



GAHC010093042020

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2806/2020

RSVCPL AKG JV.

C/O- M/S ASHIM KUMAR GHOSH, WEST JITPUR, NEAR RAMKRISHNA ASRAM, , ALIPURDUAR JN, P.O- BHOLARDABRI, ALIPURDUAR-I, WEST BENGAL- 736123, REP. BY ITS AUTHORISED SIGNATORY AND POWER OF ATTORNEY HOLDER SRI ASHIM KUMAR GHOSH, S/O- LATE ANIL CHANDRA GHOSH, R/O- WEST JITPUR, NEAR RAMKRISHNA ASRAM, ALIPURDUAR JN, P.O- BHOLARDABRI, ALIPURDUAR-I, WEST BENGAL- 736123

VERSUS

UNION OF INDIA AND 4 ORS
REP. BY THE SECRETARY, MIN OF RAILWAY, RAILWAY BHAWAN, RAIL ROAD, NEW DELHI- 11001

2:THE CHIEF ADMN OFFICER
CON-III
NF RAILWAY
MALIGAON
GHY- 781011

3:THE CHIEF ENGINEER
CON- IV
NF RAILWAY
MALIGAON
GHY- 781011

5:M/S NIRAJ BABUL NATH JV
AMBAGAN
WARD NO. 8
TEZPUR
SONITPUR



ASSA

For the Petitioner : Mr. N. Dutta, Sr. Adv.
Mr. N.N.B. Choudhury, Adv.

For the Respondents: Mr.A. Dasgupta, Sr. Adv.
Mr. G. Goswami, SC, N.F. Railway.
Mr. K.N. Choudhury, Sr. Adv.
Mr. R.M. Deka, Adv.

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM

Date of hearing : 19/01/2021.

Date of Judgement : 05/02/2021

JUDGEMENT AND ORDER (CAV)

1. Heard Mr. N. Dutta, learned senior counsel assisted by Mr. N.N.B. Choudhury, learned counsel appearing for the writ petitioner. Also heard Mr. A. Dasgupta, learned senior counsel assisted by Mr. G. Goswami, learned Standing Counsel, N.F. Railways authorities i.e. respondents Nos 2 and 3 and Mr. K.N. Choudhury, learned senior counsel assisted by Mr. R.M. Deka, learned counsel representing the respondent no. 5. None appears for the respondent no.1 Union of India. The name of the respondent no. 4 has been struck off by the order dated 10-11-2020 passed by this Court.

2. Considering the urgency expressed in this matter and as agreed to by the learned counsel for all the parties, this writ petition is being taken up for disposal at the stage of admission hearing.

3. The minutes of the Tender Committee meeting held on 18/06/2020 rejecting the technical bid submitted by the petitioner has been assailed in the present writ petition, inter-alia, on the ground that the decision of the Tender Committee is not only arbitrary and illegal but the same is also in violation of the order dated 03/06/2020 passed by this Court in WP(C) No. 1897/2020.

4. The facts necessary for disposal of this writ petition are briefly narrated herein below :-

(i) The North East Frontier Railway (N.F. Railway), through the respondent No. 3, had issued Tender Notice dated 17/12/2019 bearing No. Con.2019/DEC/05, inviting bids, in two parts, from reputed contractor(s)/firm(s) for executing as many as 4 (four) different contractual works. The Joint Venture (JV) of the writ petitioner had submitted its bid in respect of three tenders which were identical in nature including tender no. CE/Con/N-A/EMB/2019/DEC/05/RT-I for the work "*Earthwork in formation for making Railway embankment, construction of minor bridges, blanketing work, construction of RCC drain and all other connected ancillary works between Km 251.40 to 277.00 between New Bongaigaon (NBQ) – Agithori (AGT) BG doubling project*". The tender value of the contract was Rs. 68,61,09,256.68p and the period of completion was 18 months. The writ petitioner JV had also submitted its bid in respect of another tender bearing No. CE/CON/N-A/EM/B/2019/06/RT-1, included in the Tender Notice dated 17-12-2019. However, in the present case, we are concerned only with the tender no. CE/Con/N-A/EMB/2019/DEC/05/RT-I and, therefore, it would not be necessary to refer to the particulars of the other tender.

(ii) It appears from the record that for this tender, there were four bidders in total. The technical bids were opened on 14/02/2020. After examining the techno-commercial bids, the Tender Evaluation Committee had finalized the same and uploaded its decision on 28/02/2020, whereby, the technical bid submitted by the writ petitioner was shown to be non-responsive due to "negative bid capacity". It appears that the writ petitioner's technical bid was rejected on similar grounds in respect of Tender No. CE/CON/N-A/EM/B/2019/06/RT-1 as well.

