2024:DHC:4696-DB

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

\+ W.P.(C) 5702/2024 & CM APPLs. 23546/2024, 27438/2024, 30284/2024

SS RAIL WORKS PVT LTD ..... Petitioner

Through: Mr. Saurabh Kripal, Sr. Advocate with Mr. Kumar Anurag Singh, Mr. Zain A. Khan, Mr. Dhruv and Mr. Aehsas Puri, Advocates

versus

IRCON INTERNATIONAL LIMITED ..... Respondent

Through: Mr. Chetan Sharma, ASG with Mr. H. K. Chaturvedi, Mr. R.V. Prabhat, Mr. Vinay Yadav, Mr. Amit Gupta, Mr. Vikramaditya Singh, Mr. Sagar Chaturvedi, Ms. Megha Chaturvedi and Mr. Ramaditya, Advocates

% Date of Decision: 27th May, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMEET PRITAM SINGH ARORA, J: (ORAL)

1. Present writ petition has been filed under Article 226 of Constitution of India seeking setting aside of the Respondent's decision, published on 5th March, 2024[1], whereby the tender for 'Design, Supply, Installation, Testing and Commissioning of Electronic Interlocking Based Signalling System from Maho to Anuradhapura Section of Sri Lanka Railway' floated vide Notice Inviting Tender ('NIT') bearing No. IRCON/S&T/1800021/9902 on

[1] On the Government e-marketplace portal

21st August, 2023, has been cancelled by the tendering authority invoking its power under paragraph 21 of 'Instruction to Tenderer' ('ITT') citing administrative reasons ('cancelled NIT'). In addition, the Petitioner prays for a mandamus to the Respondent to comply with the directions contained in the judgment dated 12th February, 2024 passed in W.P.(C) No. 16752/2023 and order dated 19th February, 2024 passed in CM APPL. No. 10013/2024 filed in W.P.(C) No. 16752/2023 with respect to the said NIT. The Petitioner lastly seeks a direction to the Vigilance Department of the Respondent to investigate the affairs of the said cancelled NIT.

Brief Factual History

2. The brief facts relevant for deciding the dispute raised in the present petition are as under: -

2.1. The last extended date of submission for the bids under the cancelled NIT was 19th October, 2023 at 15:00 hours. The Petitioner herein expressed its interest in participating in the said tender and accordingly, submitted its bid within the permissible time period.

2.2. However, on 21st December, 2023, the Petitioner was informed by the Respondent that its bid has been rejected for the reason that the Earnest Money Deposit ('EMD') and the tender cost had not been deposited within time. On the same grounds, the bid of another entity i.e., M/s Shivakriti International Ltd. was also rejected.

2.3. Simultaneously, on 21st December, 2023, the Respondent No. 1 notified[2] that M/s Kiran Infra Engineers Ltd. is the sole qualified bidder and it was declared as the L-1 bidder.

[2] On the Government e-marketplace portal

2.4. The Petitioner herein vehemently disputed its ground for disqualification and asserted that both the EMD and the tender cost had been duly deposited within time, with the notified banker of the Respondent through SWIFT, a prescribed mode of electronic money transfer under the cancelled NIT. In these facts, the Petitioner challenged its disqualification on 22nd December, 2023, by filing W.P.(C) No. 16752/2023 before this Court. M/s Kiran Infra Engineers Ltd. was impleaded as respondent no. 2 in the said petition.

2.5. Vide judgment and order dated 12th February, 2024, this Court allowed W.P.(C) No. 16752/2023 and passed the following directions: -

> *"36. In view of the aforesaid findings, we are of the opinion that the impugned letter of the Respondent No. 1 disqualifying the Petitioner and M/s Shivakriti International Ltd. is contrary to the clauses of the NIT and therefore, illegal. Accordingly, the present writ petition is allowed the letter dated 20th December, 2023 is set aside. <u>The Respondent No. 1 is directed to provisionally qualify the Petitioner and M/s Shivakriti International Ltd. and open their Financial Bids within three days and award work to the lowest eligible bidder.</u> The Petitioner is restrained from proceeding with award of Tender in favour of Respondent No. 2 on the basis that it is the sole qualified bidder."*

(Emphasis Supplied)

2.6. The said judgment dated 12th February, 2024, was assailed by M/s Kiran Infra Engineers Ltd. before the Supreme Court in SLP (C) No. 4132/2024, however, the same was dismissed on 16th February, 2024.

