



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

Date of decision: 04th JULY, 2023

IN THE MATTER OF:

+ **W.P.(C) 5040/2023 & CM APPL. 19721/2023**

LOADSTAR EQUIPMENT LTD

..... Petitioner

Through: Mr. Ankit Jain, Mr. Mukesh Kumar,
Ms. Meenakshi Sood and Mr. Aditya,
Advocates

versus

CONTAINER CORPORATION OF INDIA LTD Respondents

Through: Mr. Chetan Sharma, ASG with
Mr.R.K. Joshi, Mr. Amit Gupta, Mr.
R.V. Prabhat, Mr. Vinay Yadav, Mr.
Saurabh Tripathi, Mr. Ojusya Joshi
and Mr. Aakarsh Srivastava,
Advocates for R-1
Mr. Divjyot Singh and Ms. Priaynshi
Aggarwal, Advocates for R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner company has filed the instant Writ Petition, for issuance of appropriate writ or directions to quash the communication dated 18.04.2023 issued by the Respondent No. 1 (Container Corporation India Ltd./CONCOR), declaring the Petitioner as technically disqualified from participating in the tender bearing reference no. CON/AREA1/TECH/FORKLIFT-20/2023, which was floated by Respondent No. 1 on their website *vide* NIT dated 08.02.2023.



2. The facts leading up to the present petition are that Respondent No.1 *vide* NIT bearing reference no. CON/AREA-1/TECH/FORKLIFT-20/2023, invited applications on the government portal, for bids from Original Equipment Manufacturers (OEMs)/authorized dealers, through a two packet online open tendering system, at an estimated total cost of Rs. 38,11,40,000/-, for the design, manufacture, supply, and commissioning of 20 forklifts of capacity 35 tons at specified terminals of Respondent No. 1/CONCOR.

3. Respondent No.1/CONCOR subsequently issued a corrigendum in respect of the part of the NIT document which lays down qualification criterion for bidders. Accordingly, Clause 2.1(b) under Section II “General Instructions to Bidders” was added to the NIT document. The relevant portion of the NIT document prescribing qualification criterion is as follows:

“2.0 Qualification Criteria

The bidder shall provide satisfactory evidence acceptable to the Purchaser to show that-

2.1 The bidder is a manufacturer or an authorized dealer of a manufacturer (as per Annexure 15) having experience of:

a) Having successfully supplied I executed at least one single purchase order of Government departments/CPSEs/SPSEs/Public listed companies/ICD/DCT /MMLP /Ports/CFS/ CTOs for similar item during previous three financial years and current financial year last day of month previous to the one in which tender is invited. The said item should have been supplied and commissioned successfully during the period mentioned above. Work experience certificate issued by private individual shall not be considered. Work experience certificate as per format attached at Annexure-14 should be submitted. The



work experience certificate should have been issued within 90 days prior to tender opening date.

If an authorized dealer submits bid on behalf of the manufacturer, the same dealer shall not submit a bid on behalf of another manufacturer in the same tender for the same item/product. Either Manufacturer OR their authorised dealer can quote. But both cannot bid simultaneously for the same item/product in the same tender.

b) The Tenderer must have received total contractual payments/ turnover/revenue (income) from operations of Rs.57.17 Crore in the previous three financial years (i.e., FY2019-20, FY2020-21 ft 2021-22) and the current Financial Year last day of month previous to the one in which tender is invited.

The tenderers shall submit Certificates to this effect which may be an attested Certificate from the concerned department I client or Audited Balance Sheet duly certified by the Chartered Accountant/Certificate from Chartered Accountant duly supported by Audited Balance Sheet. For current Financial Year certificate with regard to received total contractual payment/turnover/revenue (income) from operation should be duly certified by the Chartered Accountant.

Note: Client certificate from other than Govt Organization should be duly supported by Form 16A/26AS generated through TRACES of Income Tax Department of India.”

4. As per the NIT conditions, bids of participants were to be opened in two stages on 03.03.2023. The technical bids of the bidders was to be opened in the first stage, and the financial bids was to be opened only in the second stage, subject to evaluation of 1st stage technical bids. The Petitioner



and Respondent No. 2, the only participating bidders, submitted their technical bids. Bids of both companies were opened by Respondent No.1 for evaluation in the technical stage.

