

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

FMA 140 of 2024

With

CAN 1 of 2023

With

CAN 2 of 2024

Akash Construction

Vs.

S.B. Construction and Co. and Ors.

With

MAT 315 of 2024

With

CAN 1 of 2024

Akash Construction

Vs.

Stone Concern Infrastructure Development Pvt. Ltd. and Ors.

For the Appellant : Mr. Surajit Nath Mitra, Sr. Adv.
Mr. Manas Dasgupta, Adv.
Ms. Kabita Mukherjee, Adv.
Mr. Debjit Mukherjee, Adv.
Ms. Susmita Chatterjee, Adv.

For the State : Mr. Suman Sengupta, Adv.
Mr. Sambuddha Dutta, Adv.
Mr. Sanatan Panja, Adv.

For the Writ Petitioner/ : Mr. Debabrata Saha Roy, Adv.
 Respondent in : Mr. Neil Basu, Adv.
 FMA 140 of 2024 : Mr. Rahul Kumar Singh, Adv.
 : Mr. Sankha Biswas, Adv.

Hearing Concluded on : April 24, 2024
 Judgement on : April 30, 2024

DEBANGSU BASAK, J.:-

1. Two appeals have been heard analogously as they relate to the same tender bid Electronic Notice Inviting Tender No. 12/2023-2024 dated July 24, 2023 in relation to the work namely, Bolpur-Kankalitala Road from 0.00 Km. to 7.90 Km and Kankalitala-Lavpur road from 0.00 Km to 15.40 Km, widening and strengthening work under Bolpur Highway Division No. II in the district of Birbhum.
2. FMA 140 of 2024 has been filed by the appellant against the judgement and order dated November 20, 2023 passed by the learned Single Judge in WPA No. 23205 of 2023. Appellant has filed MAT 315 of 2024 against the order dated January 10, 2024 passed in WPA No. 26716 of 2023.
3. By the two impugned orders, learned Single Judge has set aside the disqualification of tenderers at the technical bid stage and directed the tender authorities to proceed with the tender by treating the two writ petitioners being S.B.

Construction Company and Stone Concern Infrastructure Development Pvt Ltd as technically qualified.

4. Learned Senior Advocate appearing for the appellants has submitted that, the appellants participated in a tender being Electronic Notice Inviting Tender No. 12/2023/2024 dated July 24, 2023 in relation to the work namely, Bolpur-Kankalitala Road from 0.00 Km. to 7.90 Km and Kankalitala-Lavpur from 0.00 Km to 15.40 Km, widening and strengthening work under Bolpur Highway Division No. II in the district of Birbhum.

5. Learned Senior Advocate has drawn the attention of the Court to the scope of the work as well as the Bill of quantity (BOQ) of such tender. In particular he has referred to Item No. 1.22 and 1.23 of the BOQ. According to him, such items comprise major part of the tender. Those two items have been valued at Rs. 7 Crores in aggregate as against the tender value of Rs. 52.18 crores.

6. Learned Senior Advocate appearing for the appellant has contended that, tender was opened on September 15, 2023 when, the eligibility in the technical bill was considered. The authorities did not find the writ petition eligible in the

technical bid and as such the tender of the writ petitioner had been rejected on September 15, 2023. Reasons of such rejection have been communicated to the writ petitioner on September 18, 2023. Authorities had opened the financial bid on September 19, 2023 and since the appellant was the lowest, bid of the appellant had been accepted.

7. Learned Senior Advocate appearing for the appellant has drawn the attention of the Court to Clause 3 (i) of the e-tender. He has contended that, the writ petitioner did not have requisite experience in respect of Serial No. 1.22 and 1.23 of the BOQ. In this regard, he has drawn the attention of the Court to the vacating application filed on behalf of the State.

8. Learned Senior Advocate appearing for the appellant has referred to the impugned judgement and order. He has contended that, the learned Single Judge concluded that the writ petitioner fulfilled the 40 per cent of the criterion mentioned in Clause 3(i)(a) of the tender. Learned Single Judge had held that the distinction between ICBP work and bituminous work sought to be introduced subsequently by the State is *de hors* the e-NIT and, therefore, rejection of Technical Bid of the writ petitioner was bad in law. Learned Single

Judge had allowed the writ petitioner with a direction to include the writ petitioner as a technically eligible bidder.

