets the specific tender Qualification Requirement of OPTCL.

Part-ii (Para-1)

Performance certificate issued by M/s SJVN (a Mini Ratna, Category-I and Schedule-'A' CPSE under administrative control of Ministry of Power, Govt. of India) on 22.12.2021 is specifically for the 400 kV GLS Switchyard portion for complete Rampur HEP (412 MW) E&M package which was successfully commissioned by BHEL as an EPC contractor (400 KV GIS scope as complete system) and taken over by M/s SJVN Ltd. on 27.10.2015.

Performance certificate, as is being referred to by OPTCL (submitted by BHEL, for package-36(II)/2021) was issued by M/s SJVN for Generating units (related to Power Plant scope for the E&M package).

Since OPTCL had raised post bid query/objection on bid submitted by BHEL for package-36(II)/2021 regarding the language used in the said performance certificate ("for the purpose of Hydro tenders"), a 400KV GIS scope specific certificate (for better clarity) was requested to M/s SJVN and the same was duly issued by M/s SJVN on 22.12.2021 clearly certifying BHEL's credentials for 400 kV GIS EPC scope.

Part-ii (Para-2 and 3)

Regarding “Turnkey” word mentioned in the said paras, please refer to the constituent scopes as defined in the said term “Turnkey” as per OPTCL tender QR vide clause 4.1.1 of ITB of tender specification, which explicitly stipulates that

“The bidder, as a Principal Contractor must have successfully executed and Engineering, Design, Erection and Commissioning of

i. Two nos. of 400kV or higher class GIS (SF6) Grid sub-station (with minimum three bays in each S/S on Turnkey contract”

It is evident from above that “Engineering, Design, Erection and Commissioning” is the pre-requisite requirement as per tender definition for a turnkey contract.

As per above requirement, BHEL had duly submitted the performance certificates (Rampur and Wanakbori), wherein, both the certificates clearly states that the project scope included “Engineering, Design, Erection and Commissioning”

Hence it is submitted that BHEL fully meets the OPTCL QR as far as the “turnkey” scope deis concerned. Please note that the QR does not include “civil works” categorically as QR requirement.”

Thus, the query, which was made by the OPTCL vide letter dated 03.03.2022 in Annexure-F/1, was replied by M/s. BHEL on 05.03.2022, i.e. within seven days period contending that it satisfies the requirement.

8.4 Again a query was made, with regard to confirmation of satisfactory work completion from Rampur HPS, by the OPTCL vide letter under Annexure-H/1. In

response to the same, clarification was also received on 05.03.2022 through e-mail to the following effect.

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“OPTCL Query 1 : Regarding issuance of both the performance certificates.

Draft Reply: It is confirmed that both the certificates are issued by SJVN.

A Performance Certificate dated 07.08.2017 was issued on BHEL's request (For Unit 1 &6) as credentials for participation in future Hydroelectric project tenders (Power Plant Scope).

A Performance Certificate dated 22.12.2021 was issued on BHEL's request as credentials for 400 kV GIS Switchyard Scope (Part of complete Rampur Hydroelectric Project Package including addition Bay for Reactor) for participation in all future GIS project tenders.

OPTCL Query 2: Whether both 1st & 2nd contract executed by M/s BHEL has been awarded under turnkey contract basis for 400 kV GIS Substation.

Draft Reply: The contract for Rampur Hydro Electric Project was awarded to M/s BHEL covering Engineering, Design, Supply, Storage, Erection, Testing and Commissioning scopes lying with M/s BHEL (including 400 KV GIS Switchyard scope).”

8.5 The petitioner vehemently contended that the performance certificate, which was produced by M/s BHEL-opposite party no.4, does not meet the requirement of the NIT. Therefore, it would be just and proper to refer to the performance certificate issued by SJVN Ltd, a joint venture

of Government of India & Government of Himachal Pradesh indicating therein that the opposite party no.4 has discharged its responsibility for Rampur Hydro Power Station (412 MW). The performance certificate dated 22.12.2021, which has been annexed as Annexure-10 reads as follows:-

(Page-119 of the brief)

*To Whomsoever it may concern
Performance Certificate*

"This is to certify that M/s. Bharat Heavy Electricals Limited (BHEL) has been awarded the contract by M/s SJVN Ltd. (Formerly Satluj Jal Vidyut Nigam Limited) for E&M works of Rampur HEP (412 MW) including scope of 400 kV GIS Switchyard vide Contract Ref: SJVN/ECD/RHEP/ EM (Pkg-I) 1st contract. 08-1 & 2nd Contract/08-2 dated 16.10.2008.