5. Upon examination of the bid documents in the technical stage, Respondent No.1 issued communications to the bidding parties on 23.03.2023 and again on 24.03.2023, calling upon them to submit additional documents to rectify discrepancies found in the documents, latest by 29.03.2023. The said communications issued by Respondent No.1 have been reproduced as under:

“With reference to the above E-open tender for Design, Manufacture, Supply and Commissioning of 20 Nos. of Forklift capacity 35 Ton at specified terminals of CONCOR, there are some discrepancies found in documents you have submitted as mentioned below:

1. *The name of the company in Udyam Registration Certificate, PAN, GSTIN etc is showing as M/s Loadstar Equipment Limited whereas the name mentioned in other documents like Auditor's Report, work completion certificate etc is MIs Loadstar Equipment Private Limited. This needs to be clarified and relevant documents (Certificate of incorporation, change of name of company, Memorandum of association, Article of association) in support of this name change should be submitted.*
2. *Work experience certificate issued by M/s Arcelor Mittal Nippon Steel India Limited is given on email. Work experience certificate as per the Annexure-14 of tender document should be submitted. Whether MIs Arcelor Mittal Nippon Steel India Limited is Govt departments/ CPSEs/SPSEs/Public listed companies / ICD / DCT/MMLP/Ports/CFS/ CTOs? Document in support of this shall be submitted.*



3. *As per clause 2.1 of Section-II, "Client certificate from other than Govt Organization should be duly supported by Form 16A/26AS generated through TRACES of Income Tax Department of India". Hence, form 164/26AS generated through TRACES of Income Tax Department of India shall be submitted in support of the above-mentioned point.*
4. *As per clause 2.4 of Section-II, "The supplier shall be required to provide a certificate from the statutory auditor or cost auditor of the company (in the case of companies) or from a practicing cost accountant or practicing chartered accountant (in respect of suppliers other than companies) giving the percentage of local content" in this regard you have submitted a certificate issued by Chartered Engineer rather than from the statutory auditor or cost auditor of the company.*
5. *You have submitted NIL Deviation certificate as per Annexure-4. But there is a Deviation of 'Controller' make (Refer Sl. No.7 of Schedule-II). This needs to be clarified.*
6. *Udyam Registration Certificate submitted by you has no 'validity till date' available on it hence the certificate indicating its validity shall be submitted as EMD exemption depends upon it.*

You are requested to submit the above-mentioned documents through return email latest by 29.03.2023 at 15:00hrs."

6. The Petitioner submitted their reply to the aforesaid communication and submitted documents to the Respondent *vide* emails dated 28.03.2023 and 29.03.2023, which are reproduced below:



“Dear Sir,

Sub: Submission of requisite Documents, - Ref: Your letter; CON/AREA-1/TECH/FORKLIFT-20/2023, dated 23/03/2023,

In reference to your above referred letter in regard to some of the clarifications/ additional documents to our bid submitted on 02/03/2023 against your tender ref: CON/AREA-1/TECH/FORKLIFT-20/2023, for supply of our heavy duty Forklift LS35-1200, we submit our reply as under for your kind perusal and consideration please,

1. Name of our Company: Our company - originally incorporated on 11/04/2011 - was M/s Loadstar Equipment Private limited up to 04/09/2022. The company was converted from Private Limited to Public Limited and renamed as M/s Loadstar Equipment Limited on 05/09/2022, which falls in the current FY 2022-23. Hence, the Auditor's reports up to FY 2021-22 are in the name of Loadstar Equipment Private Limited. The Certificate of incorporation, Memorandum of Association, and Articles of Association, GST Certificate, PAN Card in support of the name change are attached at enclosure (1) to this mail for your ready reference.