(iii) Aggrieved by the aforesaid decision of the Tender Evaluation Committee, the petitioner had earlier approached this Court by filing two writ petitions being WP(C) 1897/2020 and W.P.(c) No 1900/2020 pertaining to the contract Nos. "CE/Con/N-A/EMB/2019/DEC/05/RT-1" and "CE/CON/N-A/EM/B/2019/06/RT-1" respectively. The basic grievance expressed in the aforesaid writ petitions was to the effect that the N.F.Railway authorities had failed to take into account all the documents submitted by the petitioner along with its tender indicating the total value of the work executed by it during the relevant period for the purpose of calculating the "bid capacity" and

therefore, the decision of the Tender Committee was erroneous. It was also contended that the private respondent having failed to register itself in the IREPS portal of the department, its technical bid was also liable to be rejected on the ground of non-conformity with the mandatory condition contained in clause -8 of the Tender Document.

(iv) Both the aforementioned writ petitions were disposed of by the learned Single Judge, at the stage of motion hearing, by identical orders, both dated 03/06/2020, directing the N.F. Railway authorities to take into consideration all signed and certified statements of the Chartered Accountant or any other document that the petitioner had submitted along with its tender which may indicate the value of the works performed by it during the last four years and thereafter, arrive at the "bid capacity" . In the order dated 03/06/2020, the learned Single Judge had further observed that if the Railway authorities are of the view that any such document(s) was not required to be taken into consideration as per terms and conditions of the tender, a reasoned order be passed indicating the reason(s) as to why such signed and/or certified statement or document are not to be taken into consideration or are not relevant.

(v) In the light of the order dated 03/06/2020, the Tender Committee had revisited the documents submitted by the petitioner along with its technical bid which included signed and certified statements from the Chartered Accountant, IT returns etc. and thereafter, once again arrived at the conclusion that the petitioner's bid capacity was negative. The Tender Committee was of the view that as per the tender conditions, only those particulars furnished in the form of A-4 of Proforma-II could be taken into account for calculating the bid capacity and applying such criteria, the writ petitioners bid capacity was found to be negative. Since positive bid capacity was a mandatory tender condition for awarding the contract, the petitioner's Techno-Commercial bid was rejected. The decision was arrived at in the meeting of the Tender Evaluation Committee held on 18-06-2020. The reasons in support of the aforesaid decisions have been recorded in the minutes of the meeting dated 18-06-2020. Aggrieved by the said decision of the Tender Evaluation Committee, in so far as Contract No."CE/Con/N-A/EMB/2019/DEC/05/RT-1" is concerned, the present writ

petition has been filed.

5. By referring to the impugned decision of the Tender Committee, Mr. Dutta submits that even on this occasion, the Tender Committee has failed to take into account all documents submitted by the petitioner and has applied the same criteria for calculating the bid capacity as in the previous round. The learned senior counsel therefore, submits that in the garb of the Minutes of Meeting (Mom) dated 18/06/2020, the Tender Committee has virtually reiterated and reaffirmed its earlier decision by completely ignoring the directions contained in the order dated 03/06/2020 passed by this Court.

6. It is also the submission of Mr. Dutta that although the petitioner had furnished all necessary documents including the statements signed by the Chartered Accountant so as to indicate the maximum value of construction works executed and payments received in any one financial year during the current and the last three financial years for calculating the "Bid Capacity" of the petitioner, yet, owing to a mistake and oversight of his client, all the particulars pertaining the work value for the relevant period were not furnished in the prescribed format of A-4 of Proforma-II. Contending that adhering to table A4 of Proforma-II was not a mandatory prescription of the tender but was merely directory in nature, Mr. Dutta has argued that the Tender Committee has committed manifest illegality in rejecting the petitioner's technical bid on a hyper technical ground by ignoring the fact that there was substantive compliance of the tender conditions and that there was huge price difference in the bid submitted by his client compared to the price bid of the respondent no. 5.

7. Mr. Dutta has also argued that the respondent no. 5 did not have a valid registration on the IREPS portal and as such, in view of the tender condition No. 8, the bid submitted by the respondent no. 5 was also liable to be rejected on the ground of contravention of mandatory tender condition.

8. Contending that the decision of the Tender Evaluating Committee dated 18/06/2020 was vitiated by complete arbitrariness and non-application of mind, Mr. Dutta has submitted that the impugned decision of the Tender Committee be set aside and a direction be issued to the N.F. Railway authorities to accept the technical bid submitted by the writ petitioner. In support of his arguments, Mr. Dutta has relied upon a recent decision of the Apex Court in the case of **Silppi Constructions Contractors Vs. Union of India and others** reported in **2019 SCC Online SC 1133** and another decision of this court rendered

in the case of ***Megha Electricals Dihang Edutech Infrastructure Private Limited (M/s) And Others Vs State of Assam and others*** reported in **2012 (4) GLT 723**.