The Scope of Switchyard includes complete design, engineering, supply, inland transportation, insurance, delivery, handling, storage, erection, testing and commissioning of all equipment required for 400 KV GIS Switchyard.

400kV GIS Switchyard Configuration as below:

Scheme-Two Main Bus Bar Scheme

Total Bays- 12 Nos CB bays with following feeders:

- 1. 400 kV Line Bays-4 Nos.*
- 2. 400 kV Generator Transformer Bay-6 Nos.*
- 3. 400 kV Bus Reactor Bay-1 No.*
- 4. 400 kV Bus Coupler Bay-1 No.*

Following BHEL make equipments were also supplied including complete design, engineering, manufacturing, inland transportation, insurance, delivery, handling, storage, erection, testing and commissioning) as part the scope of 400 kV GIS Switchyard.

- 1. 1 no. 80 MVAR, 420 Bus Reactor.*

2. 12 nos. 400 kV Capacitive Voltage Transformers.
3. Control, Protection & Relay Panels with Switchyard SCADA.
4. Porcelain Disc Insulators and associated hardware.

The above 400 kV GIS Switchyard was successfully commissioned by M/s BHEL w.e.f 27.10.2015.

The 400 kV GIS Switchyard including all equipment has been operating satisfactorily since then.

This certificate is being issued to M/s BHEL on their request vide letter No. Ref: TBMS/21/PC/400KV Swyd Rampur Dated:20.12.2021, to enable them participate in forthcoming/future tenders."

On perusal of the above mentioned performance certificate, it is made clear that the scope of Switchyard includes complete design, engineering, supply, inland transportation, insurance, delivery, handling, storage, erection, testing and commissioning of all equipment required for 400 KV GIS Switchyard. Therefore, from the starting to finishing of work called Turnkey Project and erection comes under civil work. Therefore, M/s. BHEL-opposite party no.4 satisfies the requirement of NIT.

8.6. The meaning of "ERECTION" if will be taken into consideration, then "ERECTION," generally, is a wider term than "BULDING" and may include trade FIXTURES.

“ERECTION” in relation to a building includes extension, alteration or re-erection.

8.7. In ***H.E. Dibble Ltd. v. Moore***, (1969) 3 All ER 1465, 1471 (CA), while considering Section 62 (1) of Law of Property Act, 1925, the word ‘erection’ does not embrace something that is not a part of the land, either as a fixture or otherwise.

Erection, commissioning and installation” means any service provided by commissioning an installation agency in relation to erection, commissioning and installation of plant, machinery or equipment.

In view of Section 65 and 39 (a) of the Finance Act 32 of 1994, which has been inserted by Finance Act 23 of 2004 in Section 90.

Thereby, there is no iota of doubt that if the meaning of erection will be taken into consideration, then it includes a nature of work which will be done extension or alteration or does not embrace something that is not a part of the land, either as a fixture or otherwise.

Thereby, for the fixture or otherwise, it requires a civil work. Thus, it cannot be construed that the opposite party no.4 had no experience on turnkey contract.

8.8. Turnkey Project means a contract under which the contractor assumes responsibility to the client for constructing productive installation and ensuring that they operate effectively before turning them over to the client.

8.9. In Understanding & Negotiating Turnkey and EPC Contract, **2nd Ed. By Joseph A. Huse**, the concept of turnkey contracts has been discussed in detail and it has been held as follows:

“The 'turnkey' arrangement (also known as the 'package deal', 'design and build', 'de-en-main', 'design and construct' or 'EPC' places the duty to design and construct solely on the contractor. There is no accepted definition for each of these terms in the construction field. The term 'turnkey' tends to mean the most extreme form of placing design and construction responsibility on the contractor, such that after completion the employer need only turn the key to commence operation of the constructed facility.”

8.10 In **Hudson's Building and Engineering Contracts**, 11th Ed., para 3.029 at p. 428, the essential conditions of a turnkey contract are enumerated as under :

“Thus, in these contracts the essential feature is that the owner does not employ his own professional advisers to produce the design of the building or project which he requires. Either by negotiations or by outline specification to tendering contractors, the owner makes known his requirements and the contractor then produces the design, in the form of drawings, a specification and sometimes schedules of rates to cover possible variations. Bills are not usually used in such contracts, which will almost invariably be lump 'sum, since clearly there would be unacceptable pricing risks for an owner if bills were to be prepared by a contractor for use in a measured contract.....”