9. Learned Senior Advocate appearing for the appellant has contended that, Clause 3.0 (i)(a) of the e-NIT requires a bidder who has requisite experience of complete work having a magnitude of more than 40 per cent of the contract in the last five years. He has contended that, the work would include all works including Interlocking Concrete Block Pavement (ICBP) work and since ICBP work is a major portion of the tender experience in respect of ICBP work with requisite magnitude of completion of tender with 40 per cent valuation is a mandatory condition.

10. Learned Senior Advocate appearing for the appellant has relied upon **2020 Volume 16 Supreme Court Cases 489 (The Silppi Constructions Contractors vs. Union of India and Anr.)** in support of his contention that, a writ court exercises restraint in the field of judicial review of contractual or commercial matters. Unless a clear case of arbitrariness or mala fides or bias or irrationality has been made out, constitutional courts are slow to interfere. He has relied upon **2022 Volume 6 Supreme Court Cases 127 (M/s. N.G.**

Projects Limited vs. M/s. Vinod Kumar Jain & Ors. in support of the contention that, a writ court should refrain itself from imposing its decision over the decision of the employer. More so, when contract involve technical issues. He has relied upon **2023 SCC OnLine SC 1482 (State of Jharkhand vs. Sociedade De Fomento Industrial Pvt. Ltd and Others.)** in support of the contention that, while exercising powers of judicial review, principles of equity and natural justice stay at a distance. He has contended that, if a decision relating to award of contract is bona fide and 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 tenderer is made out.

11. Learned advocate appearing for the S.B. Construction (one of the bidders whose bid was rejected) has contended that, his client possessed the requisite qualifications as prescribed in Clause 3.0 (i)(a) of the e-NIT. In support of such contentions, he has referred to the various documents annexed to the writ petition. He has pointed out that all queries raised by the superintending engineer had been satisfactorily answered. He has pointed out, the rejection of

the technical bid of his client was arbitrary. He has contended that the reasons for rejection that have been furnished were firstly uploaded credentials were not as per Clause 3.0 (i) of the e-NIT and secondly the information furnished in the affidavit does not match with the firm that submitted the bid.

12. Learned advocate appearing for S.B. Construction has contended that, all credentials prescribed by Clause 3.0 (i) have been satisfied by this client. Moreover, his client is a partnership firm and that, partnership account number of the partner of such partnership firm had been submitted with the authorities.

13. So far as ICBP work is concerned, he has contended that, such work is envisaged in item 1.22 and 1.23 of the BOQ and the same is not technical in nature. His clients have sufficient experience in laying ICBP roads as well as ancillary works. He has referred to explanation to Clause 18 of the e-NIT which defines work to mean and include road work, bridge work, building work, sanitary and plumbing work, electrical work and any other work contemplated within the scope and ambit of the work. He has pointed out that, his clients submitted the tender in terms of the BOQ. In support

of his contentions, learned advocate for S.B. Construction has relied upon **1997 Volume 1 Supreme Court Cases (Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd. and Others)**, **2015 Volume 16 Supreme Court Cases 198 (Union of India vs. Vertex Broadcasting Private Limited and Others)**, and **2010 Volume 13 Supreme Court Cases 364 (Indian Railway Catering and Tourism Corporation Limited vs. Doshion Veolia Water Solutions Private Limited and Others)**.

14. Learned advocate appearing for S.B. Construction has contended that, the delay in execution of the work was at the behest of the State. Moreover, the State did not assail the impugned judgement and order. State has favoured the appellant. He has distinguished the judgements cited on behalf of the appellant.

15. Learned advocate appearing for the State has contended that, State filed an application for vacating all the interim order dated September 22, 2023 extended on September 29, 2023 passed in the writ petition by way of CAN 1 of 2023 WPA 23205 of 2023.

16. Learned advocate appearing for the State has drawn the attention of the court to Clause 3.0 (i) of the tender. He has pointed out that several tenderer had participated in the tender process. The tender bid had been opened when, S.B. Construction Company did not succeed. According to him, S.B. Construction Company did not fulfil the essential technical criterion being Clause 3.0 (i). S.B. Construction Company did not have requisite experience for Serial No. 1.22 and 1.23 of the BOQ. He has contended that technical criterion cannot be lowered or diluted to suit any particular candidate. The tender inviting authority being an expert body has understood and construed the terms and conditions of the contract and applied such understanding of it uniformly.