9. Mr. A. Dasgupta, learned senior counsel appearing for the respondent Nos 2 and 3, on the other hand, has argued that pursuant to the order dated 03/06/2020 passed by this court the Tender Committee had diligently verified all documents submitted by the writ petitioner and even thereafter, found that the petitioner's bid capacity was negative. Urging that the bid capacity of a bidder must be calculated as per the formulae provided in Annexure-VI of the Tender Documents, Mr. Dasgupta has argued that the petitioner has furnished the requisite information as per the mandatory condition of Annexure-A4 of Proforma-II only for work valued at Rs. 25.19 crores and therefore, only those particulars have been taken note of by the Tender Committee since any deviation therefrom would amount to going against the mandatory tender conditions. Since, a bidder whose bid capacity is negative does not qualify under the tender conditions, hence, the petitioner's techno-commercial bid was rejected. The learned senior counsel has, however, fairly submitted that other documents and certificate of Chartered Accountant submitted by the writ petitioner had been considered for assessing the financial eligibility of the bidder and that the writ petitioner did qualify under the general eligibility norms as well as on the criteria of financial eligibility but unless it fulfils the "Bid Capacity" norms, the contract cannot be awarded to the petitioner.

10. Mr. Dasgupta has also argued that pursuant to the Letter of Acceptance (LoA) issued in favour of the respondent no. 5 on 01/07/2020, the execution of the work has already commenced and a substantial part has also been completed. Therefore, submits Mr. Dasgupta, if the decision of the Tender Committee is interfered with at this stage, then in that event, the same would have adverse impact on public interest since the same would result into undue delay in completion of a Railway project of critical significance for the North-East region.

11. Supporting the stand taken by the learned departmental counsel, Mr. K.N. Choudhury, learned senior counsel appearing for the respondent no. 5 has also argued that the petitioner having failed to furnish the complete particulars in Annexure-A4 of Proforma-II so as to work out its "Bid Capacity", the technical bid of the petitioner was rightly rejected by the authorities. According to Mr. Choudhury, it is not a case where the authorities had

exercised their powers in an arbitrary and illegal manner. Moreover, submits Mr. Choudhury, the writ petitioner has failed to challenge the LoA dated 01/07/2020 issued in favour of his client despite being aware of the same and hence, the writ petition is not maintainable. According to Mr. Choudhury, in the absence of any challenge made to the LoA dated 01-07-2020, no interference by this Court with the LoA dated 01-07-2020 was called for in the facts and circumstances of the case.

12. In so far as the plea raised by the petitioner's counsel regarding non-fulfilment of eligibility criteria by the respondent no. 5 on the ground that it did not have registration on the IREPS portal, Mr. Choudhury submits that the said allegation is factually incorrect. By producing a printout of a document showing registration of the respondent no.5 in the IREPS portal, Mr. Choudhury submits that his client did have the necessary registration and therefore, it did fulfil the aforesaid criteria. However, submits Mr. Choudhury, even assuming that the respondent no. 5 did not have the registration in the IREPS portal, even then, in view of the principles laid down in Order II Rule 2 CPC, the writ petitioner cannot now take the same plea in this proceeding since the said ground was available to it in the earlier round of litigation but the petitioner had failed to press the same into service. The learned senior counsel has argued that the learned Single Judge did not accept the aforesaid plea while disposing of the earlier writ petition by the order dated 03/06/2020.

13. By referring to the materials available on record, Mr. Choudhury has further argued that the writ petitioner had failed to press for an interim order from this Court at the commencement of the work and, therefore, on such count as well, it would be highly inequitable for this Court to grant any relief to the petitioner at this stage since his client has already completed substantial part of the contractual work. According to Mr. Choudhury, the tendering authority is equally bound by the mandatory tender conditions and any deviation therefrom would be impermissible in law. Urging that in exercise of powers of judicial review, the Writ Court would not interfere in matters of commercial contract merely on making out a legal case unless absolute arbitrariness is found in the decision making process, the learned senior counsel has prayed for dismissal of the writ petition. In support of his arguments, Mr. Choudhury has relied upon the decision of the Supreme Court rendered in the case of ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others*** reported in (1999) 1 SCC 492 and ***W. B. State Electricity Board Vs Patel Engineering Co Ltd*** reported in

(2001) 2 SCC 451.

14. I have considered the submissions advanced by the learned counsel for the parties and have also gone through the materials available on record.

15. There is no dispute in this case about the fact that in order to qualify in the technical bid, the bid capacity of the bidder must not be negative. As per the tender conditions, the bid capacity will be deemed to be negative if the same turns out to be less than the estimated cost of the contract. It is also not in dispute that the petitioner was seeking consideration of few other documents and financial particulars which were not furnished by it in A-4 of proforma-II, for computation of its bid capacity, which, according to the tendering authorities, cannot be taken note of under the tender conditions. After hearing the arguments advanced by the rival parties, it has become apparent that the core controversy in this case lies on a narrow campus i.e. whether the tender committee was justified in considering only those particulars furnished in A-4 of proforma -II for calculating the bid capacity of the writ petitioner or was it incumbent upon them to consider all other documents furnished by the writ petitioner along with its tender for calculating the bid capacity? In order to answer the aforesaid question, it would be necessary for this Court to refer to some of the relevant tender conditions having a bearing in the present proceeding.

