



Neutral Citation Number: 2023:DHC:5183-DB

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

Judgment reserved on: 05.07.2023

% **Judgment delivered on: 26.07.2023**

+ **W.P.(C) 3870/2023 and C.M. Nos. 22822/2023, 27640/2023, 27679/2023 & CM APPL. 27685/2023**

FPEL TJTC CONSORTIUM

..... Petitioner

Through: Mr. Jayant K. Mehta, Sr. Advocate with Ms. Anushree Kapadia, Ms. Ruchi Krishna Chauhan and Ms. Ayushi Kumar, Advocates.

versus

ENGINEERS INDIA LIMITED AND ANR

..... Respondent

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Yuvraj Sharma, Mr. Nishank Tripathi and Ms. Shruti Agarwal, Advocates for R-1.

Mr. Rajshekhar Rao, Sr. Advocate with Mr. T. Sundar Ramanathan, Mr. Vivek Pandey, Ms. Sukanya Viswanathan, Ms. Aastha Sardana and Ms. Manasa Dammalapati, Advocates for R-2.

Mr. Atul T.N., Ms. Pragya Narayan, Mr. Vishal Choubey, Ms. Laavanya Regunathan Fischer, Advocates for proposed respondent No.3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

W.P.(C) 3870/2023

Page 1 of 25



Neutral Citation Number: 2023:DHC:5183-DB

1. Aggrieved by the rejection of its commercial bid with respect to the Bidding Document No. AS/B224-323-MA-T-6007/3020 issued (“**Bidding Document**” or “**Subject Tender**”) by the Respondents for development of Double Wall Storage Tanks including all Associated Supply & Works (Package-7A) for Pachpadra Tehsil, Barmer District, Rajasthan, India (**the Project**) *vide* communication dated 23.03.2023 (**Impugned Communication**), the Petitioner has filed the instant writ petition challenging the said communication.

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

- a. On 10.11.2022, a Tender Notice / Invitation for Bids (**IFB**) was issued by Engineers India Limited (**EIL**)/Respondent No. 1 in respect of the Project of HPCL Rajasthan Refinery Limited (**HRRL**)/Respondent No. 2. It is stated that the subject tender had undergone 1 Commercial Amendment, 2 Technical Amendments and 1 Corrigendum. The last date for submission of commercial bids in respect of the Subject Tender was 30.11.2022, which was extended to 15.12.2022.
- b. The Petitioner herein is a Consortium of Fabtech Projects & Engineers Limited (**FPEL**), a Company registered in India under the Companies Act, 1956, and Tehran Jonoob Technical and Construction Co. PJS, Iran (**TJTC**), a Company registered in Iran. The Petitioner participated in the subject tender by submitting its bid and paying an Earnest Money Deposit (**EMD**) of Rs. 4.125 Crores.
- c. Pursuant to the submission of bids, Respondent No. 1 raised two (2)



Neutral Citation Number: 2023:DHC:5183-DB

Technical Questionnaires (TQs) which pertained to past experiences and legal agreements entered into by the Petitioner, both of which were responded to by the Petitioner to the satisfaction of the Respondent No. 1 and no subsequent TQs were raised thereafter.

- d. The Respondent No. 1 raised a total of six (6) Commercial Questionnaires (CQs). Commercial Questionnaire 1 (CQ-1) was raised by Respondent No. 1 on 28.12.2022 and the Petitioner submitted its response to the same on 03.01.2023. Thereafter, Commercial Questionnaire 2 (CQ-2) was raised by Respondent No. 1, and the Petitioner submitted its response to the same on 04.01.2023.
- e. On 06.01.2023, Respondent No. 1 raised Commercial Questionnaire 3 (CQ-3), whereby Respondent No. 1 stated that the Financial Statement of TJTC for the year ending on 20.03.2022, as submitted by the Petitioner as part of its bid, provides for the qualified opinion of the auditor. Respondent No. 1, thus made a request to the Petitioner to submit the impact of qualified opinion of the auditor on the net worth of TJTC. The qualifications raised by the Auditor in the aforesaid Financial Statement read as under :

“Basis for Qualified Audit Report

4) There has been no confirming reply on 8 items of trade receivables and other receivables and prepayments amounting to IRR 1,360 billion totally, and 6 items of trade payables and other payables and advanced collections amounting to IRR 1,940 billion totally, and from EN Bank, Afrigha Branch, until the date of this report; and we could not determine their possible effects of these restrictions on the financial statements



Neutral Citation Number: 2023:DHC:5183-DB

being reported.