2.7. Thereafter, the Respondent herein preferred an application bearing CM APPL. No. 10013/2024 for modification of the judgment dated 12th February, 2024, wherein the Respondent sought additional time for compliance with the directions issued in paragraph 36 of the judgment dated 12th February, 2024. The said application was allowed and with the consent of the parties, the following modified directions were issued on 19th February, 2024:

> *"4. We have heard the counsel for the parties. The direction to complete the evaluation process within three days was issued in view of the submissions of Respondent No. 1 asserting urgency during arguments. However, in view of the request made by Respondent No. 1, we hereby extend the period of evaluation of the technical bids of the Petitioner and M/s Shivakriti International Ltd. by seven days, from today, and evaluation of the financial bids of the provisionally qualified bidders within twenty-five days thereafter, as prayed for.*
>
> *5. Further, the clerical error in the last line of paragraph 36 is corrected to read as under: -*
>
> > *"The Respondent No. 1 is restrained from proceeding with award of Tender in favour of Respondent No. 2 on the basis that it is the sole qualified bidder."*
>
> *6. With the aforesaid directions, the present application stand disposed of."*

(Emphasis Supplied)

2.8. The Respondent states that to comply with the aforesaid order dated 19th February, 2024, it requested the Petitioner and M/s Shivakriti International Ltd. to extend the validity of their respective offers. It is stated that whereas the Petitioner herein duly extended the validity of its offer up-to 31st March, 2024 but M/s Shivakriti International Ltd. did not extend the bid validity.

2.9. The Respondent states that thereafter, an Evaluation Committee consisting of three senior officers from different departments of Respondent were nominated by the Competent Authority to evaluate the technical bids of the Petitioner and M/s Shivakriti International Ltd. It is stated that the evaluation of the technical bids of the Petitioner and M/s Shivakriti International Ltd. was completed by 26th February, 2024, as per the order dated 19th February, 2024 passed in W.P.(C) 16712/2023.

2.10. The Respondent states that the Evaluation Committee after evaluating the technical bids, on the basis of the essential qualifying criteria set out in the NIT, recommended as follows:-

A. Based on the documents submitted by the Petitioner towards essential qualifying criteria, the bid was not considered technically qualified.

B. M/s Shivakriti International Ltd. had not extended the validity of its bid offer and had not complied with Clause 4.1 of the essential qualifying criteria, hence their bid was not considered for opening of financial bid.

C. M/s Kiran Infra Engineers Ltd. was thus, the sole qualified bidder, however, in view of the judgment dated 12th February, 2024 and 19th February, 2024, the Respondent did not award the tender in favour of M/s Kiran Infra Engineers Ltd.

2.11. The Respondent states that in the aforesaid facts, the Evaluation Committee was of the opinion that all the tenders may be rejected under para 21 of ITT. It accordingly, recommended the aforesaid course of action to the tender accepting authority. It is stated that the aforesaid recommendation was accepted and accordingly, the NIT dated 21st August, 2023 was cancelled under para 21 of the ITT.

2.12. The Respondent states that this decision of cancellation of NIT was duly informed to all the bidders, including the Petitioner herein, on 28th February, 2024, through e-mail. The Respondent states that thereafter, the NIT was re-tendered on 15th April, 2024 on the Government e-Procurement System ('GEM portal') and widely published in national newspapers on 15th April, 2024 and 16th April, 2024.

2.13. The Respondent states that the Petitioner however, elected to file the present writ petition and have it listed on 24th April, 2024, after a delay of about two months from the date of knowledge of cancellation of NIT dated 23rd August, 2023, just to delay the tender process.

3. The present writ petition was first listed before this Court on 24th April, 2024, on which date, the matter was adjourned to 29th April, 2024 at the request of the Petitioner. The matter was thereafter taken up on 29th April, 2024, when the Petitioner contended that the Petitioner has learnt from the GEM portal that the NIT dated 21st August, 2023, has been cancelled on 5th March, 2024 due to administrative reasons; however, the Petitioner contended that the cancellation of the NIT is with malicious intent, in order to not give effect to the judgment dated 12th February, 2024 and order dated 19th February, 2024 passed in W.P.(C) No. 16752/2023.

