

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

Date of decision: 24th MAY, 2023

IN THE MATTER OF:

+ **W.P.(C) 2607/2023 & CM APPL. 10033/2023**

TIRUPATI CEMENT PRODUCTS & ORS

..... Petitioners

Through: Mr. Puneet Agarwal, Mr. Premnand Pal and Mr. Chetan Kumar Shukla, Advocates

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Ravi Prakash, CGSC with Ms. Nidhi Bhuwonia, GP; Mr. Farman Ali, Ms. Usha Jamwal, Mr. Yash Aggarwal, Advocates for R-1.

Mr. Sandeep Kr. Mahapatra, CGSC with Ms. Osheen Verma, Advocate for R-2.

Ms. Madhavi Divan, ASG with Mr. Somiran Sharma, Mr. Dhrubajit Saikia, Advocates for R-3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The instant petition has been filed under Articles 226/227 of the Constitution of India, 1950, seeking, *inter alia*, setting aside the decision taken by Respondent No.2, i.e. Engineers India Ltd. (EIL), to reject the bid submitted by the Petitioners as well as to quash the email dated 23.02.2023

whereby reasons were provided by Respondent No.2 for rejection of the Petitioners' bid.

2. The facts, in brief, leading to the instant petition are as under:

- a) It is stated that Respondent No.3, i.e. Numaligarh Refinery Limited (NRL) operates a 3.0 MMTPA Refinery at Numaligarh, Golaghat, Assam. In order to expand the capacity of the refinery from 3.0 MMTPA to 9.0 MMTPA, Respondent No.3 appointed Respondent No.2 as the Engineering, Procurement and Construction Management (EPCM) Consultant.
- b) In light of the expansion it was decided to procure additional quantity of crude oil and for that purpose, it was planned that crude oil which was being imported through the Paradip port in Odisha would be supplied to the refinery. For this purpose, it was decided to lay cross country pipeline of around 1634 kms. length from Paradip port to Numaligarh for transporting 8 MMBT of imported crude oil. It was proposed to install the pipeline using "micro tunnelling technique and pipe jacking method". Bids were invited on 02.12.2022 by Respondent No.2, on behalf of Respondent No.3, i.e. Numaligarh Refinery Limited (NRL), for "*Microtunneling works for NRL expansion project of Numaligarh Refinery Limited*" vide Bid Document No. SM/B302-000-MK-T-9511/1022 (Domestic Competitive Bidding) bearing E-Tendering No. 2022_EIL_723611_1). The last date and time for online submission of bids was up to 12:00 PM on 02.01.2023. It is stated that *vide* corrigendum dated

02.01.2023, the last date for the submission of the bid had been extended to 16.01.2023.

- c) It is stated that the Petitioners submitted their bids on 16.01.2023, and on 31.01.2023, certain queries were raised by Respondent No.2 which were to be answered by the Petitioners by 03.03.2023. It is stated that the Petitioners responded to the said queries, along with supporting documents on 03.02.2023, however, *vide* letter dated 03.02.2023 issued by Respondent No.2, the deadline for responding to the queries was extended from 03.02.2023 to 06.02.2023. On 06.02.2023, the Petitioners re-submitted the response, along with the requisite documents which were modified. It is stated that another query was raised by Respondent No.2 on 08.02.2023 which was duly answered by the Petitioners on 11.02.2023.
- d) It is stated that *vide* an SMS dated 21.02.2023 at 8:30 P.M., the Petitioners were informed by Respondent No.2 that their bid had been rejected during the technical evaluation. This was uploaded on the e-procurement system of Respondent No.1 as well. It is stated that the Petitioners wrote a letter dated 22.02.2023 to Respondent No.2 seeking reasons for rejection of the bid, however, no response to the same was received. It is stated that after following up, a mail dated 23.02.2023 was sent by Respondent No.2, noting that primary reason for rejection of the bid was that the bidder had not furnished any documentary evidence in compliance of requirements of bid document to establish the technical qualification criteria. Detailed reasons regarding the same were also provided.

e) Aggrieved by the decision of Respondent No.2, the Petitioners have approached this Court by way of the instant writ petition.