5) *The amount of IRR 868 billion from the balance of Trade Receivables and other Receivables and Prepayments (under Notes 13 and 14) is forwarded from previous years and without any turnover. In addition, the heading of Trade Receivables and other Receivables consisting of IRR 791 billion is provisional account between the headquarters and workshops in previous years which have not been settled. Considering the performed examinations, it is necessary to consider a reserve of at least IRR 300 billion for such cases; however, in the absence of sufficient evidence, it is not possible for this Firm to determine the exact amount.*

6) *The heading of Trade Payables and Other Payables, including IRR 652 billion, and the heading of Customer Advances, including IRR 144 billion are related to stagnant and annual items that there has been no action to settle them. In the absence any confirming feedback or accounts matching statement, it was not possible for us to determine any possible adjustments.*

7) *As described in Note 22 for income tax of 2015 and 2017 an amount of IRR 215 billion have been claimed that due to objection to the said amount no tax reserve is provided and for income tax of 2018 and 2019 and the reporting year an amount equal to the declared tax is recorded in accounts. With regard to the foregoing and examinations performed, it is necessary to consider a reserve of at least IRR 200 billion for the above items, but in the absence of sufficient evidence such as the latest status of company's objection, it was not possible for us to determine its effects on the financial statements."*

The request made by Respondent No. 1 in CQ-3 reads as under:

"Bidder to submit a categorical certificate from the statutory auditor of M/s. Tehran Jonoob Technical Construction Company (Private Joint Stock), stating financial BQC parameters i.e. Turnover, Networth and Working Capital after



Neutral Citation Number: 2023:DHC:5183-DB

taking into consideration the financial impact of quantified qualifications referred to in point no. 4 to 7 of Auditor's report. Above document has to be submitted duly authenticated in line with clause no 5.6.5 of IFB."

- f. The Petitioner responded to CQ-3 on 06.01.2023. It also submitted to Respondent No.1 a letter from an Auditor based in India on 23.01.2023 and 24.01.2023. In response to the aforesaid, Respondent No. 1 requested the Petitioner to reply to CQ-3 in accordance with Clause 5.6.5 of the IFB. The Petitioner responded to the same by providing an auditor's report from an Iran based auditor on 08.02.2023, wherein it is stated that they have made adjustments to the Financial Statements taking into consideration the impact of the qualifications raised by the Auditor. The adjustments as made *vide* Auditor's report dated 08.02.2023 is reproduced as under:



Neutral Citation Number: 2023:DHC:5183-DB

(Value in Million Iranian Rial)

Financial Indicator	Certified Value	Adjustment upon Quantifying the Basics of Qualified Opinion	Value after Quantifying the Basics of Qualified Opinion
Annual Turnover	9,118,014	NIL	9,118,014
Net worth	396,323	-250,000*	146,323
Current Assets	8,732,453	-500,000*	8,232,453
Current Liabilities	8,556,749	-591,000 [#]	7,965,749
Working Capital	175,704	91,000 ⁺⁺	266,704
Net Profit	24,088	91,000 ⁺⁺	115,088

Note:

* Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 7.

+ Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 4 & 5.

Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 6.

g. Thereafter, the Respondent No. 1 raised Commercial Questionnaire 4 (CQ-4) wherein the Petitioner was requested to submit a certificate from their statutory auditor indicating the corresponding effect of clause no. 4, 5 & 6 (Basis for Qualified Opinion indicated in Auditor's Report) on its Net Worth, and the corresponding effect of clause no. 7 (Basis for Qualified Opinion indicated in Auditor's Report) on Current Liabilities. The same query was repeated in Commercial Questionnaire 5 (CQ-5). The Petitioner submitted its response to CQ-4 and CQ-5 on 16.02.2023 and 21.02.2023 respectively. The Petitioner also submitted the auditor's comments by a letter dated 22.02.2023. The relevant extract of the Auditor's letter dated 22.02.2023 is reproduced as under:



Neutral Citation Number: 2023:DHC:5183-DB

TABLE- I (Value in Million Iranian Rial)

Financial Indicator	Certified Value	Adjustment of Basics of Qualified Opinion	Value after applying Adjustment of Basics of Qualified Opinion
Annual Turnover	9,118,014	NIL	9,118,014
Net worth	396,323	-250,000	146,323
Non-Current Liabilities	21,859	+250,000	271,859
Non-Current Assets	242,478	-	242,478
Current Assets	8,732,453	-500,000	8,232,453
Current Liabilities	8,556,749	-591,000	7,965,749
Working Capital	175,704	+91,000	266,704
Net Profit	24,088	+91,000	115,088

We Statutory Auditor again re-confirm that the financial statement of financial year ending 20 March 2022 was prepared as per governing accounting standards and prevailing laws of Iran. From that the key financial indicators are coming up as below (TABLE II) which needs to be considered as final and certified.

- h. Subsequently, the Respondent No. 1 raised Commercial Questionnaire 6 (CQ-6) on 07.03.2023 and the following queries were raised therein:

“(a) With reference to the Commercial Payables and other payables of IRR 591 billion, as stated at S.No 6 of Qualified Opinion, vide auditor letter received on 22.02.2023, impact has been taken into account and adjusted from the current liabilities and net profit, in spite of the fact that the captioned bidder is not in a position to pay its subject Commercial Payables as we understand from the stated observation.

Further, Qualified Opinion at S.No 4 w.r.t. commercial receivables & other receivables of IRR 1,281 Billion and commercial payables & other payables of IRR 3,088 Million, the impact and adjustment of this qualification on Working capital, Turnover and Net Worth may also be incorporated on the above similar methodology followed by the auditor in its letter received on 22.02.2023.



Neutral Citation Number: 2023:DHC:5183-DB

(b) Vide auditor letter received on 22.02.2023, impact of IRR 250 Billion has been taken into account and adjusted in the Net Worth and Non-Current Liabilities (the crystallisation will take more than one year as stated in the CQ reply). The subject provision considered as 'non-current' may be reviewed again from the auditor in line with Accounting standard being followed, as in general parlance, 'Provision for Tax liabilities' treated always as current liabilities.

Bidder is requested to provide the point-wise response to above queries from their Statutory Auditor M/s. Argham Negar Aria Auditing and Management Services Firm on their own letter-head with appropriate stamp and signature.

The response as sought above shall be positively submitted by 10.03.2023 on NIC portal failing which we shall proceed with further evaluation based on the available information upto cut-off date and time specified."

It is also stated in CQ-6, that the Petitioner is required to submit its response to the same by 10.03.2023, failing which, Respondent No. 1 would proceed with further evaluation based on information available up to the cut-off date and time specified.

- i. On 07.03.2023, the Petitioner addressed an e-mail to EIL's project coordinator seeking more time to file its response to CQ-6 in view of public holidays in India and Iran. The petitioner addressed another e-mail to EIL's project coordinator on 08.03.2023, seeking time extension to file its reply until 14.03.2023. It is stated that no response was received by the Petitioner from Respondent No. 1 and therefore on 09.03.2023, the Petitioner responded to CQ-6 stating that the Financial Statements of TJTC have been prepared in accordance with the law and accounting



Neutral Citation Number: 2023:DHC:5183-DB

standards of Iran and the key financial indicators mentioned therein are final, authentic, absolute and undisputable and reiterated its stand as per the Auditor's Letter dated 22.02.2023.

