



GAHC010003342023



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

**Writ Petition (Civil) no. 96/2023**

Technip Energies India Ltd. [Formerly Technip India Limited], through its authorized representative, Prashant Sharma, S/o- Brij Mohan Sharma, having its office at Technip Tower, A-4, Sector-1, Noida, Uttar Pradesh - 201301 e-mail : prashant.sharma@technipenergies.com

.....Petitioner

**-Versus-**

- 1) The Union of India through Ministry of Petroleum and Natural Gas, A-Wing, Shastri Rajendra Prasad Road, 110001, Azad Bhawan Rd, IP Estate, New Delhi, Delhi- 110002.
- 2) Numaligarh Refinery Limited Through its Managing Director, Having its Registered Office at 122A, G.S. Road, Christian Basti, Guwahati- 781005 and also having Office at Golaghat, Numaligarh, Assam, 785699.
- 3) M/s Thyssenkrupp Industrial Solutions (India) Private Limited, through its Project Procurement Manager, Sushant Deshpande/ Amar Sonsale, UHDE House, Lbs Marg Vikhroli [West], Mumbai- 400083, India.



- 4) G.R. Engineering Projects Private Limited through GR Engineering Projects Pvt. Ltd., 366 Dda Flat, Badarpur, New Delhi 110044.

.....Respondents

**Advocates :**

Petitioner : Mr. D. Das, Senior Advocate, Mr. A. Khanna, Advocate  
Respondent no. 1 : Mr. K. Gogoi, Central Government Counsel  
Respondent no. 2 : Mr. N. Deka, Advocate  
Respondent no. 3 : Mr. B. Chetri, Advocate  
Respondent no. 4 : Dr. A. Saraf, Senior Advocate, Mr. P. Baruah, Advocate  
Date of Hearings : 14.03.2023, 23.03.2023, 30.03.2023 & 04.04.2023  
Date of Judgment & Order : 27.06.2023

**BEFORE**  
**HON'BLE MR. JUSTICE MANISH CHOUDHURY**  
**JUDGMENT & ORDER**

By a Notice Inviting Tender [NIT] bearing no. TK-1P25A-MP-RFQ-0034 dated 25.10.2022, the respondent no. 3, M/s Tyssenkrupp Industrial Solutions [India] Private Limited as the Engineering Procurement & Construction Management [EPCM] Consultant on behalf of the respondent no. 2, that is, M/s Numaligarh Refinery Limited [hereinafter referred to as 'the Tendering Authority' or 'Tendering Authority' or 'the NRL', at places, for the sake of easy reference] invited e-Bids from eligible bidders through the website : <http://eprocure.gov.in/eprocure/app> for execution of a contract-work :- 'Supply of Reactor & Regenerator [RXRG] Package for PFCC Unit as per Technical Specifications for Numaligarh Refinery Limited, Assam, India' ['the Contract-Work', for short]. As per the NIT, the competitive bidding process was on

Open Global Tender basis under single stage two-bid system [Part-1 : Techno-Commercial Bid (Unpriced Bid) and Part-2 : Price Bid] from competent bidders with sound technical and financial capabilities fulfilling the Bidder Qualification Criteria [BQC], as stated in the Bidding Documents. As per the NIT, the time schedule for completion of the Contract-Work is thirty-two [32] months [thirty (30) months for Mechanical Completion including Pre-Commissioning and two (02) months for Commissioning] from the date of issue of the Letter of Acceptance [LoA]. Originally, the start date of submission of bid was 24.11.2022 and the last date of submission of bid was up-to 15-00 hours, 30.11.2022. During the course of the bidding process, the time-line for submission of bids was re-scheduled and the last date of submission of bid was extended up-to 07.12.2022.