16. As per Clause-2 of the NIT dated 17/12/2019, the eligibility criteria for the bidders has been sub-divided into three parts viz. (A) Technical Criteria, (B) Financial Eligibility Criteria and (C) Bid Capacity. In this case, there is no dispute about the fact that the writ petitioner did fulfill the technical criteria. Clause 2(B) lays down the Financial Eligibility Criteria which reads as follows :-

“(B) Financial Eligibility Criteria:

(i) The tenderer must have received contractual payments in the previous three financial years and the current financial year upto the date of opening of tender, at least 150% of the advertised value of the tender. The tenderer shall submit certificates to this effect which may be an attested Certificate from the concerned department/client and/or Audited Balance Sheet duly certified by the Chartered Accountant etc.”

There is also no dispute about the fact that the petitioner herein meets the requirement of



“(C) Bid Capacity:

17. As per the conditions laid down in the tender documents, the Bid Capacity of a bidder was to be calculated as per the formula provided in Annexure-VI based on information furnished in A-4 of proforma-II. The aforesaid formula, along with the relevant explanation and/or notes as provided in Annexure-VI is extracted herein below for ready reference :-

“Available Bid Capacity = $[A \times N \times 2] = B$

Where A= Maximum value of construction works executed and payment received in any one financial year during the current and last three financial years immediately preceding the current financial year, up to date of opening of tender, taking into account the completed as well as works in progress (As Item A-4 of PROFORMA-II).

N= Number of years prescribed for completion of work for which bids has been invited.

B= Value of existing commitments and balance amount of ongoing works with the tenderer to be completed in next 'N' years (As per A-5 of PROFORMA-II).

Note:

(a) *The Tenderer(s) shall furnish the details of existing commitments and balance amount of ongoing works with tenderer as per the prescribed proforma of Railway for statement of all works in progress and also the works which are awarded to tenderer but yet not started upto the date of opening of tender. In case of no works in hand, a NIL statement should be furnished. This statement should be submitted duly verified by Chartered Accountant.*

(b) In case of JV, the tenderer(s) must furnish the details of existing commitments and balance amount of ongoing works with each member of JV as per the prescribed proforma of Railway for statement of all works in progress and also the works which are awarded to tenderer but yet not started upto the date of opening

of tender. In case no works in hand, a 'NIL' statement should be furnished. This statement should be submitted duly verified by Chartered Accountant.

(c) Value of a completed work/work in progress/work awarded but yet not started for a Member in an earlier JV shall be reckoned only to the extent of the concerned member's share in that JV for the purpose of satisfying his/her compliance to the above mentioned technical eligibility criteria in the tender under consideration.

(d) The arithmetic sum of individual "bid capacity" of all the members shall be taken as JV's "bid capacity".

(e) In case, the tenderer/s failed to submit the above statement along with offer, their/his offer shall be considered as incomplete and will be rejected summarily.

(f) The available bid capacity of tenderer shall be assessed based on the details submitted by the tenderer. In case, the available Bid Capacity is less than estimated cost of work put to tender, his offer shall not be considered even if he has been found eligible in other eligibility criteria/tender requirement."

18. The credentials of the tenderers were to be furnished in Proforma-II of annexure-VI. Therefore, the various entries in Proforma-II would be relevant for the purpose of this case and are being reproduced herein below for ready reference :-

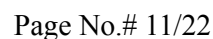
"CREDENTIALS OF THE TENDERER

A. **EXPERIENCE:**

1. No. of years the firm has been in operation under its present name:
2. Details of similar nature of work completed by the Tenderer in last 7 years with Documentary proof as per Para 2A of NIT.
3. Financial Position:

Year wise Financial Turnover during, the last three financial years and in current financial year (Copies of Audited Annual report, Accounts or a statement duly certified by a Chartered accountant or Authenticated payment record of Railway should be enclosed).

Year	Turnover (Rs. In Lakhs



Current year	

4. *Details of work executed and payment received during the current & last three financial years taking into account the completed as well as work in progress (with documentary proof).*

(Details of works executed and payment received in current & last three financial years)

[illegible]

“As per ‘A’ of ANNEXURE-VI

NOTE : The statement should be submitted duly verified by the Chartered Accountant.

5. (sic 4) Details of existing commitment and balance amount of ongoing works with the tenderer including the works which are awarded but not yet started upto the date of opening of tender (with documentary proof).

Sl. No.	Name of Clients work & Address	CA/SCA value in Rs.	Upto date Payment received Rs.	Balance Amount to be completed in Rs.	Original date of completion	Extended date of completion if any	Remarks

(As per 'B' of ANNEXURE-VI)

NOTE :The statement should be submitted duly verified by the Chartered Accountant."

19. As per Note (f) of Annexure –VI, the offer of a tenderer shall not be considered even if he is found eligible under other eligibility criteria if the bid capacity is found to be less than the estimated cost of work put up in the tender.