3. Mr. Puneet Agarwal, the learned Counsel appearing on behalf of the Petitioners herein, submits that the bid of the Petitioners was submitted only after it was found that it was duly qualified to participate in the bidding process. He submits that various queries were raised by Respondent No.2, on 31.01.2023 and then on 08.02.2023, and in both the instances, the Petitioners responded to the queries well before the deadline with clarification and supporting documents.

4. Mr. Agarwal submits that the decision of Respondent No.2 to reject the bid of the Petitioners is replete with arbitrariness, *mala fide*, and illegality. He states that the rejection was initially intimated late at night via SMS and no reasons were assigned for the said rejection. He further states that the e-procurement system also displayed that the Petitioners were rejected as their bids were “Techno Commercially Not Accepted”, but, no reasons were accorded for the same. Mr. Agarwal also states that there are nine (9) parts of works mentioned in the tender, i.e. Part-A, Part-B, Part-C, Part-D, Part-E, Part-F, Part-G, Part-H and Part-I, and one bidder can only be awarded maximum four (4) parts based on overall least cost basis. He, thus, argues that as only two bidders have been deemed to be techno-commercially qualified, it goes against the evaluation philosophy underlying the bidding document and that both the bidders would be aware of the rate quoted by the other party because of the reverse bidding process.

5. The learned Counsel for the Petitioners further submits that the haste in which the financial bid is being opened, combined with the lack of reasoning behind rejecting the Petitioners’ bid indicates that the whole exercise conducted by the Respondents was to single out certain bidders. He

states this illegal and arbitrary behaviour of the Respondents is further exemplified by the reasons for rejection which were later provided to the Petitioners *vide* impugned email dated 23.02.2023 as per which it has wrongly been stated that the Petitioners had not provided the requisite documentary evidence in compliance of the requirements of the bid document. The learned Counsel argues that, with respect to the work to be carried out in Bharat Nagar, the Petitioners had submitted all the relevant documents as well as the clarifications with a certificate dated 06.02.2023 issued by the Delhi Jal Board (DJB) certifying the fulfilment of the requirements. He further states that similar works are being executed by the Petitioners for other authorities.

6. *Per contra*, Ms. Madhavi Divan, learned ASG appearing for Respondent No.3, submits that the Courts have exercised restraint when it comes to interfering not only in matters of a commercial nature, i.e. tender matters, but have also given way to the opinions of experts. She states that the Petitioners herein are merely disgruntled entities and their bid was rejected only after a call regarding the technical qualifications compliance was taken by the experts. The learned ASG further informs this Court that the work involved is of national importance and has to be completed in a time-bound manner.

7. Ms. Divan relies on Clause 6.0 of the Bidder Qualification Criteria (BQC) to submit that as the work involved micro-tunnelling under a river or water body or water logged crossing, it was imperative for the bidder to submit past experience certificates demonstrating their capabilities in the first instance itself. She relies on Clause 6.4 to argue that all these documents were to be submitted in support of past experience and that no additional past experience would be sought from the bidder. She states that

the Petitioners were clearly aware of these pre-requisites before it submitted its bid. With respect to the clarifications, Ms. Divan submits that the responses of the Petitioners to the queries instituted by Respondent No.2, along with the supporting documents, had been examined in detail and it was only after finding the bid submitted by the Petitioners to be in deviation of the tender conditions that the said bid was rejected.

8. Ms. Divan informs this Court that as per Clause 27 of the tender document, bids had been invited on a “zero deviation basis” and that if any bid was made with deviation, it would be liable for rejection without any further correspondence. She further states that the rejections were transparently communicated to the bidders, and that on insistence of the Petitioners, the Respondent No.2 provided detailed reasoning for rejection of the bid.