2. Work Experience Certificate issued by M/s Arcelor Mittal Nippon Steel India Limited: Work Experience Certificate on the Letter Head as per the prescribed format as in Annexure-14 is pending from our customer as the authorisation for this format is being sought. We will submit this certificate before the deadline tomorrow. M/s Arcelor Mittal Nippon Steel India Limited is a Joint Venture Company of M/s Arcelor Mittal S.A. and Nippon Steel Corporation, both of which are companies public-listed on global stock exchanges.



3. *TRACES of Income Tax Department form 16/26AS in support of Client Certification: The TRACES of TDS are attached for FYs 2021-22 & 2022-23 at enclosure (2) for your ready reference.*

4. *Local Content Certificate from Statutory Auditor or cost Auditor: Local Content Certificate from our Statutory Auditor is attached at enclosure (3) for your reference.*

5. *Clarification w.r.t. to NIL deviation certificate: Clarification is herewith attached at enclosure (4).*

6. *Validity of UDYAM REGISTRATION CERTIFICATE: As per UDYAM Registration Website, Ministry of Micro, Small and Medium Enterprises, there is no Validity date applicable for this certificate. However, the registration may be at any time verified by scanning the QR code affixed to the certificate. Copy of the sample verification is attached at enclosure (5) for your reference.*

We are confident that we have clarified all your points of discrepancies indicated in your letter and look forward to your consideration of our offer.”

7. On a perusal of the documents submitted by the Petitioner, the Tender Evaluation Committee of Respondent No.1 found the Petitioner to be technically not qualified and rejected the bid of the Petitioner *vide* impugned communication dated 18.04.2023.

8. The Petitioner thereafter addressed an email to the CMD of Respondent No. 1, stating that no reasons had been assigned for their disqualification, and requested the intervention of CMD of Respondent No. 1 to permit the Petitioner to give further clarifications. However, there was no response to this communication.



9. Being aggrieved by the decision of the Respondent No.1 dated 18.04.2023, disqualifying the Petitioner from the tender process, the Petitioner has filed the instant petition on 19.04.2023, challenging the impugned communication with the following prayers:

“(i) Certiorari, inter alia quashing the communication dated 18.04.2023 issued by respondent No. 1 to the petitioner herein contending that the petitioner is not technically qualified in the tender bearing No. CON/AREA-1/TECH/FORKLIFT-20/2023;

(ii) Prohibition inter alia restraining the respondent No. 1 from taking any further steps in the tender bearing No. CON/AREA-1 /TECH/FORKLIFT -20/2023;

(iii) Mandamus, thereby directing the respondent no. 1 to treat the bid submitted by the petitioner as technically qualified in the Tender bearing no.CON/AREA-1/TECH/FORKLIFT-20/2023.”

10. Learned Counsel for the Petitioner has drawn the attention of this Court towards Clause 2.1(a) and 2.1(b) of the NIT and submits that the Petitioner has requisite experience, and it has previously supplied the machines as specified in the tender. He states that the reason given by Respondent No.1 disqualifying the bid of the Petitioner as is reflected in the counter affidavit is completely arbitrary. He submits that the supplier, i.e., M/s Excellent Engineering & Allied Service Private Limited withdrew from the tender before the last date, and, therefore, this is not a case where both the manufacturer and the supplier are relying on the same experience certificate for being considered for award of tender.

11. *Per contra*, learned ASG for Respondent No.1 submits that the purported experience certificate is only a purchase order executed by M/s Excellent Engineering & Allied Service Private Limited and since M/s



Excellent Engineering & Allied Service Private Limited is not a listed company which therefore, does not meet the requirement of Clause 2.1(a) of the NIT document, which requires that the bidder must have an experience of successfully supplied/executed at least one single purchase order for a similar item during the previous three financial years. He also states that the experience certificate submitted by APL Apollo Steel Pipes was in fact issued to M/s Excellent Engineering & Allied Service Private Limited which is also not acceptable because the certificate has not been issued by APL Apollo Steel Pipes in favour of the Petitioner.