20. According to the writ petitioner, for the purpose of the bid capacity formula contained in Annexure-VI, the value of "A" based on the certificate issued by its Chartered Accountant, ought to have been taken as Rs 150.50 crore being the value of work executed in the year 2018 - 2019, in which event, its bid capacity would have been above the estimated cost of the work. In order to demonstrate the same, the petitioner had relied upon various documents including a certificate dated 04/11/2019 issued by its Chartered Accountant. In the certificate dated 04/11/2019 submitted by the petitioner, the following information, in tabular form, was provided :-

Year	Total Contract Revenue (Rs. In Lakhs)
2013-14	7461.00
2014-15	7428.30
2015-16	7075.09
2016-17	10931.27
2017-18	13666.68
2018-19	15050.50

21. As noted above, as per the certificate dated 04/11/2019, the total contract value for the year 2018-19 was shown as Rs 15050 lakhs (Rs 150.50 crores). According to the petitioner, the figures reflected in the certificate dated 04/11/2019 clearly shows that the petitioner had received contractual payment which was atleast 150% more than the estimated value of the work. However, as mentioned above, the said information furnished through the certificate issued by the Chartered Accountant along with other documents were not taken into account by the Tender Committee for calculating the bid capacity of the petitioner since those were not in the form of A-4 of Proforma-II. According to the Tender Committee, the value of "A", as per information furnished in A-4 of Proforma-II worked out to only Rs 25.19 crore and only that value and not Rs. 150.50 crores can be taken into account for calculating the petitioner's bid capacity.

22. In W.P.(C) No 1897/2020 the petitioner's contention was that regardless of the prescription of Annexure A-4, the tender committee was duty bound to consider the amount of Rs.150.50 crores as the total contract revenue earned by the petitioner in the years 2018-19, which was apparent from the certificate dated 04/11/2019 issued by the Chartered Accountant of the petitioner as well as the other documents including the Income Tax return, Auditors Report, Balance Sheet, Profit and Loss Account and cash flow statement was



submitted by the petitioner along with its tender. Taking note of the above grievance expressed by the petitioner, the learned Single Judge had disposed of WP(C) 1897/2020 by order dated 03/06/2020 by issuing the following directions :-

“20. Accordingly, this petition stands disposed of by requiring the respondent railway authorities to take into consideration all such signed and certified statements of the Chartered Account or any other document that the petitioner had submitted along with the tendered bid which may indicate the value of the works performed by them during the last four years and thereafter arrive at the bid capacity of the petitioner. If the respondent railways are of the view that any such signed and certified statement or documents are not required to be taken into consideration as per the terms and condition of the tender process or which may otherwise be not relevant for the purpose, appropriate reasoned order be passed by the tender committee as to why they think that such signed and certified statements of documents are not to be taken into consideration or are not relevant.”

23. In terms of the order dated 03/06/2020, the Tender Evaluation Committee had revisited the bid submitted by the petitioner but found that as per the formula $(A) \times (N) \times (2) = (B)$, the bid capacity of the petitioner was (-) 93.28 crores, which was less than the qualifying value of 68.61 crores i.e. the estimated cost of the work. As such, the petitioner's bid capacity was held to be negative. The Tender Committee had taken the value of "A" as Rs. 25.19 crores and not Rs. 150.50 crores as claimed by the writ petitioner. The reasons for arriving at the conclusion have been explained in detail in the minutes of meeting of the Technical Committee held on 18/06/2020 which would speak for itself. The relevant part of the MoM dated 18/06/2020 is, therefore, reproduced herein below for ready reference :-

“(D) Reasons for not taking value of "A" as Rs. 150.50 crores in bid capacity: Petitioner has been claiming that the value of "A" in bid capacity formula is Rs. 150.50 crores for RSV Construction Pvt. Ltd. Why Railways does not consider it relevant, for bid capacity calculation, is explained in the following paragraphs.

(I) There are 3 eligibility criteria in the tender, which have to be met by tenderers. These are :

a) Technical criteria

b) *Financial criteria*

c) *Bid capacity.*

The yearly contractual payment in favour of M/s. RSV Construction Private Ltd. During 2018-19 is Rs. 150.50 Cr., submitted in the form of balance sheet and Profit & Loss account, signed & certified by Chartered Accountant, is submitted against the eligibility criteria (b) i.e. Financial eligibility and same has been considered by Railway. Tenderer has qualified the Financial eligibility criteria on the basis of this.

However in case of Bid Capacity, tenderer has to submit the payment details in A-4 Proforma-II as explained under para 3 (B-1) of tender committee minutes above. Tenderer have submitted A-4 Proforma-II in respect of M/s. RSV Construction Private Ltd and maximum value of contractual payment in a year is only Rs. 25.19 crores (year 2016-17). This value has therefore been considered as value of "A" for calculation of bid capacity.