9. With respect to the contention of the Petitioners that the clarification from DJB had been provided in response to the queries posed by Respondent No.2, Ms. Divan submits that as per Clause 6.1.1 (a) of the tender document, the bidders were required to demonstrate that they had carried out microtunnelling under river or water body/water logged crossing. However, the Petitioners have only demonstrated microtunnelling under water logged/submerged condition below water table. The learned ASG states that microtunnelling under water logged area and submerged condition below water table are two different conditions. She states that since submerged condition below water table was not a qualification requirement, the bidder was required to provide documentary evidence for extent of microtunnelling crossing under water logged area. She submits that the clarification submitted by the Petitioners did not specify the extent of microtunnelling crossing executed under water logged area. The layout plan

submitted by the Petitioners also does not indicate the presence of water body/water logged area.

10. The learned ASG submits that the Reverse Auction process has been conducted as per the requisite guidelines, and that the allegations of haste and illegality that are being flung at Respondent No.2 are baseless as no material substantiating the same has been placed before this Court. She concludes her submissions by stating that no interference of this Court is warranted in the instant matter and that the decision of Respondent No.2 is in consonance with the clauses of the tender document as well as other guidelines governing tenders of such nature.

11. Heard Mr. Puneet Agarwal, appearing for the Petitioners, Ms. Madhavi Divan, learned ASG appearing for Respondent No.3, and perused the material on record.

12. Before proceeding with the merits of the case, it is first necessary to delineate the scope of tender. The bids were called for installation of pipeline using “Micro Tunnelling Technique and Pipe Jacking Method” across rivers of Paradip – Numaligarh Crude Oil Pipeline (PNCPL) project. This pipeline is an important project for the Government for transporting imported crude oil through Paradip Port in Odisha to Numaligarh in the district of Golaghat, Assam. The pipeline which is to be laid down across 10 rivers are *Tista, Mansai/Jaldhaka, Torsa, Guruphela, Raidak, Raidak, Gangia, Sankosh, Kanamakra* and *Beki*. The relevant clause i.e., Clause 6 of the tender document pertaining to the Bid Qualification Criteria (BQC) has been reproduced as follows:

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6.0 BIDDER QUALIFICATION CRITERIA (BQC):

6.1 TECHNICAL CRITERIA

A. Sole Bidder:

6.1.1 Bidder (Sole Bidder) shall have completed on his own the following in last ten (10) years reckoned from the last date of month previous to one in which bids are invited:

<i>Part -A/ Part-B/ Part-C/ Part-G/ Part-H</i>	<i>a) Execution (Engineering & Construction) of minimum 300-meter-long crossing using micro tunnelling technique with Jacking pipe of diameter 800 mm or above in a single drive under a single contract.</i> <i>Out of the above length i.e., 300-meter micro tunnelling, minimum 150-meter length shall be either under river or water body/ water logged crossing.</i> AND <i>b) One buried hydrocarbon steel pipeline project involving laying/ installation (^{Note-1}) & testing of at least 1.0 km long pipeline of diameter 18 inches or above in a single contract.</i>
<i>Part-D/ Part-E/ Part-I</i>	<i>a) Execution (Engineering & Construction) of minimum 200-meter-long crossing using micro tunnelling technique with Jacking pipe of minimum diameter 800 mm or above in a single drive under a single contract.</i> <i>Out of the above length i.e., 200-meter micro tunnelling, minimum</i>

	<i>100-meter length shall be either under river or water body/ water logged crossing.</i> AND <i>b) One buried hydrocarbon steel pipeline project involving laying/ installation (^{Note-1}) & testing of at least 1.0 km long pipeline of diameter 18 inches or above in a single contract.</i>
<i>Part - F</i>	<i>a) Execution (Engineering & Construction) of minimum 150-meter-long crossing using micro tunnelling technique with Jacking pipe of minimum diameter 800 mm or above in a single drive under a single contract.</i> <i>Out of the above length i.e., 150-meter micro tunnelling, minimum 75-meter length shall be either under river or water body/ water logged crossing.</i> AND <i>b) One buried hydrocarbon steel pipeline project involving laying/ installation (^{Note-1}) & testing of at least 1.0 km long pipeline of diameter 18 inches or above in a single contract.</i>

Note-1: Definition of laying/ installation: - Laying/ installation of hydrocarbon steel pipeline by open trench/ open cut/ HDD/ Micro tunnelling method.