2. The Bidding Documents had mentioned the Bidder Qualification Criteria [BQC] including technical experience criteria, financial experience criteria and commercial experience criteria. As regards the mode of submission, the NIT mentioned that the Bids were to be uploaded on the e-Procurement Portal : <http://eprocure.gov.in/eprocure/app> [also to be referred to as 'the Portal' or 'e-Procurement Portal' at places hereinafter, for easy reference] before the last date and time of submission of bids [Bid Due Date] and a bid submitted using any other mode was not to be accepted. It was further notified that the bids including supporting documents, were to be uploaded by the bidders only through the e-Procurement Portal and hardcopy of the Bidding Documents was not to be accepted. The bidders had to fill in all relevant information and to submit the Bidding Documents in complete into electronic tender on the e-Procurement Portal. Both the Techno-Commercial Bid and the Price Bid were to be submitted concurrently by signing them digitally, at the e-Procurement Portal. As per the procedure laid down in the Bidding Documents, the Techno-Commercial Bids [Part-I] received on the e-Procurement Portal were to be opened first and thereafter, the same, submitted in electronic form, were to be processed on the e-Procurement Module on the e-Procurement Portal. The Price Bids [Part-II] of e-Bid of only those bidders whose Techno-Commercial Bids were determined to be technically and commercially acceptable by the EPCM Consultant, would be opened. The bidders selected for opening of their Price Bids were to be informed about the date, time and place of Price Bid opening.

3. After opening the Techno-Commercial Bids, the Techno-Commercial Bids of the bidders were evaluated and completed on 24.12.2022. After evaluation of the Techno-Commercial Bids, the respondent NRL/EPCM Consultant found Techno-Commercial Bids of two bidders i.e. the petitioner and the respondent no. 4 responsive and it was decided to open the Price Bids submitted by the two participant bidders. The date of opening of the Price Bids was scheduled at 3-00 p.m. on 26.12.2022.
4. It is the case of the petitioner that it successfully uploaded both the Techno-Commercial Bid and the Price Bid on the e-Procurement Portal on 07.12.2022. By duly admitting both the Bids submitted by the petitioner on the e-Procurement Portal, the System generated an acknowledgement acknowledging successful submission of both the Techno-Commercial Bid and the Price Bid of the petitioner. The Techno-Commercial Bids of the two participant bidders i.e. the petitioner and the respondent no. 4, were opened for evaluation on 08.12.2022. After evaluation of the Techno-Commercial Bids, a Summary Sheet was generated on the e-Procurement Portal declaring that the Techno-Commercial Bids of the petitioner and the respondent no. 4 were accepted with the recommendation to open their Price Bids. As scheduled, the Price Bids of the two participant bidders whose Techno-Commercial Bids were found responsive, were opened on 26.12.2022. The e-Procurement System generated a Tender Summary Report first indicating that the Price Bids of the two participant bidders were admitted for opening. Thereafter, the e-Procurement System had automatically generated a BoQ Comparative Statement containing a comparative analysis of the Price Bids submitted by the two participant bidders. In the System-generated BoQ Comparative Statement, only the rates and amounts uploaded by the respondent no. 4 in its Price Bid were reflected and the data and the rates stated to be uploaded by the petitioner in its Price Bid were not reflected in the System-generated BoQ Comparative Statement.
- 4.1. Having noticed that the data and the rates uploaded by the petitioner in its Price Bid were not reflected in the System-generated BoQ Comparative Statement, uploaded on the e-Procurement Portal on 26.12.2022, the petitioner stated to have immediately contacted the officials of the respondent no. 2 and the respondent no. 3 requesting for the reason as to why the contents of its Price Bid were not reflected in the System-generated BoQ Comparative Statement. After exchange of a number of communications from both the sides since 27.12.2022, an e-mail was finally



received by the petitioner on 02.01.2023 from the respondent no. 3 stating that the Price Bid was 'not viewable without login credentials' due to which its Price Bid could not be considered for further evaluation. It was mentioned that as a consequence, the petitioner's offer stood rejected in accordance with Clause F[i][h] read with Clause F[i][bbb] of the NIT/Bidding Documents, and applicable laws, including laws of equity.