3.1. This Court issued notice in this writ petition, which was filed to challenge the cancellation of the NIT dated 21st August, 2023, on 29th April, 2024 and posted the matter for further hearing on 23rd July, 2024.

3.2. At this stage, it is pertinent to note that the receipt of the e-mail dated 28th February, 2024 or the re-tender on 15th April, 2024 was not disclosed by the Petitioner either in the writ petition or during the course of hearing held on 29th April, 2024. These facts have been brought on record by the Respondent subsequently, as discussed hereinafter.

4. The Petitioner, thereafter, filed[3] CM APPL. No. 27438/2024 seeking ad-interim ex-parte stay on the e-procurement notice dated 15th April, 2024. The said application was listed before this Court on 08th May, 2024 and it

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[3] On 07th May, 2024.

was contended by the Petitioner that it has learnt about the re-tender dated 15th April, 2024 recently on 05th May, 2024. It was contended that the e-procurement notice reflects the malicious intent of the Respondent in over-reaching the judgment and order dated 12th February, 2024. None appeared on behalf of the Respondent on 08th May, 2024, despite advance service of the application.

4.1. This Court vide order dated 08th May, 2024, issued notice in CM APPL. 27438/2024 and passed an ad-interim order directing that bid in question (re-tender) shall not be finalized.

4.2. Pertinently, even on this date of hearing, the Petitioner did not disclose to the Court the receipt of email dated 28th February, 2024 nor the fact that the e-procurement notice dated 15th April, 2024, was published in the national newspapers on 15th April, 2024 and 16th April, 2024.

5. In the aforesaid facts, the Respondent filed CM APPL. 30284/2024 seeking vacation of the ad-interim order dated 08th May, 2024. The said application was taken up for hearing on 20th May, 2024 and learned Additional Solicitor General ('ASG') on the said date produced before this Court, the original file of the tender proceedings containing the decision of the Evaluation Committee with respect to the earlier bid. The Respondent filed before this Court, the minutes of the Evaluation Committee's meetings held on 23rd February, 2024, 24th February, 2024 and 26th February, 2024 to demonstrate that the directions issued by the Court in its judgment dated 12th February, 2024 and order dated 19th February, 2024 had been duly complied with. The Respondent also placed on record the email dated 28th February, 2024 sent to the Petitioner communicating the cancellation of tender dated

21st August, 2023, under paragraph 21 of the ITT. The matter was adjourned to 22nd May, 2024, to enable the Petitioner to peruse the said minutes of the Evaluation Committee's meetings and address arguments.

5.1. The matter was taken up for hearing on 22nd May, 2024, wherein, after addressing some arguments, the Petitioner sought time to take instructions and address arguments on the legality of its disqualification by the Evaluation Committee. However, on the said date, the Petitioner also sought liberty from this Court to participate in the (re-tendered) e-procurement notice dated 15th April, 2024, as the last date of submission of the bid had been extended up-to 27th May, 2024; the said prayer of the Petitioner was not objected to by the Respondent. It was further clarified by this Court on 22nd May, 2024 that Respondent is at liberty to proceed with scrutiny of bids received in pursuance to the e-Procurement notice dated 15th April, 2024. The matter was thus, adjourned on 22nd May, 2024 at the request of the Petitioner to address further arguments on 27th May, 2024.

5.2. The Petitioner in pursuance to the said liberty has submitted its bid in response to e-procurement notice dated 15th April, 2024.

6. The matter is thereafter, taken up for hearing today i.e., on 27th May, 2024. The Petitioner submitted its reply to CM APPL. 30284/2024 during the course of hearing. Similarly, the Respondent herein submitted a written Note as well as documents explaining the findings of technical disqualification of the Petitioner's bid by the Evaluation Committee. The reply and the written Note are taken on record and with the consent of the parties, the writ petition itself is taken up for final hearing.