- j. Thereafter, on 15.03.2023, the Petitioner submitted a response to Respondent No. 1, from the Auditor of TJTC dated 13.03.2023, wherein he refuted the suggestions made in CQ-6 and stated that the key financial indicators will remain unchanged as he had taken the impact of qualified opinions into consideration *vide* his previous letter dated 22.02.2023.
 - k. Subsequently, the Petitioner addressed an e-mail to EIL and HRRL on 22.03.2023, stating that despite compliances on their behalf, the Respondents are proceeding ahead to disqualify the Petitioner without any valid reason, which would result in automatic award of the Project to the only other bidder.
 - l. On 23.03.2023, the Petitioner received intimation from the bid portal at 6:17 PM that Respondent No. 1 has rejected the Petitioner's bid for the Subject Tender during technical evaluation for the reason that the Petitioner's bid does not meet the financial criteria (Net Worth) as per the Bidding Qualification Criteria (**BQC**) as specified in the Bidding Document.
3. Mr. Jayant Mehta, Learned Senior Counsel appearing on behalf of the Petitioner submits that the rejection of the Petitioner's Bid by Respondent No. 1 is arbitrary, unreasonable, discriminatory, bad in law and in violation of Articles 14 and 19 of the Constitution of India, and is therefore liable to be set aside. He submits that while the Respondent states that the



Neutral Citation Number: 2023:DHC:5183-DB

Petitioner's bid has been rejected on the ground that it does not fulfil the Financial Criteria (Net Worth) as specified in the BQC of the Bidding Document, the actions of the Respondent show that the rejection of its bid has been done to benefit the only other bidder, i.e. Respondent No. 3. He argues that this is also apparent from the fact that sufficient time was not given to the Petitioner to respond to CQ-6 as there was a public holiday on 08.03.2023 in both India (on account of Holi) and Iran (on account of Imam Mahdi's birthday) which was followed by the weekend.

4. Mr. Mehta submits, that the Petitioner has submitted the duly audited financial statements of the members of the Petitioner consortium as per the requirements of the Subject Tender and that its bid meets all criteria specified in the BQC. He submits that the net worth of TJTC is positive, as required by the BQC, and the same can be seen from the Financial Statement submitted by the Petitioner along with its bid. He also submits that even after quantifying the impact of the auditor's qualified opinion, the net worth of TJTC continues to remain positive as has been shown by the Petitioner consistently through its responses to the various CQs raised by Respondent No. 1.

5. Mr. Mehta further submits that the Respondent No. 1 has not properly evaluated the bid of the Petitioner. It is his contention that the EIL has no authority to substitute the opinion of the auditor without giving any reasons for the same. He contends that upon the request made by the EIL, the Auditor has taken into account the qualifications highlighted in Clause Nos. 4, 5, 6 & 7 (Basis for Qualified Opinion indicated in Auditor's Report) and



Neutral Citation Number: 2023:DHC:5183-DB

even then the net worth of TJTC is positive, as required by the BQC. In such a scenario, the disqualification of the Petitioner on the ground that it does not meet the Financial Criteria (Net Worth) is arbitrary and there is nothing on record to substantiate this reasoning given by the Respondents for rejection of the Petitioner's bid. He submits that the Impugned Communication is not a reasoned order and thus liable to be set aside.

6. It is submitted by Mr. Mehta that the clauses under the heading "Basis for Qualified Audit Report" as indicated in the Auditor's Report are only qualifications with respect to the limitations of audit carried out by the auditor and not an adverse opinion on the net worth of the Petitioner.

7. It is further submitted by Mr. Mehta that the queries raised by Respondent No. 1 in the CQs are mechanical in nature and there is non-application of mind on the part of the Respondents in considering the responses of the Petitioner to the CQs, as they kept on raising the same query even after the Petitioner had given reasoned and satisfactory responses to all the CQs raised.

8. Mr. Sanjay Jain, Learned Senior Counsel appearing on behalf of Respondent No. 1/EIL submits that the Petitioner's bid has been rejected as it failed to meet the "Net Worth" criteria, which is a *sine qua non* for a bidder to be considered for opening of commercial bid. He submits that the Petitioner was given multiple opportunities by Respondent No. 1 to satisfy EIL that its net worth was positive, however the Petitioner failed to do so and therefore its bid was liable to be rejected.

9. Mr. Jain, brought to the attention of this Court, "Form O", which



Neutral Citation Number: 2023:DHC:5183-DB

forms a part of the Bidding Document and provides for the format and manner in which prospective bidders were to calculate their “net worth” for the purpose of the Subject Tender. He highlights that as per “Form O”, the net worth of a bidder is to be calculated as per the formula “Paid Up Share Capital + Share Application Money Pending Allotment + Reserves (as defined in Form O) – Accumulated Losses – Deferred Revenue Expenditure to the extent written off = Net Worth”. He further highlights “Form O” clearly stipulates that the net worth of the bidder has to be calculated after giving effect to the impact of audit qualification given in the auditor’s report.