***Note-2:** Bidder's experience for meeting qualification criteria as mentioned in 6.1.1 (a) & 6.1.1 (b) may be in the same contract or in separate contracts. This note is applicable for Single Bidder and as well as for Consortium bid.*

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6.4 DOCUMENTS AND DATA REQUIRED WITH BID

Bidders are required to submit all such past experience (s) (PTR) meeting the BQC along with relevant supporting documents in the first instance itself, along with the bid to justify that the bidder meets the Qualification criteria as given above. Accordingly, only such past experience (s) shall be considered for qualification, details of which are provided in the bid by the bidder and subsequently no additional past experience (PTR) shall be sought from the Bidder.

***6.4.1 Documents towards Technical criteria:** The bidder shall furnish the following documents in support of his meeting the qualification criteria stated in clause no. 6.1.1, 6.1.2 & 6.2.*

- 1. Copies of Work order, Completion certificate/ Execution certificate from Client/ Client authorized supervisory agency of qualifying job(s) in the name of the bidder.*
- 2. In case, bidder's experience is acquired as a Sub-Contractor, work order (including SOR, wherever required for establishing scope of work) and Completion Certificate/ Execution Certificate issued by the main Contractor as well as Completion Certificate/ Execution Certificate issued by end User/ Owner/ PMC shall also be submitted. However, in case Bidder is not able to furnish the completion certificate from the end User/ Owner/ PMC in his name, then he shall furnish a*

copy of the approval letter by end User/ Owner/ PMC for engaging the Bidder as a Sub-Contractor.

3. In case of consortium bid, leader and member of the consortium / unincorporated joint venture shall meet the relevant experience criteria. Leader and member of the consortium / unincorporated joint venture shall submit the Memorandum of Understanding (MOU)/ Consortium agreement clearly defining the scope and responsibility of each member along with nomination of leader.

4. For Equipment's specified under Key Construction Equipment CATEGORY-1 - BIDDER has option to propose equipment's from "OWNED" or "HIRED sources" against this category. BIDDER to provide proof of ownership (Copy of Invoice payment/ Insurance Cover/ Registration with Statutory body/ Certificate from Chartered Engineer) for OWNED equipment's and if BIDDER opts to hire any equipment of this category, an MOU from the hiring agency of the equipment and Proof of Ownership (Copy of Invoice payment/ Insurance Cover/ Registration with Statutory body/ Certificate from Chartered Engineer) with that agency needs to be submitted along with the BID. In addition, bidder has to submit a recent inspection certificate (issued within 6 months from the bid due date) from Chartered Engineer/ Reputed third party agency certifying that equipment's are in good working condition."

13. A perusal of the abovementioned Clause 6.1 shows that the bidders must have experience in Micro Tunnelling Technique under rivers. This Court can take a view of the fact that the rivers in Assam are fast flowing rivers and the Respondents, therefore, were looking for a bidder who must have experience in Micro Tunnelling Technique under fast flowing rivers. The Petitioners have given an experience certificate from Delhi Jal Board

(DJB) to show that the Petitioners had earlier carried out works for DJB. The said certificate reads as under:

 Delhi Jal Board	DELHI JAL BOARD:GOVT. OF N.C.T. OF DELHI OFFICE OF THE EXECUTIVE ENGINEER (C)DR-XI ROOM NO.303 :VARUNALAYA PHASE- I, JHANDEWALAN,KAROL BAGH NEW DELHI:-110005 Tel.: 011-23554487 / E-mail: eecdrxi@gmail.com	 आज़ादी का अमृत महोत्सव
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STOP CORONA: WEAR MASK, FOLLOW PHYSICAL DISTANCING, MAINTAINING HAND HYGIENE