Submissions of Counsel for parties

7. The learned ASG appearing on behalf of the Respondent states that the Petitioner's technical bid was evaluated by the Evaluation Committee, which after examining the Petitioner's documents for the essential qualifying criteria prescribed at Clause 1(a) and Clause 1(b) of the NIT, held that the Petitioner does not comply with the above essential qualifying criteria enlisted at Annexure-V of ITT. In addition, the Evaluation Committee held that the Petitioner's bid failed to comply with the requirement of Clause 11 of the NIT under which the authorized signatory of tenderer is required to digitally sign the technical and financial bid documents.

7.1. He states that as per Clause 1(a) of the essential qualifying criteria, the Petitioner ought to have submitted documents which evidence that the Petitioner has supplied, installed, tested and commissioned OFC based Railway Telecommunication System. He states that the Petitioner supplied three (separate) credential certificates, however, no details of execution of OFC based Railway Telecommunication System is mentioned in any of these certificates.

7.2. He states similarly, as per Clause 1(b) of the essential qualifying criteria, the Petitioner ought to have submitted documents evidencing that it has supplied, installed, tested and commissioned OFC based Railway Telecom Work of minimum 70 kms. He states that the Petitioner supplied three (separate) credential certificates under this criteria, however, no details of execution of OFC based Railway Telecom Work is mentioned in any of these certificates.

7.3. He states that the works which are the subject matter of the e-procurement notice dated 15th April, 2024 are to be completed in Sri Lanka within one year of signing with the Indian Government i.e., on 21st September, 2023. He states that with a short time left to achieve the said deadline it is imperative that the ad-interim order dated 08th May, 2024 as modified on 22nd May, 2024 be vacated. He states that any delay in completion of the works, which are subject matter of the e-procurement notice dated 15th April, 2024 will negatively affect international and public relation and will be against public interest. He states that the Respondent will suffer irreparable loss and injury if the project in question is injuncted.

7.4. He states that the Petitioner suppressed the e-mail dated 28th February, 2024, addressed to it communicating the cancellation of the erstwhile tender dated 21st August, 2023. He states that the Petitioner also suppressed the issuance of e-procurement notice dated 15th April, 2024 from this Court when the matter was first listed on 24th April, 2024 and subsequently on 29th April, 2024. He states that the Petitioner's inexplicable delay in approaching this Court after a gap of two months in April, 2024, evidences an intent to delay the tender process.

8. In reply, learned senior counsel for the Petitioner states that rejection of the Petitioner's technical bid by the Evaluation Committee in February, 2024, is mala fide and a fraud on this Court. He states that the documents submitted by the Petitioner for satisfying the essential qualifying criteria prescribed at Clause 1(a) show that the Petitioner duly satisfied the condition (iii) under Clause 1 (a) and in this regard, he relied upon the completion certificate dated 02nd December, 2022, issued by Respondent itself. He states

that in light of the said completion certificate dated 02nd December 2022, the decision of the Evaluation Committee qua non-compliance of Clause 1(a) is wrong.

8.1. He states that with respect to Clause 1(b) of the essential qualifying criteria the Petitioner has relied upon three credentials certificates which clearly show that the Petitioner had completed ten (10) stations and more than 130 kms, which is far beyond the requirement of the qualifying criteria.

8.2. He states that the Evaluation Committee while disqualifying the Petitioner has remarked that in the completion certificates submitted by the Petitioner there is no mention of completion of similar works of supply, installation, testing and commissioning of OFC based Railway Telecommunication System. He states that the Petitioner has been allegedly non-suited on this basis. He seeks leave to place on record and rely upon a Letter of Acceptance ('LOA') dated 18th December, 2018 issued by Respondent herein to show that the scope of work at 'Clause N' of said LOA expressly included execution of OFC based Railway Telecom Work. He states that the work awarded in pursuance to the said LOA has been executed by the Petitioner to the satisfaction of the Respondent and the completion certificate dated 02nd December, 2022 filed by the Petitioner with its bid documents pertains to the said LOA. He states that Respondent being the tendering authority was well aware about the LOA and its scope; and therefore, the finding of the Evaluation Committee that Petitioner herein has not placed on record completion certificates with respect to OFC based Railway Telecommunication System under Clause 1(a) is incorrect. He states that though the completion certificate dated 02nd December, 2022 itself does not refer to this work, the Respondent being the tendering authority was aware of the scope of LOA. He states that the Evaluation Committee should have sought a clarification from the Petitioner, however, it wrongly proceeded to disqualify the Petitioner.