12. Heard learned Counsel for the parties and perused the material on record.

13. A perusal of Clause 2.1 shows that the qualification criteria stipulates that a manufacturer or an authorized dealer of a manufacturer must have the experience of successfully supplying/executing at least one purchase order of government departments/CPSCs/SPSCs/ Public Limited Companies etc. for a similar item during the previous three years and the last day of the current financial year previous to the one in which the tender is invited. It also stipulates that the bidder and the authorized dealer both cannot simultaneously bid for the same item or product in the same tender.

14. Admittedly, M/s Excellent Engineering & Allied Service Private Limited has withdrawn from the tender even before the last date of submission of the tender. The question that arises for consideration is as to whether the certificate issued by APL Apollo Steel Pipes to M/s Excellent Engineering & Allied Service Private Limited for having supplied the forklift can be considered in favour of the Petitioner who is the manufacturer and whether the rejection of the said certificate issued by APL Apollo Steel



Pipes should be discarded only because it has been issued in favour of M/s Excellent Engineering & Allied Service Private Limited.

15. Clause 2.1 stipulates that in order to be considered for the tender, the manufacturer or an authorized dealer has to prove of having successfully supplied or executed one purchase order. The certificate issued by APL Apollo Steel Pipes shows that M/s Excellent Engineering & Allied Service Private Limited has supplied the machine manufactured by the Petitioner.

16. The reason given by Respondent No.1 that just because the certificate issued by APL Apollo Steel Pipes was in favour of M/s Excellent Engineering & Allied Service Private Limited. This reason cannot be accepted because that certificate shows that the machine manufactured by the Petitioner has been executed by M/s Excellent Engineering & Allied Service Private Limited with Apollo Steel Pipes.

17. No doubt, it is well settled that judicial review in administrative actions that too in matters of tender is extremely limited. However, judicial review can be exercised to prevent arbitrariness, irrationality and unreasonableness.

18. It is now well settled and has been held by the Apex Court in times without number that basic requirement of Article 14 of the Constitution of India in action by the State and non-arbitrariness in essence and substance is the heartbeat of fair play and State actions are amenable to the judicial review to the extent that the State must act validly for a discernible reason and not whimsically. If the State or instrumentality of State does not act reasonably or fairly in awarding contracts, then the Court has to step in exercising its powers under Article 226 of the Constitution of India. The Apex Court in Vice Chairman & Managing Director, City and Industrial Development Corporation of Maharashtra Ltd. and Another v. Shishir



Realty Private Limited and Others, 2021 SCC OnLine SC 1141 has observed as under:-

"72. Before we state the conclusions, this Court would like to reiterate certain well-established tenets of law pertaining to Government contracts. When we speak of Government contracts, constitutional factors are also in play. Governmental bodies being public authorities are expected to uphold fairness, equality and rule of law even while dealing with contractual matters. It is a settled principle that right to equality under Article 14 abhors arbitrariness. Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process. A transparent bidding process is much favoured by this Court to ensure that constitutional requirements are satisfied.

73. Fairness and the good faith standard ingrained in the contracts entered into by public authorities mandates such public authorities to conduct themselves in a non-arbitrary manner during the performance of their contractual obligations.

74. The constitutional guarantee against arbitrariness as provided under Article 14, demands the State to act in a fair and reasonable manner unless public interest demands otherwise. However, the degree of compromise of any private legitimate interest must correspond proportionately to the public interest, so claimed.

75. At this juncture, it is pertinent to remember that, by merely using grounds of public interest or loss to the treasury, the successor public authority cannot undo the work undertaken by the previous authority. Such a claim must be proven using material facts, evidence and figures. If it were otherwise, then there will remain no sanctity in the words and undertaking of the Government. Businessmen will be hesitant to enter Government contract or make any investment in



furtherance of the same. Such a practice is counter-productive to the economy and the business environment in general." (emphasis supplied)

19. It is well settled and has been stated by the Apex Court that arbitrariness is the antithesis of Article 14 of the Constitution of India and the State has to act in a fair and reasonable manner. As stated above, in order to meet the qualification criteria all that had to be shown by the bidder who is a manufacturer is that it is having the experience of supplying at least one single purchase order of government departments, CPSEs, SPSEs, Public listed companies, ICD, DCT, MMLP, Ports, CFS, CTOs for similar item during previous three financial years and current financial year last day of month previous to the one in which tender is invited.