10. Mr. Jain submits that the Statutory Auditor of the Petitioner had given only a qualified opinion in its report, without containing the impact analysis to show that the net worth of the Petitioner is positive. He states that the Respondent No. 1 gave six (6) opportunities to the Petitioner through CQs to satisfy EIL how the figures discussed in Clauses 4, 5 & 6 (Basis for Qualified Opinion indicated in Auditor’s Report) would result in the Petitioner’s net worth being positive. He argues, that if the net worth of the Petitioner is to be calculated in accordance with the parameters provided in “Form O”, it comes out to be negative, and thus fails the Net Worth criteria as per the BQC. He contends that the Petitioner failed to comply with the aforesaid requirements and thus failed to satisfy Respondent No. 1 that its net worth was positive, and therefore the decision of Respondent No. 1 to reject the bid of the Petitioner cannot be said to be arbitrary, discriminatory or perverse.



Neutral Citation Number: 2023:DHC:5183-DB

11. Mr. Jain further submits that the Project is a mega project and capital intensive in nature, and therefore it is imperative that the Petitioner satisfies the Respondents that it has the financial capacity to complete the project.

12. Mr. Jain relies upon the decisions of the Hon'ble Supreme Court in *Silppi Constructions Contractors v. Union of India*, (2020) 16 SCC 489, and *National High Speed Rail Corp. Ltd. v. Monte Carlo Ltd.*, (2022) 6 SCC 401, to submit that there is a presumption that the author of the tender document is in the best position to understand and interpret the same, and if it finds anything missing and endeavours to elicit the information, the same cannot be questioned in Judicial Review.

13. Mr. Jain further relies upon the decisions of the Apex Court in *Agmatel India (P) Ltd. v. ResourSYS Telecom*, (2022) 5 SCC 362, to submit that the technical evaluation and interpretation of a bid is not open to Judicial Review. He submits that in the instant case, the Petitioner failed to comply with the manner in which Net Worth is to be calculated under "Form O" which is a part of the Technical evaluation under the BQC, and the Petitioner failed to comply with the same. He therefore contends that the Petitioner cannot challenge the Impugned Communication on the ground that the manner in which the Petitioner computed its net worth was not accepted by Respondent No. 1.

14. Mr. Rajshekhar Rao, Learned Senior Counsel appearing on behalf of Respondent No. 2/HRRL submits that the Respondent No. 1 has taken a reasoned decision in the matter. He submits that as per Clause 5.4.2 of the IFB, the bidder was required to have a positive net worth and the manner in



Neutral Citation Number: 2023:DHC:5183-DB

which net worth is to be calculated is prescribed in “Form O”. He submits that the Petitioner submitted “Form O” and determined its net worth without taking into consideration the qualifications given in the Auditor’s report, which was a requirement under “Form O”, and therefore the bid of the Petitioner was liable to be rejected on this ground alone.

15. It is submitted by Mr. Rao that as there was only one other bidder, the Respondent in good faith sought multiple clarifications from the Petitioner by way of CQs and yet the Petitioner repeatedly failed to take into account the impact of the qualifications given in Clause Nos. 4, 5 & 6 (Basis for Qualified Opinion indicated in Auditor’s Report) on its net worth. He submits that if the impact of the qualifications given by the Auditor is taken into account, the net worth of the Petitioner comes out to be negative. The calculation as done by Respondent No. 2 in this regard is reproduced as under:

S.no	Particulars	Amount in Million Iranian Rials
1.	Net worth as per the Petitioner (without taking into consideration audit point nos. 5 & 7)	396,323
2.	(Less) Quantification as per point nos. 5 (IRR 500 billion) & 7 (IRR 250 billion)	750,000
	Total net worth	(-) 353,677

16. It is further submitted by Mr. Rao that the Respondent repeatedly



Neutral Citation Number: 2023:DHC:5183-DB

failed to calculate its net worth in accordance with the format prescribed in “Form O” of the Bidding Document, and it is settled law that the calculation of net worth for the purpose of a tender has to be as per the requirements of the tender. He relies upon a decision of this Court in *Kalinga Commercial Corporation Ltd. v. Steel Authority of India*, 2023 SCC OnLine Del 3548, to submit that the calculation of net worth of an entity and the preparation of balance sheet are two separate exercises.