8.3. He states that the finding of the Evaluation Committee that the tender documents were not digitally signed by the authorized signatory as per Clause 11 of cancelled NIT is factually incorrect as the bid was submitted online and was digitally signed.

8.4. He states that with respect to non-disclosure of e-procurement notice dated 15th April, 2024 in the writ petition and at the hearing dated 29th April, 2024; the same was not deliberate as the Petitioner herein was not aware about the re-tender on 29th April, 2024, and learnt about the same only on 05th May, 2024, when the tender was published in the newspapers.

Findings and Analysis

9. We have heard the learned senior counsel for the Petitioner as well as learned ASG appearing for the Respondent and perused the record.

10. In the facts of this case, the writ petition initially filed was predicated on the assumption that Respondent has cancelled the NIT dated 21st August, 2023, to overreach the judgment dated 12th February, 2024 and order dated 19th February, 2024 passed by this Court in W.P.(C) 16752/2023; and has failed to comply with the directions of bid evaluation in the said order(s). This is for the reason that the erstwhile NIT was cancelled by the Respondent, exercising its power under para 21 of the ITT citing administrative reasons and further, for the reason that the Petitioner was not communicated the factum of its technical bid being assessed as disqualified

by the Evaluation Committee in its meetings held on 23rd February, 2024, 24th February, 2024 and 26th February, 2024.

11. The Respondent has however, since placed on record documents evidencing the exercise undertaken by it to comply with the judgment dated 12th February, 2024 and order dated 19th February, 2024 passed by this Court in W.P.(C) 16752/2023; and has placed on record the decision of the Evaluation Committee recording the reasons for holding the Petitioner's bid as technically disqualified.

12. With these facts coming on record, the scope of the writ petition has been altered and the initial challenge to the decision of the Respondent in cancelling the erstwhile NIT dated 21st August, 2023 on the grounds of violation of the orders of this Court passed in W.P.(C) No. 16752/2023 does not survive. The scope of writ petition has since shifted and the Petitioner has now in its reply filed to CM APPL. 30284/2024 challenged the technical disqualification of its bid by the Evaluation Committee.

13. Before we examine the rival contentions of the parties on the bona fides of disqualification of Petitioner's technical bid, it would be apposite to refer to the judgment of Supreme Court in ***Jagdish Mandal v. State of Orissa and Ors.***[4], wherein, the Court held that the power of judicial review will not be invoked to correct error in evaluation of bids unless the Court comes to the conclusion that the evaluation process was arbitrary and irrational or is mala fide and intended to favour someone. The relevant para 22 reads as under:

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[4] (2007) 14 SCC 517

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

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
(ii) Whether public interest is affected.
If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(Emphasis Supplied)

Findings w.r.t disqualification under Clause 1(b) of essential qualifying criteria

14. Keeping in view the aforesaid principles of judicial review, we proceed to examine the Petitioner's challenge to the decision of the Respondent's Evaluation Committee. In this regard, we may note that Clause 1(b) of the essential qualifying criteria on the basis of which the Petitioner's bid was rejected reads as follows:

> *"Essential Qualifying Criteria:*
>
> *1. The bidder should possess the experience of having successfully completed or substantially completed similar works during the last 7-years (ending last day of the month previous to the one in which tenders are invited) which should be anyone of the following: -*
>
> *…*
>
> *Similar works means: -*
>
> *…*
>
> *b) The bidder should have achieved during the last three years (ending last day of the month previous to the one in which tenders are invited) the minimum annual production value/ Quantity of the key construction activities stipulated as per scope of the work- **Supply, Installation, Testing and Commissioning of Electronic Interlocking System at 7 stations and OFC based Railway telecom work of minimum 70 km**.*
>
> *i) The minimum quantity of key construction activities mentioned in para 1(b)above may be covered under one contract or more than one contract.*
>
> *ii) <u>The quantities of key construction activities mentioned in para 1(b) above may be from completed/ ongoing works</u>.*
>
> *iii) For the key construction activities mentioned in para 1(b) above proof of executed items of work shall be submitted by bidder duly issued by their client.*
>
> *iv) The work completion certificates should clearly reflect quantities of Key* construction activities."