NO. DJB/EE(C)DR.XI/2023/ 227	Dated: 06.02.2023
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TO WHOMSOEVER IT MAY CONCERN

This is in continuation to the Performance Certificate No DJB/EE(C)DR.XI/2023/05 dated 03/01/2023 issued by undersigned, the details of the scope of work as required by EIL is as under:

- 1) The agency carried out complete Engineering work like Alignment survey, Total station survey, GPR Survey, Geo Technical Survey, Design of Jacking / Receiving Shaft, Verifying the thickness of 1500 mm / 1600 mm ID M.S. Jacking Pipe used in Micro Tunneling work.
- 2) The agency carried out the 1500 mm ID MS pipe by Micro Tunneling method in a single stretch of 326.80 mtr. under water logged /submerged condition below water table. The agency performed dewatering in Jacking Shaft and Receiving Shaft to carry out the work in dry condition.
- 3) The Completion Plan showing the location of single stretch Micro Tunneling of 326.80 mtr. length is attached herewith.

This clarification is issued on the request of the agency for tender purpose.

✓ Tirupati Cement products, C-60, Community Centre, Janak Puri, New Delhi - 110058	 (P. K. Kapil) Executive Engineer (C) DR-XI Ex. Eng. (C) Dr. XI R.No: 308, Varunalaya Bldg. Ph-1 Jhandewalan, New Delhi-110005 Delhi Jal Board (Govt. of NCT)
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14. The contention of the Petitioners is that the above-mentioned certificate fulfils the criteria as laid down in Clause 6 of the tender

document. The map attached to the certificate does not show that the Petitioners have carried out any work of Micro Tunnelling Technique under rivers. The map which is attached to the experience certificate does not indicate that the Petitioners have carried out any work under a river. Undoubtedly, Clause 6.1 of the tender document mentions that the Micro Tunnelling could be either under river or water body/water logged crossing. Although, the Respondents have used the word water body or water logged crossing, it can be discerned from the tender that what the Respondents are actually looking for is a bidder who has experience in Micro Tunnelling Technique under moving water. Material on record further indicates that clarifications were sought for by the Petitioners regarding their experience and the Petitioners did give their replies which were considered by the Respondents for the purpose of technical evaluation, and the Respondents found that the bid submitted by the Petitioners not to be fulfilling the evaluation criteria.

15. Clauses 17 and 27 of the tender document enumerate the “zero deviation” policy as per which bidders are advised to submit their bids in strict compliance with the specifications and other stipulations. If a bid is not submitted in complete compliance with the terms and conditions of the tender document, then the bid is liable for rejection. Clause 22 records Respondent No.2’s right to accept or reject any bid without incurring any liability and without the obligation to inform the affected bidder or bidders of the ground for its actions. These Clauses have been reproduced as under for ease of comprehension:

“17 ZERO DEVIATION BIDDING

17.1 The bids shall be based on the terms and conditions of the ITB, Scope of Work, and Technical Specification etc. of the Bidding Document. Bidders are advised to submit their bids in strict compliance with the specifications and other stipulations contained therein and not to stipulate deviations. Accordingly, bidder shall submit Technocommercial compliance format as per proposal Form - C, duly signed as token of his acceptance.

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22 OWNER'S RIGHT TO ACCEPT ANY BID AND TO REJECT ANY BID

22.1 The Owner/EIL reserves the right to accept or reject any Bid, and to annul the Bidding process and reject all Bids at any time prior to award of the order without thereby incurring any liability to the affected Bidder or Bidders or any obligations to inform the affected Bidder or Bidders of the ground for Owner/EIL's action.