*Petitioner wants that the value of "A " in bid capacity should be taken as Rs. 150.50 crores in respect of M/s. RSV Construction Private Ltd. just because the profit & loss account statement is signed and certified by Chartered Accountant. For this figure to be considered as value of "A" in bid capacity, the mandatory information as per A-4, Proforma-II have to be submitted by tenderer as recorded under para 3(B1) of tender committee minutes earlier. The mandatory information in A-4 Proforma-II has been submitted for the amount of Rs. 25.19 crores only. Therefore, in absence of contract details and year wise payment against each contract as per the A-4 Proforma-II, the amount of Rs. 150.50 Cr. cannot be considered for evaluation the Bid Capacity, even if statements are signed by Chartered Accountant. **Adopting value of "A" as Rs. 150.50 crores without requisite details would be gross violation of tender conditions stipulated at para 5(C) (page no. 9 of tender document) and Annexure VI (page 242 of tender document).***

(II) *Railways has considered all relevant statements of Chartered Accountant that the petitioner had submitted along with the tendered bid.*

There are multiple statements required to be submitted in support of different eligibility criteria. The figures and information required for a particular eligibility criteria is clearly mentioned in the tender conditions. The figure of Rs. 150.50 Cr is the contractual payment received by RSV Construction Private Ltd. during 2018-19 and it is submitted in support of financial eligibility criteria. It does not contain information and date required to be considered it as value of "A" in bid capacity and therefore not considered relevant in terms of conditions of tender. Merely having signed and certified by Chartered Accountant does not make it valid for consideration against the bid capacity calculation.

(III) Tenderer RSVCP-AGK JV have submitted the details in A-4 Proforma for Rs. 25.19 crores only against the value of "A" in respect of RSV Construction Private Ltd., which has been rightly considered by Railways for calculation of bid capacity. The statement for Rs. 150.50 crores in the form of profit & loss statement does not contain details such as name of work, contract no., clients' name, contract value, value of works executed, date of completion, payment received during the year etc. as laid down in A-4 Proforma-II, which makes this figure ineligible to be considered as value of "A" for calculation of bid capacity. Tender conditions note (e) of bid capacity clearly stipulates that in case, the tenderer/s failed to submit the above statement along with offer, their/his offer shall be considered as incomplete and will be rejected summarily. Since the format has not been submitted for amount of Rs. 150.50 crores, adopting this figure for calculation of bid capacity will be gross violation of tender conditions at para 5(C) (Page no. 9 of tender document) and Annexure VI (page 242 of Tender document).

(IV) As discussed above, Bid Capacity of RSVCP-AGK JV is lesser than estimated cost of work and therefore they do not qualify the bid capacity eligibility criteria. In terms of tender condition note (f) under Annexure-6 (Page 242 of Tender document), their offer is not considered even if they have been found eligible in other eligibility criteria/tender requirement.

4.0

Recommendation : in view of the above deliberations,

Tender Committee recommends Bid Capacity of RSVCP-ALG JV as Rs (-) 93.28 Crores (negative Rs. Ninety three point two eight crores) which is less than the minimum required bid capacity of Rs. 68.61 Crores. Therefore RSVCP-ALG JV does not fulfill the Bid Capacity eligibility criterion.

5.0 Accepting Authority : Competency of acceptance/modification/rejection of TC recommendations lies with CAO/CON-II."

24. A careful reading of the criteria laid down in Annexure-VI leaves no room for doubt that the bid capacity of a bidder would have to be calculated as per the formula provided therein which is $[A \times N \times 2 = B]$. Annexure-VI also categorically provides that the relevant information/particulars would have to be provided by the bidder as per A-4 of Proforma-II for calculating the value of "A" and as per Annexure A-5 of Proforma-II for calculating the value of "B".

25. Table A-4 of annexure-VI seeks information as regards details of works executed and payment received during the current and last three years by furnishing specific particulars as regards client address, CA/SCA value, value of work executed, original date of completion and extended date of completion. Such statements are also required to be verified by the Chartered Accountant. It is the admitted case of the petitioner that information in format A-4 of Proforma-II furnished by the petitioner was valued only at Rs. 25.19 crores and not 150.50 crores. Accordingly, the authorities have taken the value of "A" as Rs. 25.19 crores for calculating the bid capacity of the petitioner and found the same to be negative.

26. It further appears that Clause 2 (B) of the tender document dealing with "Financial Eligibility Criteria" permits the tenderer to submit attested certificates from department/ client and audited balance sheet certified by the Chartered Accountant. It is, therefore, evident that the certificate dated 04/11/2019 issued by the Chartered Accountant was as per A-3 of Annexure -VI and, therefore, the same could have been taken into account for assessing the Financial Eligibility of the petitioner but the same did not have any role to play in calculation of value of "A" or "B" so as to determine the bid capacity.

27. A scrutiny of the various conditions/ notes contained in Annexure-VI goes to show that the value of "A" and "B" for computing the bid capacity was required to be calculated

only as per information furnished in prescribed form i.e. A-4 and A-5 respectively. From a reading of the MoM dated 18/06/2020 it is apparent that the Tender Committee has treated compliance of prescription of A-4 of Proforma-II as an essential condition of the Tender Document. Further, note "e" of Annexure-VI makes it abundantly clear that failure on the part of the bidder to submit above statement along with the offer may result into rejection of the bid. From the specifications laid down in annexure-VI, it is apparent that the requirement of furnishing information/ particulars in A-4 and A-5 format of Proforma-II was an essential tender conditions and therefore, it was mandatory for every bidders to comply with the same.