(Emphasis supplied)

14.1. The Petitioner furnished three (separate) credential certificates with its bid to fulfil the requirement of minimum quantity of the key construction activities required under Clause 1(b) (ii). The Respondent has placed before us the Petitioner's letter dated 19th October, 2023, submitting its bid and enclosing three specific credential certificates for establishing its compliance with Clause 1(b)(ii). We have perused the said three certificates and none of these three certificates contain any reference to supply, installation, testing and commissioning of 'OFC based Railway Telecom Work of minimum 70 kms'. Therefore, the decision of the Evaluation Committee opining that Petitioner does not comply with the Clause 1(b) (ii) is bona fide.

14.2. The Petitioner sought to contend that the credential certificate dated 17th October, 2023, at serial no. 6 shows execution of OFC work and this is in compliance of Clause 1(b). However, we find that the said certificate ex-facie does not contain any reference to 'OFC based Railway Telecom Work', which is the expression used in the cancelled NIT. Since, the experts on the Evaluation Committee have opined that this certificate dated 17th October, 2023 does not show supply, installation, testing and commissioning of OFC based Railway Telecom Work, we are not inclined to interfere with the said decision of the Committee as the technical aspects of the scope of work under the cancelled NIT dated 21st August, 2023 vis-à-vis the certificate dated 17th October, 2023, cannot be appreciated by this Court and we would prefer to defer to the assessment of the Evaluation Committee.

14.3. In addition, the Petitioner during the course of arguments has relied upon an LOA dated 18th December, 2018 placed on record with its reply to CM APPL. 30284/2024. It is stated that in this LOA at Clause N it would be evident that Petitioner had indeed carried out 'OFC work' pertaining to telecommunication, for Respondent. The Petitioner thus, contends that it is technically qualified and could not have been ousted. In this regard, we may note that the three credential certificates filed by the Petitioner with its bid for satisfying the criteria under Clause 1(b) (ii) do not pertain to this LOA. Therefore, Petitioner cannot impugn the decision of the Evaluation Committee as regards non-compliance of Clause 1(b) of the essential qualifying criteria on the basis of this LOA. Further, as per Clause 1(b), the experience of execution of OFC based Railway Telecom Work had to be for minimum 70 kms. However, even as per this LOA dated 18th December, 2018, the Petitioner has executed OFC work in 65 kms, whereas the requirement under the clause is for minimum 70 kms.

14.4. Therefore, the challenge laid by the Petitioner to its disqualification under Clause 1(b) of the essential qualifying criteria is without any merits.

Findings w.r.t Clause 1(a) of the essential qualifying criteria

15. In view of the aforesaid finding upholding Petitioner's disqualification qua Clause 1(b), we could have rested the issue, however, since the Petitioner has also challenged its disqualification under Clause 1(a) on the grounds of arbitrariness and mala fide, we are proceeding to examine the Evaluation Committee's decision said disqualification, as well.

15.1. Clause 1(a) of the essential qualifying criteria on the basis of which the Petitioner's bid was rejected reads as follows:

> *"The bidder should possess the experience of having successful completed or substantially completed similarly works during the last 7-years (ending last day of the month previous to the one in which tenders are invited) which should be anyone of the following:*
>
> > *(i) Three similar works each costing not less than the amount equal to 30% of the estimated cost i.e., $25,50,353 (i.e. ₹21.22 Cr @ $1 = ₹83.19 as on 20-10-2023).*
> >
> > *(ii) Two similar works each costing not less than the amount equal to 40% of the estimated cost i.e. $34,00,471 (i.e. ₹28.29 Cr @ $1 = ₹83.19 as on 20-10-2023.)*

> *(iii) One similar work costing not less than the amount equal to 60% of the estimated cost i.e. $ 51,00,706 (i.e. ₹42.44 Cr @ $1 = ₹83.19 as on 20-10-2023)*
>
> *Similar works means:-*
>
> *a) Works are considered similar if executed work involves: (Corrigendum-III at CP 971)*
>
> *i. Supply, Installation, Testing and Commissioning of E1/Relay based Railway Signalling System.*
>
> *ii.* ***Supply, Installation, Testinga and Commissioning of OFC based Railway Telecommunication System****."*

(Emphasis Supplied)

15.2. The Petitioner submitted three credential certificates with its bid for demonstrating that it meets the aforesaid essential qualifying criteria. The Respondent has contended that none of three credential certificates make any reference to the Petitioner herein having supplied, installed, tested and commissioned the 'OFC based Railway Telecommunication System', in the projects to which the certificates pertain. The Respondent therefore, states that the decision of the Evaluation Committee concluding that Petitioner failed to comply with the aforesaid essential qualifying criteria is fair and reasonable.