20. The reason given by Respondent No.1 that since the certificate has been issued by APL Apollo Steel Pipes only in favour of supplier, and, therefore, it cannot inure in favour of the manufacturer, cannot be accepted.

21. At this juncture, it is apposite to reproduce Clause 5.4 along with Annexure-10 & 11 of the NIT.

"5.4 For purpose of Para 2.1 (a), the bidder should additionally submit-

(a) Performance Statement as in Annexure-10, giving a list of major supplies (Forklift of Capacity 32-35 Ton), effected in the last 3 years from the date of tender opening, giving the details of Purchaser's name and address, e-mail, telephone No., Fax No., Contact Person, order No. and date and the quantity supplied and whether the supply was made within the delivery schedule as asked in Annexure-10 and information of Work Experience of Forklifts in Annexure-14.

(b) A statement indicating details of equipment deployed and quality control measures adopted as in



Annexure-11 shall be furnished. Copy of Quality Management System Certificates to be submitted.

(c) In case the bidder is an authorized dealer of manufacturer, a certificate with regard to design and manufacturing from by the manufacturer will be submitted along with the bid.

(d) In case the bidder is an authorized dealer of manufacture of Forklift, a certificate as per format Annexure-15 should be submitted along with bid document.

xxx

ANNEXURE-10

(Please see Clause-5.4 (a) of Section-II, General Instructions to Bidders)

PROFORMA FOR PERFORMANCE STATEMENT DETAILS OF OTHER CUSTOMERS

Tender No..... Date of Opening Time Hours
Name of the Firm

SL. No.	Order placed by (full address, e-mail, telephone no. Fax No. Contact Person of Purchaser)	Order No. and date	Description & quantity of FORKLIFT	Date of completion of delivery	Remarks indicating reasons for late deliveries, if any	Has the FORKLIFT/ been satisfactorily commissioned and is it giving trouble free service?
				As per contract	Actual	

(Signature and seal of bidder)

Note: The details of supply orders for the period of at least 3 years (36 months) prior to opening of the tender, should be furnished in above format."



ANNEXURE-11

(Please see Clause-5.4 (b) of Section-II, General Instructions to Bidders)

PROFORMA FOR EQUIPMENT AND QUALITY CONTROL

*Tender No Date of opening
Time Hours.*

Name of the Firm

(Note - All details required only for the items tendered)

1. *Name & Complete Postal address of the firm*
2. *Telephone, Fax No. Office/Factory/Works*
3. *E-mail address*
4. *Location of the manufacturing factory*
5. *Details of Industrial Licence (if any) wherever required as per statutory regulations*
6. *Brief description of plant & machinery erected and functioning in each Deptt. (Monographs & description pamphlets be supplied if available).*
7. *Flow sheet of the process of manufacture of Forklift machines*
8. *Production capacity of Forklift Machine quoted for, with the existing plant & machinery*

<i>Monthly</i>	<i>Annual</i>
----------------	---------------

 - 8.1 *Normal*
 - 8.2 *Maximum*
9. *Brief details of arrangement for quality control of products such a laboratory, testing Equipment etc.*
10. *Organization chart of bidder to be enclosed.*



11. *Whether the Forklift machines are tested to any standard specification such as ISO, CE, if so, copies of specimen test certificates should be submitted.*

(Signature and seal of the manufacturer/Bidder)''

22. A cumulative reading of Clauses 2.1, 5.4 along with Annexures-10 & 11 of the NIT only shows that the manufacturer has to show that it has supplied a machine which has been successfully installed. Similarly, Annexure-14 also requires the certificate to be given by the manufacturer. The Petitioner has established that it has fulfilled the eligibility criteria and, therefore, their bid ought not to have been rejected.

23. During the course of the hearing, this Court had directed the Respondent No.1 to open the financial bid of the Petitioner also and it transpires that the Petitioner is the lowest bidder.

24. In view of the above, the writ petition is allowed, along with pending application(s), if any. The Respondents are directed to proceed ahead in accordance with law.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JULY 04, 2023

hsk/ss