8.11 In **FIDIC- An analysis of International Construction Contracts (Edited by Robert Knutson, p. 127-28, it has been stated :**

“In India the concept of Turnkey is understood in the same way as it is in most of the other countries. Generally speaking, it relates to that aspect of Construction Con-tracts where the contractor takes 'complete responsibility' for an engineering project. Complete responsibility would include furnishing of all plant, labour materials, supplies, equipment transportation, super-vision, technical, professional and other services. The contractor is under an obligation to perform all operations relating to design, manufacture, delivery installation and the design and execution of building or engineering works as contracted. In the case of Turnkey Contract or a product-in-hand con-tract, the general description of a scope of construction may be contemplated by additional contractual provisions, obligating the contractor to effect all construction which, although not specifically described is nevertheless necessary or usual, having regard to the agreed operational capabilities of the works. Such a provision may avoid disputes as to who is to supply all items of material or perform minor items of construction either forgotten during the negotiation or not considered worthy or special mention. The mere use of the term Turnkey may not be sufficient to impose such an obligation on the contract.”

8.12 In Black's Law Dictionary, Eighth Edition, page-344 states as follows:-

Engineering, procurement and construction contract. A fixed-price, schedule-intensive construction contract-typically used in the construction of single-purpose projects, such as energy plants- in which the contractor agrees to with variety of responsibilities, including the duties to provide for the design, engineering, procurement and construction of the facility, to prepare start up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility-Abbr. EPC contract- Also termed turnkey contract."

8.13. Therefore, Turnkey Project in which the ownership is originally transferred from original builder/proprietor only after ensuring that everything is "turn on" and running properly.

8.14 In **Indure Ltd.** (supra), the apex Court at paragraph-3 observed as follows.

"Tenders were invited by N.T.P.C on 08.01.1988 for submitting bids for Ash Handling Plant Package for its Farakka Super Thermal Power Project, Stage-II, by way of International Competitive Bidding, popularly known as Global Tender. The scope of work involved in such package included designing and engineering, manufacture, inspection and testing at suppliers works, packing, transportation to site, unloading, storage and handling at site, erection, testing and commissioning of complete Ash Handling Plant for 2 x 500 MW Steam Generating Units (for short 'the plant'). Such type of works contract is known as 'On C.A. No. 1123 of 2003 Turnkey Basis'. Bids made by bidders were to

cover whole of the work as abovementioned. Bid made by any person not covering the entire scope of work was liable to be treated as incomplete and could be rejected on that ground only. The bidder was required to quote a lump sum price in its proposal for the entire scope of work covered under the bid documents. It further required that bidders shall indicate the bid price in their home currency or in US dollars.”

8.15. In **Director of Income Tax-II** (supra), the apex Court at paragraph-2 observed as follows:

“On 28.02.2006, the Oil and Natural Gas Company (“ONGC”) awarded a “turnkey” contract to a consortium comprising of the Respondent/Assessee, i.e. Samsung Heavy Industries Co. Ltd. (a Company incorporated in South Korea), and Larsen & Toubro Limited, being a contract for carrying out the “Work”, inter alia, of surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, and start-up and commissioning of entire facilities covered under the ‘Vasai East Development Project’ (“Project”).

8.16 Therefore, on the basis of the performance certificate issued by SJVN Ltd. in favour of M/s. BHEL-opposite party no.4 and taking into consideration the red herring prospectus, there is no iota of doubt that opposite party no.4-M/s. BHEL has got the experience in executing a contract on turnkey basis. Therefore, the objection so raised by the petitioner cannot sustain in the eye of law.

8.17 In the proceeding dated 22.03.2022, the PSC of the OPTCL recommended five bids as being techno-

commercially compliant and the committee recommended for opening of the price bids. On 30.03.2022, the price bid for the NIT bearing CPC-49/2021-22 was opened. Fifty percent of the responsive bidders, i.e., minimum three were allowed to participate in the e-Reverse Auction held thereafter, on 07.04.2022. The details of the price after the e-Reverse Auction are as under:-

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Details of Price after e-RA.					
Name of the Bidder	Initial Price	Evaluated Price including GST (Price in INR)	Price after e-Reverse Auction including GST (Price in INR)	Tendered estimated cost (including GST) (Price in INR)	% deviation after e-Reverse Auction.
(i) M/s. Bharat Heavy Electrical Ltd	2,10,45,41,526.70		2,09,82,28,002.70	2,00,31,49,600.00	(+) 4.75 (L1)
(ii) M/s. L&T Ltd.	2,21,52,65,754.72		2,10,13,84,814.70	2,00,31,49,600.00	(+) 4.9 (L2)
(iii) M/s. Siemens Ltd. JV with A.K. Das Associates Ltd.	2,14,66,82,726.56			2,00,31,49,600.00	+ 7.17 (L3)
The above price as per bidding condition is inclusive of all taxes & duties under Works Contract @ 18% GST.					