17. He further relies upon the decision of the Apex Court in *Agmatel India Pvt. Ltd.* (supra) to submit that in matters pertaining to tenders, Court should give way to the opinion of experts and not get involved in technical evaluation, and even if the interpretation given by the tendering authority is not acceptable, that itself cannot be reason for interfering with the interpretation of the tendering authority.

18. In rejoinder, Mr. Mehta contends that “Form O” is only required to assess whether the bidder meets with the criteria of net worth as positive or negative. He submits that clarifications/queries form a part of the tender process and the responses given during such process form a part of the tender bid. He contends that the quantification of the auditor’s qualified opinion during such process is required to be taken into account as if the same is part of the bid, and failure to do so by the Respondent is unreasonable and arbitrary. He reiterates that the net worth of Petitioner continues to remain positive after the impact of the auditor’s qualifications is taken into account and therefore the Impugned Communication rejecting the bid of the Petitioner is liable to be set aside.



Neutral Citation Number: 2023:DHC:5183-DB

19. Heard learned Senior Counsels appearing for the parties and perused the material on record.

20. At the outset, we deem it apposite to refer to the relevant clauses from the Bidding Document that set out the requisite criteria for “Net Worth” which need to be satisfied by the bidder. The same is found in Clause 5.4.2 of the IFB and “Form O”. Clause 5.4.2 of the Bidding Document reads as under:

“5.4.2. NET WORTH CRITERIA

The financial net worth of the Bidder (sole Bidder or incorporated Joint Venture or Leader of the Consortium) and second member of consortium as per the audited financial results of immediate preceding financial year shall be positive barring CPSEs approved by PMC and/or HRRL.”

The relevant extracts of “Form O” are reproduced as under:

B. NET WORTH

Networth of the **immediate preceding financial year** (based on audited financial results)

FINANCIAL YEAR	NET WORTH (indicate currency also) (As per Audited Financial Statement)	NET WORTH (POSITIVE or NEGATIVE)
F.Y. _____		

Formulae for working out Net Worth :

Net worth calculation: Net worth means paid up share capital, Share Application Money pending allotment* and reserves# less accumulated losses and deferred expenditure to the extent not written off. Net worth has been calculated using the following formula, as per provisions of the enquiry document:

Reserves to be considered for the purpose of net worth shall be all reserves created out of the profits and securities premium account but shall not include reserves created out of revaluation of assets, write back of depreciation and amalgamation.

*Share Application Money pending allotment will be considered only in respect of share to be allotted.



Neutral Citation Number: 2023:DHC:5183-DB

S. No.	Description	As shown in Audited Financial Statement	
		Figure (In Currency _____)	Schedule Reference, Page no., Clause no.
A	Paid up Share capital		
B	Add : Share Application Money pending allotment		
C	Add : Reserves (As defined above)		
D	Less : Accumulated Losses		
E	Less: Deferred Revenue Expenditure to the extent not written off		
F	Net Worth (A+B+C-D-E)		

NOTES

1) Bidder to submit Copies of Audited Financial Statements (Balance Sheets and Profit & Loss account) for the above three Financial years including Auditor's Report, all Schedules etc. as per provisions of the Bidding Document

2) Net Worth, Working Capital and Turnover have been calculated using the above mentioned formulae and after giving effect to the impact of audit qualification given in the auditor's report.

21. A bare perusal of the aforesaid shows that in order to fulfil the “Net Worth Criteria” for the Subject Tender, the financial net worth of the Bidder and the second member of consortium as per audited financial results of the immediate preceding financial year shall be positive. This “net worth” is calculated as per the formula provided for in “Form O” which is “Paid Up Share Capital + Share Application Money Pending Allotment + Reserves (as defined in Form O) – Accumulated Losses – Deferred Revenue Expenditure to the extent written off = Net Worth”. Note 2 in “Form O” also provides that this calculation has to be done after giving effect to the impact of audit qualification given in the auditor’s report.