28. In the case of **Central Coal Fields Ltd. vs SLL-SML** reported in **(2016) 8 SCC 622**, the Supreme Court has observed that an essential requirement of the NIT is required to strictly adhered to and the same cannot be deviated from. It was further observed that the decision of the employer as to whether a term in the NIT was essential or not is to be given due weightage. Therefore, if the Tender Committee is of the view that furnishing information as per A-4 of Proforma-II was mandatory, such view of the employer cannot be lightly interfered with by the Writ Court unless there is a strong reason for doing so, which, however, is not present in this case.

29. Mr. Dutta has argued that only A-5 of Proforma-II was mandatory and not Annexure-4. I am afraid, such submission of the learned senior counsel for the petitioner cannot be accepted by this court for the following reasons. Firstly, Annexure-VI lays down the formula for calculating the bid capacity i.e. $[A \times N \times 2 = B]$ whereunder, the value of "A" and "B" are to be computed based on inputs provided as per A-4 and A-5 of Annexure-VI. Since there is only one composite formula for calculating the bid capacity, there is no justifiable ground for this court to treat the applicability of the two components of the same formula i.e. "A" and "B" differently. Secondly, notes "a" to "f" in Annexure-VI refer to the same formula for calculating bid capacity and therefore, there is also no reason as to why only A-5 and not A-4 should be treated as essential requirement of the Tender Documents. In view of the above, this court is of the un-hesitant opinion that A-4 of Proforma-II was an essential condition of the tender and no deviation therefrom was permissible under the Tender Condition.

30. In the above context it must further be noted herein that the respondents have called for information from the bidders in prescribed format so as to assess not only the financial eligibility but also the bid capacity of the tenderers. Those are two distinct and

different criteria under the tender document. It may be so that the particulars furnished by the bidders may have some common application or utility in making assessment of the eligibility of the bidder on both the criteria mentioned in the tender document. But that by itself would not relieve the bidder from the requirement of furnishing information in the prescribed format, by adhering to the tender conditions, moreso, when such particulars are necessary for evaluating the eligibility of the bidders.

31. In so far as compliance of the order dated 03/06/2020 passed by this court is concerned, as noticed above, while directing the Tender Committee to consider all documents submitted by the writ petitioner, the learned Single Judge had also granted liberty to the authorities to record reasons if it was felt that those signed and certified documents were not relevant and hence, were not required to be taken into account. Therefore, it is evident that while issuing the order dated 03/06/2020, the learned Single Judge did not finally decide the issue raised by the petitioner nor does the order contain any direction, in absolute terms, so as to consider the documents submitted by the petitioner along with its tender so as to calculate the bid capacity. Although there was a direction to consider all documents yet, liberty was also granted to the Tender Committee not to do so, if there was a valid reason to be recorded in writing. Availing the liberty granted by the order dated 03/06/2020, the Tender Committee has observed that the information not furnished in the form of A-4 of Proforma-II of Annexure-VI of the Tender Document cannot be taken into consideration for calculating value of "A" since the tender conditions would not permit so. On a careful reading of the MoM dated 18/06/2020 and the relevant tender conditions, this court is of the opinion that the reasons cited by the Tender Committee for not considering the certificate issued by the Chartered Accountant and other documents for calculating the bid capacity of the petitioner are both reasonable and in conformity with the tender conditions.

32. Coming to the next issue pertaining to the objection raised by the petitioner as to the validity of the bid submitted by the respondent no. 5 owing to its alleged failure to register on the IREPS website, as mentioned above, the learned senior counsel for the respondent no. 5 has produced a copy of the relevant document which *prima facie* indicates that the Joint Venture of respondent no. 5 was registered in the online portal of the N.F. Railway authorities (IREPS). During the course of hearing, the writ petitioner could not dislodge such submission of the respondents' counsel. Be that as it may, the aforesaid plea

was admittedly taken by the petitioner in WP(C) 1897/2020, which was disposed of by the order dated 03/06/2020. However, the order dated 03/06/2020 of this Court does not indicate as to in what manner, the aforesaid plea was pressed into service by the writ petitioner. The petitioner also did not seek leave of the court nor did it reserve its right to raise the same plea in another proceeding at a subsequent stage. As such, in view of the principles laid down in Order II Rule 2 CPC, I find sufficient force in the submission of Mr. K.N.Choudhury, learned senior counsel for the respondent no. 5 that the writ petitioner cannot be permitted to once again raise the same plea in the present proceeding.

33. It is also to be noted here-in that when the writ petitioner had approached this court in the earlier round, the tender was yet to be finalized. However, subsequent to the exercise carried out on 18-06-2020, LoA dated 01/07/2020 has been issued in favour of the successful bidder i.e. the respondent no. 5 with instruction to commence the work and the execution of the work has also commenced. Although the writ petitioner had proper knowledge of the said fact, yet, the LoA dated 01/07/2020 has not been assailed in this proceeding.