15.3. The Petitioner herein does not dispute that the three certificates submitted by it did not contain any mention of execution of OFC based Railway Telecommunication System. It however, contends that (one of) the certificate dated 02nd December, 2022, pertains to contract agreement dated 13th February, 2019, which was awarded by the Respondent itself to the Petitioner. It is stated that in the LOA for the said contract agreement dated 13th February, 2019, it is clearly recorded that 'OFC Telecommunication' was within the scope of this contract. It is stated that since Respondent was the employer in the said project, this information was available with the Respondent and therefore, the Petitioner could not have been disqualified.

15.4. We are not persuaded with the stand of the Petitioner. The Petitioner had due knowledge that under Clause 1(a)(ii), it was obliged to file certificates which ex-facie evidence that it has supplied, installed, tested and commissioned OFC based Railway Telecommunication System. However, the three certificates filed by the Petitioner to prove its qualification do not contain any mention of the works stipulated in Clause 1(a) (ii). The Petitioner was obliged to be diligent so as to ensure that it places on record with its bid, all documents available to prove beyond doubt its qualification. Since, the certificate dated 02nd December, 2022, itself did not record execution of works required to be mentioned as per Clause 1(a)(ii), we are unable to accept the contention of the Petitioner that the Evaluation Committee acted arbitrarily in holding that the Respondent is disqualified. The Evaluation Committee is not obliged to probe for further information from the bidder and if the said Committee has elected not to ask for any clarification, in the facts of this case, we are unable to hold that the same is arbitrary, as the completion certificate dated 02nd December, 2022, does not prima facie indicate that the information mentioned at serial no. 2 under the head 'name of work' is incomplete. The information under the head 'name of work' was comprehensive and the Committee could have reasonably believed that this was the only scope of work.

15.5. The contention of the Petitioner that since the Respondent itself was the employer in the contract which pertains to completion certificate dated 02nd December, 2022, the Evaluation Committee is deemed to have inherent knowledge of the scope of the LOA, appears to be far-fetched. The Evaluation Committee was comprised of three senior officers of the Respondent from different departments, who were tasked with evaluating the technical qualification of the bids on the basis of the documents filed by the bidder and not on the basis of any personal knowledge of the tendering authority. It appears to us that it is the Petitioner who has faltered in submitting its bid document and therefore, we do not find the conclusion of the Evaluation Committee as arbitrary or unreasonable.

15.6. In addition, in these writ proceedings we are unable to conclude whether the works mentioned at Clause N of the LOA dated 18th December, 2018, relied upon by the Petitioner meets the test of Clause 1(a)(ii) of the essential qualifying criteria. This is a matter exclusively within the jurisdiction of the Evaluation Committee and as observed above, we do not find the conclusion of the Evaluation Committee to be arbitrary. In this regard, it would be apposite to refer to the judgment of Supreme Court in ***National High Speed Rail Corporation Limited v. Montecarlo Limited and Another***[5], wherein the Court had held as under:-

> *"22. It is required to be noted that as per the tender documents, all the bidders were required to adhere to the requirements as per the terms and conditions mentioned in the tender document. There cannot be any deviation by any bidder. The terms and conditions of the tender documents were settled by JICA as per JICA's International Guidelines, which are required to be followed by all bidders including the original writ petitioner. <u>Therefore, when the terms and conditions of the tender document were settled by JICA, it is ultimately for JICC/JICA to take a decision whether a bid submitted by a particular bidder is non-responsive and/or non- compliant to the technical requirements of the bidding documents. Therefore, when a conscious decision has been taken by JICC/JICA on the bid submitted by the original writ petitioner being non-</u>*