8.18 The petitioner, along with its lead partner M/s Seimens Ltd., was given opportunity to make the lowest bid by lowering their quoted price, but they did not do so.

8.19. Taking into consideration the aforesaid e-Reverse Auction, the PSC of OPTCL on 27.06.2022 recommended for issuance of LoA in favour of M/s. BHEL-opposite party no.4 vide Annexure-L/1, basing upon which the Board of Directors on 16.07.2022 approved the proposal for award of LoA in favour of M/s. BHEL-opposite party no.4 on turnkey contract basis as recommended by the PSC. Since the order value of the project was more than Rs.100 crore, necessary approval of the State Government was sought for.

8.20 In view of the aforesaid provision, it is made clear that M/s. BHEL-opposite party no.4 satisfies the requirement of Clause-4.1.1 of the NIT. Thereby, the objection so raised by the petitioner cannot have any substance. As a result, the writ petition cannot sustain. Issue No.1 is accordingly answered against the petitioner.

9. **Issue No. 2.**

It is evident that after the evaluation of the techno commercial bid, the petitioner and M/s. BHEL-opposite party no.4 were qualified along with three others. The PSC in its proceeding dated 22.03.2022 had

recommended for opening of the price bids and accordingly the price bid was opened on 30.03.2022. Out of the 50% of the responsive bidders, minimum three were allowed to participate in the e-Reverse Auction held on 07.04.2022. But neither the petitioner nor his lead partner M/s Seimens Ltd., even after affording opportunity to them to make the lowest bid by lowering their quoted price, does so. In view of the table quoted in the foregoing paragraphs it is made clear that since the petitioner and his lead partner M/s Seimens Ltd. did not participate in the e-Reverse Auction, it has no locus to challenge the same by filing the present writ petition. As such, at the behest of the petitioner, the writ petition cannot sustain.

9.1 In **National Highways Authority** (supra), the apex Court at paragraph-20 of the judgment held as follows:-

“While considering the relief claimed by the respondent (claimant), the same should have been tested on the touchstone of the principle governing the tender process, especially when the validity of the tender document has not been put in issue or challenged before any competent forum. Going by the terms and conditions in the tender documents, as already alluded to in paragraph 8 above, there is no tittle of doubt that the right of the claimant (respondent) to match the bid of L-1 or to exercise

ROFR would come into play only if the respondent was to participate in the tender process pursuant to the notice inviting tenders from the interested parties. The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money. The plain wording of the eligibility clause in the tender documents and the incidental stipulations make it explicit that the respondent was required to participate in the tender process by submitting its sealed bid (technical and financial). The fact that a deeming clause has been provided in the tender document that if the respondent was to participate in the bidding process, it shall be deemed to fulfill all the requirements of the tender clauses 3 to 6 of the RFP, being the existing concessionaire of the Project, does not exempt the respondent from participating in the tender process; rather the tenor of the terms of the documents made it obligatory for the respondent to participate in the tender process to be considered as a responsive bidder, along with others. Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever.”

9.2 In the judgment rendered in the case of **Pratap Chandra Sahu** (supra), of which one of us (Dr. Justice B.R. Sarangi) was the author, this Court held that if the petitioner does not choose to participate in the same, at his behest, the benefit sought cannot be extended and no direction can be issued for cancellation of such E-Tender issued by opposite party no.3 in Annexure-2.

9.3 Therefore, this Court unhesitatingly comes to a conclusion that the petitioner has no locus to assail the settlement of contract in favour of opposite party no.4.

9.4 In **Patel Engineering** (supra), the apex Court at paragraph-25 of the judgment observed as follows:-

“The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to the Rule of law and our Constitutional values.”

On the basis of the facts and law, as discussed above, this Court has already come to a conclusion that the selection of M/s. BHEL-opposite party no.4 is in consonance with the Clause-4.1.1 of the NIT. Therefore, the ratio decided in the case of **Patel Engineering** (supra) has no application to the present context.

9.5 Similarly, in **Kanhaiya Lal Agrawal** (supra) at paragraph-5 of the judgment, the apex Court observed that the Court is normally reluctant to intervene in matters of entering into contracts by the Government, but if the same is found to be unreasonable, arbitrary, mala fide or is in disregard of mandatory procedures, the Court will not hesitate to nullify or rectify such actions. It is the settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in **G.J.Fernandez vs. State of Karnataka & Ors.**, 1990(2) SCC 488. Even if this contention is taken into consideration, as urged by the learned Senior Counsel appearing for the petitioner, by applying the above ratio to the present context the same cannot justify to nullify the

contract awarded in favour of M/s. BHEL-opposite party no.4.