5. Aggrieved by such rejection of its Bid, the petitioner has approached the Court by this writ petition instituted under Article 226 of the Constitution of India seeking inter alia setting aside of the decision of the respondent authorities to reject the Bid of the petitioner, communicated vide the e-mail dated 02.01.2023, and also for a direction to the respondent NRL to consider the Price Bid of the petitioner in accordance with the NIT and the Bidding Documents.
6. I have heard Mr. D. Das, learned senior counsel assisted by Mr. A. Khanna, learned counsel for the petitioner; Mr. K. Gogoi, learned Central Government Counsel [CGC] for the respondent no. 1; Mr. N. Dekka, learned counsel for the respondent no. 2; Mr. B. Chetri, learned counsel for the respondent no. 3; and Dr. A. Saraf, learned senior counsel assisted by Mr. P. Baruah, learned counsel for the respondent no. 4.
7. Mr. Das, learned senior counsel appearing for the petitioner, opening his submissions, has submitted that the competitive bidding process was a Global Tender – Open Competitive Bidding under single stage two-bid system comprising of Techno-Commercial Bid [Un-Priced Bid] & Price Bid. The petitioner submitted both its Bids by uploading the same on the e-Procurement Portal on 07.12.2022, that is, before the scheduled time on the last date of bid submission. As per the Bid Acknowledgement published on 07.12.2022, the Bid of the petitioner was successfully uploaded on the e-Procurement Portal. The Techno-Commercial Bids of the participant bidders were opened on 24.12.2022 and from the Summary Sheet uploaded on the e-Procurement Portal, it was reflected that only two bidders i.e. the petitioner and the respondent no. 2 had participated in the bidding process and their Techno-Commercial Bids were accepted. After the evaluation process of the Techno-Commercial Bids was over, it was decided to open the Price Bid of the two bidders at 3-00 p.m. on 26.12.2022. After opening of the Price Bids resulting in the System-generated BoQ Comparative Statement on 26.12.2022, the decision regarding

rejection of the Bid of the petitioner was conveyed on 02.01.2023 by the e-mail of even date.

- 7.1. Mr. Das has referred to the different events and the communications exchanged between the petitioner and the respondent authorities during the period from 26.12.2022 to 02.01.2023, which, according to him, were parts of the decision-making process. He has extensively referred to e-mails, dated 27.12.2022 & dated 02.01.2023. By the e-mail dated 02.01.2023 [at 10-03 a.m.], the respondent no. 3 expressing regret, informed the petitioner that the petitioner's Price Bid could not be considered for further evaluation as the contents of the Price Bid were not viewable without login credentials. He has contended that the respondent authorities without any application of mind, had taken resort to Clause F[i][h] and Clause F[i][bbb] of the NIT as the grounds of rejection of the Price Bid of the petitioner.
- 7.2. It is his submission that the said two clauses i.e. Clause F[i][h] and Clause F[i][bbb] of the NIT were not attracted in the case in hand. By making reference to Clause F[tt] of the Bidding Documents, he has contended that any rejection of the Price Bid, if it entailed so, the same was required to be done only after opening of the Price Bids, meaning thereby, it was incumbent on the part of the Tendering Authority to open the Price Bid of a bidder whose Techno-Commercial Bid was found responsive and only then, it could be considered as final. Drawing attention to Clause 34.3[ii], he has contended that Clause 34.3[ii] required that the Price Bids of only those bidders whose Techno-Commercial Bids were determined to be technically and commercially acceptable by the respondent no. 3, shall be opened. He has, thus, contended that Clause 34.3[ii] had cast an obligation on the part of the Tendering Authority to open the Price Bid of a bidder like the petitioner herein whose Techno-Commercial Bid had been found responsive. It is his submission that Clause 41.1 was similarly worded like Clause 34.3[ii] and the presence of two similarly worded clauses in the Bidding Documents had made it amply clear that the Price Bid of a Techno-Commercially responsive bidder was necessarily to be opened and evaluated in all situations.
- 7.3. Clause F[aaa][d] had prescribed that the Price Bid was required to be submitted by the bidder in the BoQ format. It was only in the event the Price Bid was not submitted by a bidder in the BoQ format, the Bid of such bidder would be considered as non-responsive entailing rejection. Clause 39.3 had laid down the Bid Rejection