34. It also appears from the record that assailing the minutes of meeting of the tender committee dated 18/06/2020, the petitioner had approached this Court by filing the present writ petition on 24/06/2020. On 11-03-2020 an interim order was passed in WP(C) 1897/2020 restraining the respondents from issuing any work order without the leave of the Court till the next date. It appears that the said order ultimately got merged with the final order dated 03/06/2020 whereby liberty was granted to the respondents to proceed with the tender after completing the exercise indicated therein. As such, there was no interim order operating after 18/06/2020, suspending the operation of the LoA dated 01/07/2020 or the execution of work, as a result of which, the work had proceeded. A perusal of the report dated 18/11/2020 produced by Mr. Dasgupta goes to show that substantial progress in the execution of the work has already been made by the respondent No. 5 pursuant to the LoA dated 01/07/2020. Although Mr. Dutta has argued that the price quoted by the writ petitioner is lower than the respondent No 5 and, therefore, interference with the LoA would be in public interest, yet, there is no material on record to support the said assertion of the petitioner's counsel. Moreover, it is settled law that in a bidding process involving two parts i.e. techno-commercial and financial bid, price quoted by the bidders would be relevant only if the

technical bid is found to be responsive. Since the petitioner's technical bid was found to be non-responsive, the price quoted by it would not be of any significance in this case.

35. It would also be significant to note here-in that pursuant to the order dated 03/06/2020 the respondents were required to re-visit the techno-commercial bid submitted by the writ petitioner in respect of two different tenders. In terms of the orders dated 03/06/2020, the Tender Committee had reconsidered the matter and thereafter, rejected the technical bids submitted by the writ petitioner in both the tenders on similar grounds. However, the petitioner has not questioned such decision of Tender Committee in respect of Tender No."CE/CON/N-A/EM/B/2019/06/RT-1" but has assailed the same decision in respect of this tender. Therefore, it is apparent that the petitioner had in fact accepted, in-principle, the grounds on which the impugned decision of the Technical Committee was rendered in the other tender, while assailing the said decision in connection with the present tender.

36. Law is firmly settled through a long line of decisions rendered by the Hon'ble Supreme Court that in government contracts, it is the decision making process and not the decision of the authorities that would be open for scrutiny in exercise of power of judicial review. In the case of ***Raunak Internation Ltd. (Supra)***, the Apex Court has observed that judicial review in matters of commercial contract in which the State are involved would not be justified except where there is substantial public interest is involved and in case where the transaction itself is malafide.

37. In the case of ***Michigan Rubber (India)Ltd. Vs. State of Karnataka*** reported in ***(2012) 8 SCC 216***, the Apex Court has observed that the basic requirement of Article 14 is fairness in the action of the State and non-arbitrariness in essence and substance is the heartbeat of fair play.

38. In the case of ***W.B. State Electricity Board (Supra)*** the Supreme Court had emphasized on the importance of maintaining sanctity and integrity of the tender process while awarding contract by observing that all parties to a tender are bound by the tender conditions which should be scrupulously complied with. In the said decision it has been held that negligent mistakes in bid documents cannot be permitted to be corrected on the basis equity.

39. After considering a number of previous decision governing the issue, the Apex, in the case of ***The Silppi Constructions Contractors (supra)*** relied upon by Mr. Dutta, had

summed up the law and has observed that there is a need for overwhelming public interest to justify judicial intervention in matters of contracts involving the state instrumentalities. The Courts should give way to the opinion of experts unless the decision is found to be totally arbitrary or unreasonable. In the aforesaid decision, it was also observed that the authority floating the tender is the best judge of its requirements and therefore, the courts interference should be minimal.

40. From the materials available on record, I find that the Tender Committee has recorded proper reasons in support of its conclusion in rejecting the technical bid of the writ petitioner. Such reasons not only provide proper justification for the decision but the same also appear to be in conformity with the essential tender conditions. Moreover, the project in question has been identified as a "critical project". Having regard to the purpose of the project there can be hardly any doubt about the fact the public interest will be better served in early completion of the project. Once it is found that essential tender conditions have been violated, the writ court, being a court of equity, would not issue a writ of mandamus compelling the respondents to act in violation of the essential conditions of the tender even if another view is possible in the matter. Therefore, applying the ratio laid down in the aforementioned decisions of the Apex Court, I am of the opinion that there is no scope for this court to interfere with the impugned decision in exercise of power of judicial review.

41. In so far as the decision rendered in the case **of Megha Electricals Dihang Edutech Infrastructure Private Limited and others (supra)** is concerned, in that case, the decision of the tender committee rejecting the technical bid was interfered with on the ground that there was substantial compliance of the tender condition. It was a case where the tender condition being Clause 19(vii) of section 2 of the Bid Document prescribed that the bid security should be in the name of JV of all the partners and not in the name of a partner. However, the tenderer had deposited the earnest money in the form of a bank draft through the constituted attorney of one of the JV partners. It was in such fact situation the learned Single Judge had held that there was substantive compliance of the tender conditions and accordingly had set aside the decision of the Tender Committee upon interpreting the relevant clause of the NIT. Upon a careful reading of the judgement, I find that the aforesaid said decision was rendered in the facts and circumstances of that case and therefore, it would have no application in the facts of this case.



42. For the reasons stated here-in before, this Court is of the opinion that there is no merit in this writ petition. The same is accordingly dismissed.

Parties to bear their own cost.

JUDGE

Sukhamay

Comparing Assistant