9.6 In **Poddar Steel** (supra), the ratio decided in the case of **G.J. Fernadez** (supra) has also been taken note of. Since this Court has already held against the petitioner, the judgment so cited by learned Senior Counsel for the petitioner does not have any application to the present context.

9.7 In **Uflex Limited** (supra), the judgment cited by learned Senior Counsel appearing for opposite party no.1, the apex Court referring to **Jagdish Mandal v. State of Orissa**, (2007) 14 SCC 517 at paragraph-2 of the judgment observed as follows:-

“The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.”

Further, referring to ***Tata Cellular v Union of India***, (1994) 6 SCC 651, the apex Court came to a conclusion at paragraph-42 to the following effect:-

“We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even [36] more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular²⁶ and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”

9.8 In ***Utkal Suppliers*** (supra), the judgment of which was authored by one of us (Dr. Justice B.R. Sarangi), at paragraph-21 of the said judgment it was observed as follows:-

“Coming to the power of judicial review in the matters relating to tenders or award of contracts, it is to be borne in mind some special features. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially

commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains, out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of 36 judicial review, should be resisted. Such interferences either interim or final, may hold up public works for years, or delay relief of succour to thousand and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review may very cautious and as such, the scope of judicial review to award of contract has been considered by the apex Court in various judgments.”

9.9 Therefore, while exercising power of judicial review, the apex court has already set up the principle, which has been taken note of in ***Sterling Computers Ltd. v. M & N Publications Ltd.*** (1993) 1 SCC 445; ***Raunaq International Ltd. v. I.V.R. Construction Ltd.*** (1999) 1 SCC 492; ***Air India Ltd. v. Cochin International Airport Ltd.*** (2000) 2 SCC 617; ***Assn. of Registration Plates v. Union of India*** (2005) 1 SCC 679; ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*** (2006) 11 SCC 548 : (2006)

11 Scale 526; **Michigan Rubber (India) Limited v. State of Karnataka**, (2012) 8 SCC 216; **Maa Binda Express Carrier v. North East Frontier Railway**, (2014) 3 SCC 760.

9.10 In **Gammon India Limited** (supra), referring to paragraphs- 28, 30 and 31, it was observed by the apex Court that **New Horizons Ltd v. Union of India**, (1995) 1 SCC 478, recognizes a joint venture to be a legal entity in the nature of a partnership of the constituent companies. The partnership concept in relation to a joint venture is to be accepted then the joint venture could be treated as a 'legal entity', with the character of a partnership.

9.11 In **Consortium of Thermopads** (supra), the apex Court at paragraph-14 of the judgment observed as follows:-

“14. In view, (Me principles of law laid down by the apex Court, as discussed above, it is made clear that the apex Court has time and again put restriction with regard to the interpretation given to the conditions of tender document and, as such, it has been held that unless there is mala fide or perversity in the understanding or appreciation or the application of terms and conditions of the tender documents, constitutional Courts should not interfere with the interpretation given to such tender documents. The apex Court has given a caution with

regard to exercise of the power of judicial review and laid down the law stating that exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or-procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken by the Tendering Authority, which is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the Court should follow the principle of restraint. More so, the Tendering Authority, who is the author of the tender document, is competent person to interpret the conditions of the tender document and, as such the Constitutional Court should not interfere with the interpretation given by the Tendering Authority.

Thus, this Court is of the firm opinion that the power of judicial review being limited one, so far as tender matters are concerned, in exercise of the same to the present facts, the writ petition is not maintainable at the instance of the present petitioner.

9.12 In view of the foregoing discussions, the petitioner has no locus to file the writ petition and at his behest the writ petition is not maintainable. Accordingly issue no.2 is answered against the petitioner.

10. **Issue No.3.**

In view of the foregoing discussions, it is made clear that the petitioner having forgone his right by not participating in e-Reverse Auction, at his behest the writ

petition cannot sustain. Apart from that, the petitioner is not the person aggrieved so as to approach this Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. Consequentially, this issue is also answered against the petitioner.

11. On the basis of the facts and law, as discussed above, since all the issues have been answered against the petitioner, this Court is of the considered view that the writ petition merits no consideration and the same stands dismissed. However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

B.P. SATAPATHY. I agree.

(B.P. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 2nd December, 2022, Arun/GDS