17. Learned advocate appearing for Stone Concern Infrastructure Development Private Limited (another unsuccessful tenderer) has contended that, his client filed WPA 26716 of 2023 for setting aside of the cancellation of technically qualified agencies published on September 15, 2023 by the authorities. There, his client was declared not eligible on the ground that the uploaded credential of his client was not as per Clause 3.0 (i) of the e-NIT.

18. Learned advocate appearing for Stone Concern Infrastructure Development Private Limited has referred to Clause 3(i) of the e-NIT and contended that, his client fulfilled eligibility criterion prescribed therein.

19. Public works roads directly had issued an Electronic Notice Inviting Tender No. 12 of 2023 – 2024 for the widening and strengthening of a highway by Electronic Notice Inviting Tender dated July 24, 2020.

20. Appellant herein, S.B. Construction Company and Stone Concern Infrastructure Development Private Limited amongst others had participated in such e-tender process.

21. Terms and conditions of such e-tender process relevant to the present context are as follows :-

“3.0 i) Credential :-

a) The prospective bidders shall have satisfactorily completed AS A SOLE FIRM (NOT as a sub-contractor) or ONE PARTNER OF JOINT VENTURE (NOT as a sub-contractor) during the last 5 (five) years prior to the date of issue of this NIT at least one work of similar nature under the authority of State/Central Gov., State/Central Gov. undertaking, Statutory/Autonomous Bodies constituted under the statute of the Central /State Government and having a magnitude more than 40 (Forty) percent (30% in case of 2nd Call, 20% in case of 3rd Call) of the of the Estimated amount put to lender of intended job.”

“Clause 17

Explanation : The word 'work' means and includes road work, bridge work, building work, sanitary and plumbing work, electrical work and /or any other work contemplated within the scope and ambit of this contract. For

i) The work of patch repair or patch maintenance in nature or a combination thereof, the Defect Liability Period of the work shall be Three months from the actual date of completion of the work.

ii) Thorough Bituminous Surfacing work with bituminous thickness less than 40mm, Repair & Rehabilitation of any road/bridge/ culvert/building/Sanitary & Plumbing work, the Defect Liability Period of the work shall be one year from the actual date of completion of the work;

iii) Extension of building/ bridge/ culvert, Construction of new flexible pavement upto bituminous level which has been designed for a period of 3 years or more, Widening and Strengthening of flexible pavement designed for a period of 3 years or more, Improvement of riding quality/ Strengthening of flexible pavement designed for a period of 3 years or more; Providing only mastic asphalt layer over existing bituminous surface without providing bituminous profile corrective course/ bituminous base course, the Defect Liability Period of the work shall be three years from the actual date of completion of the work:

iv) Construction of new building/new bridge/new culvert, Reconstruction of building/bridge/culvert Including construction of approach roads for bridge/culvert, Construction of rigid pavement, Reconstruction of rigid pavement, Construction of new flexible pavement covered by mastic work which has been designed for a period of 5 years or more, Widening and Strengthening of flexible pavement covered by mastic work which has been designed for a period of 5 years or more, Improvement of riding quality/Strengthening of flexible pavement covered by mastic work which has been designed for a period of 5 years or more, the Defect

Liability Period of the work shall be five years from the actual date of completion of the work:"

Defect Liability Period for Retro- Reflective sheeting will be for 7 years from the actual date of completion of the work;

Defect Liability Period for metal crash barriers will be for 7 years from the actual date of completion of the work."