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27 BID REJECTION CRITERIA

27.1 Bids are invited on "Zero Deviation Basis". Accordingly offer is to be submitted in complete compliance to terms & conditions of the bidding document without any deviation. Offer with deviation shall be liable for rejection without any further correspondence.

27.2 Hence Bidder shall ensure submission of complete bid without any deviation as per requirement of Enquiry document in first instance itself."

16. The material on record reveals that queries were raised by Respondent No.2 on two occasions, first on 31.01.2023, to which the Petitioners responded on 06.02.2023, and second on 08.02.2023, to which the Petitioners responded on 11.02.2023. By way of these queries, certain

clarifications and authenticated documents were sought from the Petitioners, which are stated to have been provided. This fact is not in dispute. The grievance of the Petitioners lie in the fact that, despite provision of these clarifications and documents, the Respondent No.2 failed to recognise the compliance of the Petitioners' bid and sent an unreasoned intimation of rejection. This Court, at the outset, rejects this submission of the Petitioners.

17. It has been categorically contended by Respondent No.2 that the documents submitted by the Petitioners had been duly assessed by experts of the subject matter, and it was only after this careful consideration that the bid of the Petitioners was found to be non-compliant with the Bidder Qualification Criteria. Furthermore, as stipulated in Clause 22, the discretion to reject or accept a bid or even annul the bidding process lies with the tendering authority. Thus, there resided no obligation in Respondent No.2 to have provided the Petitioners with the reasons for rejection of their bid. However, it is only on insistence of the Petitioners that Respondent No.2 was constrained to sending the impugned communication dated 23.02.2023 recording elaborate reasons that led to the rejection of the Petitioners.

18. The material on record further reveals that the sole point of contention that has arisen in the instant matter pertains to whether or not the Petitioners were able to satisfy the technical eligibility requirement with respect to their Previous Track Record (PTR) pertaining to microtunnelling. It is the contention of Respondent No.2 that the execution of microtunnelling crossing at rivers involves carrying out construction activities in the face of large surface water which has a flow. It is in these circumstances that it is desired that the bidder must have a track record in microtunnelling crossings in water logged areas.

19. In order for the Petitioners to have been eligible, it was necessary for them to demonstrate that they had the requisite track record. However, as has been submitted by Respondent No.2, the clarification of the DJB which has been provided by the Petitioners fails to indicate the extent of microtunnelling that has been executed specifically under water logged areas which is the requirement as per the Bidder Qualification Criteria under Clause 6.0 of the tender document. This Court is inclined to agree with the reasoning of Respondent No.2.

20. With regard to PTR-2 which pertained to the works in Bharat Nagar, Respondent No.2 had sought for clarification as the documents could not establish the length of the single drive for the crossing which was under river or water body or water logged area. The DJB document which was provided by the Petitioners in response to this query indicated that length of single drive was 326.0 meter under the water logged/submerged condition below the water table. It is on this basis that the Petitioners' bid was rejected as there is a difference between water logged area and submerged condition below the water table, and the latter was not a requirement as per the tender document. The phrasing of the DJB document clearly fails to indicate whether microtunnelling work executed by it involved the presence of water on the surface. Therefore, the Respondent No.2 was correct in its assessment in rejecting the bid of the Petitioners.

21. In any case, it has been well established that the authority that authors the tender documents is the best person to appreciate the requirements of the tender. This principle has been time and again upheld in various Judgments of the Supreme Court, such as Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Limited and Anr.,(2016) 16 SCC 818 and Agmatel India Private Limited v. Resoursys Telecom and Ors., (2022) 5 SCC 362. It is

imperative for Courts, specifically when tenders involve critical and technical infrastructure works, to defer to the tendering authority's manner of understanding and appreciation of the requirements of the tender. Further, Courts must stay their hands when it comes to judicial review of contractual matters. It has been observed consistently by the Apex Court in a catena of judgements that Courts may interfere in administrative decisions or contractual matters if, and only if, the same is arbitrary, irrational, unreasonable or *mala fide*, or biased [Refer to: Tata Cellular v. Union of India, (1994) 6 SCC 651, Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 and Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517].