22. In the instant case, the Petitioner submitted its bid for the Subject Tender, which included the Financial Statement of TJTC for the previous



Neutral Citation Number: 2023:DHC:5183-DB

financial year ending on 20.03.2022 along with an Auditor's Report. The said report included the qualified opinion of the Auditor under the heading "Basis for Qualified Audit Report". As per the Auditor Report, the net-worth of the Petitioner was positive. It is not disputed that the Petitioner in its initial bid had not taken into consideration the quantified impact of the qualified opinion of the Auditor in his report. Respondent No. 1, *vide* CQ-3, CQ-4, CQ-5 and CQ-6 requested the Petitioner to submit an Auditor's Report wherein the impact of the qualified opinion of the Auditor is taken into consideration while calculating the net worth of the Petitioner. In response the Petitioner submitted a certificate from the Independent Auditor dated 08.02.2023 stating that it has taken into consideration the quantified impact of the qualified opinion of the Auditor and the net-worth of the Petitioner is still positive. It re-iterated its stance *vide* the Auditor Report dated 22.02.2023 wherein it also stated that the impact of the qualified opinion was prepared upon request and has been done in accordance with the standard practice of accounting in Iran. The Auditor's Report dated 08.02.2023 is being reproduced hereunder for convenience:

Certificate from Independent Auditor and Legal Inspector

In connection to the Report issued by us on 12.10.2022 for the Financial Statements of M/s. Tehran Jonoob Technical and Construction Co. (PJ5) for the Fiscal Year ending on 20.03.2022; we further indicate the adjustment in the key financial indicators considering our basis of the qualified opinion (in the Report issued by us on 12.10.2022) under clause 4 to 7 as per the table below:



Neutral Citation Number: 2023:DHC:5183-DB

{Value in Million Iranian Rial}

Financial Indicator	Certified Value	Adjustment upon Quantifying the Basics of Qualified Opinion	Value after Quantifying the Basics of Qualified Opinion
Annual Turnover	9,118,014	NIL	9,118,014
Net worth	396,323	-250,000*	146,323
Current Assets	8,732,453	-500,000 ⁺	8,232,453
Current Liabilities	8,556,749	-591,000 [#]	7,965,749
Working Capital	175,704	91,000 ^{##}	266,704
Net Profit	24,088	91,000 ^{##}	115,088

Note:

* Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 7.

+ Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 4 & 5.

Adjustment upon the applying the quantification of basics of Qualified Opinion mentioned under clause no. 6.

23. A perusal of the aforesaid report shows that while the impact of the qualified opinion of the Auditor as stated in Clause No. 7 of (Basis for Qualified Opinion indicated in Auditor's Report) has been taken into consideration for computing net worth, however, the impact of the qualified opinion in Clause Nos. 4, 5 & 6 (Basis for Qualified Opinion indicated in Auditor's Report) has not been taken into consideration for calculating net worth. The impact of Clause Nos. 4 & 5 (Basis for Qualified Opinion indicated in Auditor's Report) has been taken into consideration for calculating Current Assets, Working Capital and Net Profit and the impact of Clause No. 6 (Basis for Qualified Opinion indicated in Auditor's Report) has been taken into consideration for calculating Current Liabilities, Working Capital and Net Profit.



Neutral Citation Number: 2023:DHC:5183-DB

24. The law regarding interference by a High Court with the decision of a tendering authority, in exercise of its powers under Article 226 of the Constitution of India, is well settled by the Hon'ble Supreme Court. It has been observed consistently by the Apex Court in a number of judgments that the Court may interfere in an administrative decision, if and only if the same is arbitrary, irrational, unreasonable, *mala fide* or biased. The Hon'ble Supreme Court in ***Tata Cellular v. Union of India***, (1994) 6 SCC 651, has stated as follows:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.”