BOQ

Sl. No.	Item Description	Quantity	Units	Estimated Rate in Rs. P	Total Amount Rs. P	OTAL AMOUNT in words
1	2	3	4	5	6	7
1.22	1.22 Supplying and laying in specific pattern of Interlocking concrete block Pavements (ICBP) with concrete blocks (with concrete grade as specified as per Table 1 of IS 15658:2006) manufactured from BIS licensee manufactured with spacer nib (small protruding profiles on the vertical face of a paver block used as device for keeping minimum joint gap in between the paving blocks as per cl. no. 3.26 of IS: 15658) and of specified size and shape with aspect ratio (The ratio of length to thickness of a paver block, as per cl. no. 3.3 of IS: 15658) as per table 2 of IS: 15658 with flexural strength / breaking load as per Annexure G of IS: 15658, on the prepared base course of specified CBR as per Table no. 1 of IRC SP 63 (2018) or else as mentioned in design and drawing with a cushion of compacted bedding sand of 25-35 mm thick (grading of the bedding sand as per clause 6.5.1 of IRC SP - 63) and filling up the gaps in between paver blocks with joint filling sand (the grading of the joint filling sand will be as per clause 6.5.2 of IRC SP 63) and completing the edges with cut block as per Cl. no. 8.7. of IRC SP-63(2018) with proper confinement of bedding and joint filling sand, compaction, levelling and filling up of the edge gaps. 60 mm.thick Coloured Decorative.	10000.00	m2	1032.00	13416000.00	INR One Crore Thirty Four Lakh Sixteen Thousand Only
1.23	Supplying and laying in specific pattern of Interlocking Concrete block Pavements (ICBP) with concrete blocks (with concrete grade as specified as per Table I of IS 15658:2006) manufactured in steel mould clamped to a vibrating table by hydraulic pressure (as per cl.no. 6.30 of IRC:SP:63(2018) from BIS licensee manufacturer, with spacer nib (small protruding profiles on the vertical face of a paver block used as device for keeping minimum joint gap in between the paving blocks as per cl. no. 3.26 of IS: 15658) and of specified size and shape with aspect ratio (The ratio of length to thickness of a paver block, as per cl. no. 3.3 of IS: 15658) as per table 2 of IS: 15658 with flexural strength/breaking load as per Annexure G of IS: 15658, on the prepared base course of specified CBR as per Table no. 1 of IRC SP 63 (2018) or else as mentioned in design and drawing with a cushion of compacted bedding sand of 25-35 mm thick (grading of the bedding sand as per clause 6.5.1 of IRC SP-63) and filling up the gaps in between paver blocks with joint filling sand (the grading of the joint completing the edges with cut block as per Cl. no. 8.7 of filling sand will be as per clause 6.5.2 of IRC SP 63) and joint filling sand, compaction, levelling and filling up of the edge gap. 120 mm thick Grey.	38825.89	m2	1437.00	57734098.00	INR Five Crore Seventy Seven Lakh Thirty Four Thousand & Ninety Eight Only

22. The tender process has prescribed that, the tenderer will submit a technical bid and a financial bid. The technical

bid will be opened first and after acceptance thereof, the financial bid of the successful tenderer will be opened to find out the lowest bidder before awarding the contract.

23. Technical bids of the tenderers had been opened on September 15, 2023. A list of technically qualified tenderers had been published by the authorities on September 15, 2023 where both S.B. Construction Company and Stone Concern Infrastructure Development were shown as technically disqualified. By a letter dated September 18, 2023, S.B. Construction had been informed that its tender bid was rejected. Authorities had opened the financial bid on September 19, 2023 where the appellant was found to be the lowest bidder.

24. S.B. Construction Company had filed a writ petition being WPA 23205 of 2023 inter-alia assailing the rejection memo dated September 18, 2023. In such writ petition in which 2 interim orders had been passed. State had applied for vacating of the interim orders by way of an application being CAN 1 of 2024 therein. The impugned judgement and order dated November 20, 2023 had disposed of both the writ petition and the vacating application filed therein.

25. Stone Concern Infrastructure Development had filed a writ petition being WPA 26716 of 2023 inter-alia assailing the List of Technically Qualified Agencies published by the authorities in September 15, 2023 in which the impugned order dated January 10, 2024 was passed.

26. Both the impugned judgement and order of the learned single judge had proceeded on the basis of interpretation of the clauses of the tender documents. Learned single judge had held that, the interpretation of the clauses of the tender documents as made by the authorities were erroneous and proceeded to substitute the court's interpretation with that of the interpretation of the authorities. Learned single judge had thereafter proceeded to hold that, the rejection of the technical bids of the 2 writ petitioners were incorrect. The learned single judge had therefore directed the authorities to proceed from the technical bid stage after considering the 2 writ petitioners as technically qualified in the tender process.

27. While considering the power of judicial review with regard to interpretation of tender documents, **Silppi Constructions Contractors (supra)** has, on review of the authorities cited before it, held as follows: –

“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 requirement 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.”

28. In **NG Projects Ltd (supra)** the Supreme Court in the context of judicial review of tenders involving construction of road, as is in this case, has held as follows:-

“22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee

was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

29. In *Sociedade De Fomento Industrial Private Limited (supra)* the Supreme Court taking note of its earlier decision has held that evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance and that if the

decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of powers of judicial review, interfere even if a procedural aberration or error in assessment causing prejudice to tenderer, is made out.