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*responsive/non-compliant to the technical requirements of the bidding documents, **unless there are specific allegations of mala fides and/or favouritism, the same could not have been the subject-matter of scrutiny by the High Court in exercise of the powers under Article 226 of the Constitution of India.***

*26. At this stage, it is to be noted that what can be said to be substantially responsive technical bid has been defined under Article 33.2. The High Court in the impugned order has observed and held that the bid submitted by the original writ petitioner can be said to be substantially responsive technical bid. **However, it is required to be noted that when the author of the tender document, in the present case, JICC/JICA, had taken a conscious decision that the bid submitted by the respondent-original writ petitioner can be said to be non-responsive and suffering from material deviation, it was not for the High Court to consider/opine whether the bid submitted by the original writ petitioner is substantially responsive technical bid or not unless the decision is found to be perverse and/or suffered from mala fides and/or favouritism."***

(Emphasis Supplied)

Findings w.r.t non-compliance of Clause 11

16. Lastly, the Evaluation Committee observed that all the documents submitted by the Petitioner with the bid were not digitally signed by the authorized signatory of the Petitioner and therefore, Clause 11 of the NIT was not complied with. The Petitioner has disputed the said observation of the Evaluation Committee and stated in its reply to CM APPL. 30284/2024 that this is a false conclusion, however, the Petitioner has not produced its bid document with the reply. Instead, the Respondent has produced before this Court the entire bid submitted by the Petitioner and on a perusal, we do not find the digital signatures of the Petitioner's authorized signatory on the bid documents. Accordingly, the allegation of the Petitioner that this conclusion of the Evaluation Committee Respondent is mala fide, is without any basis.

16.1. The bid documents are physically signed by the Petitioner's authorized signatory but no digital signatures have been affixed.

Findings w.r.t delay and laches

17. As noted above, notice in this writ petition was issued by this Court on 29th April, 2024, however, the Petitioner on the said date neither disclosed receipt of the email dated 28th February, 2024, addressed to it by the Respondent informing that the earlier tender dated 21st August, 2023, has been cancelled nor disclosed the publishing of the fresh e-procurement notice dated 15th April, 2024. Instead, a narrative was built before the Court that the Petitioner has learnt about the cancellation of the earlier tender dated 21st August, 2023 through the information published on the GEM portal on 05th March, 2024.

18. Similarly, at the hearing on 08th May, 2024 while praying for an ad-interim stay in CM APPL. 27438/2024, it was stated that Petitioner learnt about the fresh e-procurement notice dated 15th April, 2024 (re-tender), only on 05th May, 2024. Learned senior counsel for the Petitioner states, today, that the Petitioner learnt about the fresh tender through newspaper publication on 05th May, 2024 and he states that the Petitioner was not aware about the publication of the re-tender on the GEM portal on 15th April, 2024.

19. The Respondent has placed before us the documents evidencing that the fresh e-procurement notice was published on the GEM portal on 15th April, 2024 and widely published in the national newspaper Hindustan Times in various editions on 15th April, 2024 and 16th April, 2024. In these undisputed facts, the contention of the Petitioner that it learnt about the re-

tender on 05th May, 2024 appears fallacious. The Petitioner has not offered any explanation for not disclosing the receipt of the email dated 28th February, 2024 intimating it about the cancellation of the earlier tender dated 21st August, 2023.

20. In our considered opinion, the non-disclosure of the email dated 28th February, 2024 and the fresh e-procurement notice dated 15th April, 2024 was deliberate and not bona fide. The cause of action, if any, for the Petitioner to approach the Court arose on 28th February 2024, however, the Petitioner elected to have the writ petition listed before this Court on 24th April, 2024 after publishing of the re-tender on 15th April, 2024; considering that the tender works pertains to international obligation assumed by the Union Government, time is of the essence and the delay in approaching this Court coupled with the suppression noted above, leads to the conclusion that the present proceedings are not bona fide, against public policy and barred by delay and laches.

21. We accordingly, find no merit in the present petition and the same is dismissed along with pending applications. No orders as to costs. The date already fixed stands cancelled.

MANMEET PRITAM SINGH ARORA, J

ACTING CHIEF JUSTICE

MAY 27, 2024/*rhc/aa*