25. Summing up the principles laid down in ***Tata Cellular*** (supra), ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517, ***Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay***, (1989) 3 SCC 293, and ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***, (2016) 8 SCC 622, the Hon'ble Supreme Court in ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***, (2016) 16 SCC 818,



stated:

“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.” (emphasis supplied)

26. In ***Silppi Constructions Contractors*** (supra), the Hon’ble Supreme Court has followed the aforesaid judgments and reiterated the principle that Courts should exercise a lot of restraint while exercising powers of judicial review in respect of tender matters pertaining to technical issues as the Courts lack the expertise to adjudicate upon technical issues. The relevant portion of the Judgment is reproduced as under:

“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



Neutral Citation Number: 2023:DHC:5183-DB

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." (emphasis supplied)

27. From the aforesaid judgments, it is clear that the scope of interference by way of judicial review in commercial matters is extremely limited and can only be justified when a case of arbitrariness, unreasonableness, *mala fide*, bias or irrationality is clearly made out. Further, the Courts lack the requisite expertise to adjudicate upon technical issues which are often involved in commercial matters. In the absence of the same, the Courts should exercise restraint and not interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

28. It is also a settled principle that the authority which floats the tender and has authored the tender documents is the best judge regarding the interpretation of the same. The Apex Court in *Agmatel India* (supra) has stated as under:

"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



Neutral Citation Number: 2023:DHC:5183-DB

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.” (emphasis supplied)

29. The Petitioner’s contention that the Auditor has prepared the audit reports in accordance with the laws and accounting standards of Iran, and thus the net worth of the Petitioner should be computed as per the Financial Statement submitted by it has no merit. The manner in which net worth of a bidder is to be calculated has been expressly provided for in “Form O” and a bidder cannot seek a substitution of its own view in place of what has been provided in the Bidding Document, nor does this Court have the technical expertise to do so. Furthermore, the tendering authority is the best interpreter of the tender document, and the manner in which the net worth of a bidder should be calculated for a specific tender project should be left with the tendering authority and this Court cannot interfere with the same unless it is shown to be arbitrary, unreasonable, perverse or *mala fide*. Furthermore, it has been held by the Hon’ble Supreme Court in **J.K. Industries Ltd. v. Union of India**, (2007) 13 SCC 673, that the balance sheet (which is a financial statement) of a company is not an indicator of its net worth.

30. In view of the aforesaid, it is apparent that the Petitioner has failed to comply with the BQC as it failed to take into account the impact of the qualified opinion of the Auditor in calculating its net worth, even after repeated requests by Respondent No. 1 to do so. From a perusal of the



Neutral Citation Number: 2023:DHC:5183-DB

record, it is clear that the Petitioner failed to calculate its net worth in accordance with “Form O” and failed to establish that it’s net worth would be positive had it done so. The Petitioner’s failure to do so means that it has failed to meet the Financial Criteria (Net Worth) as specified in the Bidding Document and therefore its bid was liable to be rejected. Further, as per the calculation done by Respondent No. 2 taking into account the qualifications given by the Auditor, the net worth of the Petitioner turns out to be negative, and the bid of the Petitioner would thus stand rejected on that ground as well. The Petitioner has failed to establish that the actions of the Respondents are an attempt to favour or benefit Respondent No.3, or that the action is arbitrary, unreasonable, *mala fide* or perverse in any manner.

31. In the present case, the Project for which the IFB was issued by the Respondents is an important part of Respondent No. 2’s project to set up a grass-root Refinery-cum-Petrochemical Complex at Pachpadra Tehsil in Barmer District of Rajasthan, which is a capital-intensive project. In this regard, the financial capacity of the bidder becomes a significant factor which has to be kept in mind by the tendering authority while awarding the tender. The decision of rejecting the Petitioner’s bid on the ground that it failed to meet the Financial Criteria (Net Worth) as per the Bidding Document thus cannot be said to be not arbitrary, unreasonable, *mala fide* or perverse and thus does not warrant interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Accordingly, this Court does not find any merit in the present petition.

32. With these observations, the petition is dismissed, along with pending



Neutral Citation Number: 2023:DHC:5183-DB

application(s), if any.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SANJEEV NARULA)
JUDGE

JULY 26, 2023

Signature Not Verified

Digitally Signed
By: BHUPINDER SINGH
ROHELLA
Signing Date: 26.07.2023
15:20:23

W.P.(C) 3870/2023

Page 25 of 25