30. In *Dutta Associates Private Limited (supra)*

Supreme Court has in the facts of that case, found that the entire process leading to the acceptance of the tender was vitiated by more than one illegality. In such circumstances, Supreme Court has proceeded to cancel the acceptance of the tender.

31. In *Vertex Broadcasting Company Private Limited*

(supra) the Supreme Court has found that, there was departure from the terms of the NIT and those of the draft license agreement. In such circumstances, Supreme Court has set aside the forfeiture of the license fee and the earnest money as unjustifiable.

32. The authorities cited above have noted that, tenders and contracts of Article 12 authorities are amenable to judicial review. However, the power of judicial review of a constitutional court is circumscribed, albeit voluntarily, on prescribed parameters. While adjudicating a challenge to a

tender or a contract, a constitutional court is not called upon to reassess the decision of the authorities as a Court of Appeal and substitute its decision, upon reappraisal of the documents, with the decision taken by the authorities. The role of the constitutional court is to ensure that the authorities have acted fairly, reasonably, transparently and that, the decision taken was not vitiated by arbitrariness, unreasonableness, bias or was mala fides contrary to law or public interest. Since courts may not possess the requisite expertise for evaluating a technical contract or tender, it should leave the experts to decide on the same but ensuring that, such decision was not actuated by a desire to favour a particular tenderer or was not perverse.

33. In the facts of the present case, it has not been alleged by the writ petitioners that, there is a departure from the conditions of the e-NIT. The writ petitioners have contended that, the interpretation given by the learned single judge is a valid interpretation of the terms and conditions of the e-NIT and should be preferred over the interpretation given by the authorities of the same terms and conditions.

34. At the technical bid stage, the authorities had considered the same terms and conditions of the e-NIT as set out in paragraph 21 herein and held that, some of the tenderers did not have requisite 40% of work of ICBP to qualify at the technical bid stage. Learned Single Judge has, however, held that, the distinction between ICBP work and bituminous work was artificially introduced, *de hors* the e-NIT and created to favour the appellant. Learned Single Judge has interpreted the same terms and conditions in a different way and held that, the disqualified tenderers were technically qualified. In essence, learned single judge has substituted the court's view over the view taken by the authorities on interpretation of the tender terms and conditions.

35. No doubt the terms and conditions of the e-NIT can be interpreted in the manner as has been done by the learned Single Judge. At the same time, it has to be accepted that, the e-NIT has a component of ICBP work of substantial value. The understanding of the authority that clause 3.0 (i)(a) requires 40% of the value of ICBP is not *de hors* the e-NIT. ICBP work is a substantial part of the e-NIT. ICBP work being a part of the e-NIT the allegation of introduction of consideration of

work of ICBP by a tender at the technical evaluation stage cannot be said to have been artificially introduced as ICBP work was an integral part of the e-NIT. Interpretation of the e-NIT as has been done by the learned Single Judge may be more equitable for all the tenderers but as has been observed in ***Sociedade De Fomento Industrial Pvt. Ltd (supra)*** principles of equity and natural justice stay at a distance. Nothing has been placed on record to suggest that the two writ petitions before us have the requisite technical qualifications as interpreted by the authorities. Therefore the decision of the authorities in treating the two writ petitioners before us as technically disqualified cannot be said to be perverse.

36. Writ petitioners cannot call upon a writ court to substitute its views with that of the views of the authorities, in respect of a tender process, without establishing that, the view taken by the authorities is mala fide, or made in colourable exercise of power, or without jurisdiction or is such that, no reasonable person can accept such a view or was against public interest.

37. In the facts and circumstances of the present case, none of the writ petitioners have been able to establish that, the view taken by the authorities was not uniformly applied across the entirety of the tenderers participating in the tender process. Writ petitioners have not been able to establish that, the same interpretation was not applied for evaluating the tender of the successful tenderer. The authorities did not apply a different yardstick for the purpose of evaluating the successful tenderer. All participating tenderers had been assessed on the same interpretation of the same terms and conditions of the tender process.

38. In such circumstances, both the appeals being FMA 140 of 2024 and MAT 315 of 2024 are allowed, without any order as to costs. The impugned judgement and order dated November 20, 2023 passed in WPA No. 23205 of 2023 and the order dated January 10, 2024 passed in WPA No. 26716 of 2023 are set aside.

39. All connected applications are disposed of accordingly.

[DEBANGSU BASAK, J.]

40. I agree.

[MD. SHABBAR RASHIDI, J.]