22. It is now well settled that that the Courts should give weight to the opinion of the experts unless the decision is totally unreasonable and arbitrary. The Apex in Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. New J.K. Roadways, Fleet Owners and Transport Contractors and Others, 2020 SCC OnLine SC 1035 has observed as under:

“18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, this Court noted:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(emphasis supplied)

23. Similarly in Agmatel India (P) Ltd. v. Resoursys Telecom, (2022) 5 SCC 362, the Apex Court, after placing reliance on a number of Judgments, has held as under:

25. This Court referred to various decisions on the subject and stated the legal principles as follows : (Galaxy Transport Agencies case [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , SCC paras 14-20)

"14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur

Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held : (SCC p. 825, para 15)

‘15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.’

15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha [Bharat Coking Coal Ltd. v. AMR Dev Prabha, (2020) 16 SCC 759] , under the heading “Deference to authority's interpretation”, this Court stated : (SCC p. 776, paras 50-52)

‘50. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent 1 seeks to only enforce terms of NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

51. In the present facts, it is clear that BCCL and C1-India have laid recourse to clauses of NIT, whether it be to justify condonation of delay of Respondent 6 in submitting performance bank guarantees or their decision to resume auction on

grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818]

52. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.'

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] , this Court held as follows : (SCC pp. 501-02, para 20)

'20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness,

irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.'

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the NIT For this reason, the Division Bench's conclusion [New JK Roadways v. State (UT of J&K), 2020 SCC OnLine J&K 733] that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, para 22)

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

judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can

say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.’

19. Similarly, in Montecarlo Ltd. v. NTPC Ltd. [Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272] , this Court stated as follows : (SCC p. 288, para 26)

‘26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to

auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.'

20. *This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own."*

26. *The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is*

manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.”

24. The Apex Court in N.G. Projects Ltd. v. Vinod Kumar Jain, (2022) 6 SCC 127 has held as under:

12. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It was held as under : (SCC p. 825, paras 13 & 15)

“13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It

is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

13. *This Court sounded a word of caution in another judgment reported as Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] , wherein it was held that the courts must realise their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical issues, the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above, the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. The courts must also not interfere where such interference would cause unnecessary loss to the public exchequer. It was held as under : (SCC p. 501, paras 19-20)*

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into

between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts, but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent

arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case.”

xxx

16. *In Galaxy Transport Agencies v. New J.K. Roadways [Galaxy Transport Agencies v. New J.K. Roadways, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , a three-Judge Bench again reiterated that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. It was observed as thus : (SCC paras 17-18 & 20)*

“17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench [New JK Roadways v. UT of J&K, 2020 SCC OnLine J&K 733] ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the NIT. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be

second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, para 22)

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If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.'

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own."

25. A holistic reading of the material on record and the legal jurisprudence above showcases that the Petitioners failed to adhere to the technical qualification criteria as stipulated in the tender document and flouted the "zero deviation" principle underlying the same. The Respondent

No.2 committed no infraction while rejecting the bid of the Petitioners for being unable to prove its eligibility. In fact, multiple opportunities were provided to the Petitioners to clarify their previous works, and despite these opportunities, they were unable to clearly establish their technical compliance.

26. As stated earlier, the crude oil which is to be transported through tunnel laid down across and under various rivers which are fast moving. In view of the nature of the tender, the tendering authority is the best person to determine as to what would be the best suitable bidder to perform the task of “Micro Tunnelling work” to ensure proper flow of crude oil. The decision of the tendering authority in not finding the Petitioners suitable enough to carry out the work in question cannot be said to be unreasonable and arbitrary.

27. Accordingly, this Court does not find any merit in the writ petition preferred by the Petitioners and, thus, no case has been made out which warrants the exercise of this Court’s jurisdiction under Article 226.

28. With these observations, the petition is dismissed, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MAY 24, 2023

hsK/RR