Criteria in relation to Techno-Commercial Bids only and those criteria were open to the Tendering Authority to apply during the process of evaluation of the Techno-Commercial Bids. In case a bidder did not submit the Techno-Commercial Bid in the prescribed format, that is, password protected PDF files, the same would have led to rejection of the Techno-Commercial Bid. Such was not the case in respect of the Techno-Commercial Bid of the petitioner as the petitioner had uploaded its Techno-Commercial Bid in the prescribed format, that is, in password protected PDF files. In this connection, the learned senior counsel has referred to 'Frequently Asked Questions' [FAQ] listed by the Government of India in the Central Public Procurement Portal [e-Procurement]. Question & Answer [Q&A] no. 9 therein pertain to generation of the BoQ Comparative Statement by the e-Procurement Portal. The query therein is to the effect that if the data of a bidder do not get reflected in the System-generated BoQ Comparative Statement what would be consequence. It is answered that the e-Procurement Portal generates the Comparative Statement from the BoQ Excel file uploaded by the bidders and if the bidder makes any mistake in Sheet Name or any of the values, then the System would not be able to read the data from the BoQ uploaded and hence, may get miss out from the Comparative Statement. The Department user may take a decision to accept or reject depending on the nature of mistake for regeneration the Comparative Statement manually and upload the Comparative Statement along with the Financial Summary which can be seen by the general public. Thus, it is contended that merely because BoQ Excel file containing the Price Bid of the petitioner was a password protected one and the e-Procurement Portal did not read the data and the rates from the said BoQ Excel file, uploaded successfully on the e-Procurement Portal by the petitioner, resulting in non-reflection of the data and the rates from the said BoQ Excel file in the System-generated BoQ Comparative Statement, the Tendering Authority considering the alleged mistake, which by no stretch was an intentional one, ought to have regenerated the Comparative Statement manually and uploaded such a Comparative Statement along with Financial Summary on the e-Procurement Portal. Such non-intervention on the part of the Tendering Authority to re-generate and upload the Comparative Statement manually on the e-Procurement Portal was clearly an arbitrary and discriminatory act resulting in causing prejudice to the petitioner, he has contended. In the event a decision was taken by the Tendering Authority to re-generate the Comparative Statement manually and upload the same on the e-Procurement Portal, such a decision would not have materially affected any of the



stakeholders. Rather, the same would be consistent with a fair and non-arbitrary bidding process.

- 7.4. It is his further contention that there was no doubt whatsoever as regards the scope/possibility of manipulating the data entered by a bidder in its Price Bid after the Price Bid was uploaded in the e-Procurement Portal. The respondent NRL itself had sought a clarification from M/s National Informatics Center [NIC], Ministry of Electronics & Information Technology vide a letter dated 18.01.2023 with a query to the effect that whether anyone including the bidder, can make any changes to an uploaded BoQ Excel file after the elapse of the Bid Due Date. The NIC had replied by its e-mail dated 19.01.2023 stating that after the bid submission due date and time, a bidder cannot modify BoQ once the Price Bid had been uploaded on the e-Procurement Portal. He has, thus, contended that the petitioner had uploaded its Price Bid on the e-Procurement Portal in the correct file format, that is, BoQ Excel file. Yet, the respondent no. 2 and the respondent no. 3 had taken shelter under Clause F[i][bbb] to reject the Price Bid of the petitioner. Under Clause 75[i][bbb], a Price Bid can be rejected if it did not open due to corrupt bid values/formats. From the e-mail dated 27.12.2022 of the respondents, it is clear that they could open the Price Bid of the petitioner on 27.12.2022.
- 7.5. It is contended that Clause 11 of Instructions to Bidders [ITB] of the Bidding Documents required the bidders to sign an Integrity Pact. Clause 11.6 therein made mention of the appointment of Independent External Monitors [IEMs]. The matter of non-opening of the password protected BoQ Excel file containing the Price Bid of the petitioner was considered by the IEMs in its meeting and the IEMs had offered their view, which are advisory in nature, only on 04.01.2023, that is, after rejection of the Price Bid of the petitioner on 02.01.2023. The learned senior counsel for the petitioner by referring to the Record Note of Discussions of the IEMs, has contended that the decision to reject the Price Bid of the petitioner was taken at a time, anterior to the decision taken by the IEMs. Thus, the decision to reject the bid of the petitioner at an earlier date [02.01.2023] when the matter was still under consideration of the IEMs, was ex-facie arbitrary and unjustified with mala fide intent on the part of the respondent NRL as well as the EPCM Consultant.
- 7.6. Mr. Das, learned senior counsel for the petitioner has, thus, articulated his grounds of challenge on the premises, firstly, there was arbitrariness in the decision-making



process as the rejection of the Bid of the petitioner on 02.01.2023 is incorrect and for untenable reasons; and secondly, there was no power and authority to reject the Price Bid of a bidder whose Techno-Commercial Bid had been found responsive, merely because of a password has been put in the BoQ Excel file containing its Price Bid. Therefore, such rejection was beyond the scope of the NIT/Bidding Documents and as such, the decision to reject the Price Bid of the petitioner is liable to be set aside. Apparently, there is no deliberation before the decision taken on 02.01.2023 to reject the Price Bid of the petitioner as the meeting of the IEMs was held posterior 02.01.2023, that is, only on 04.01.2023.

- 7.8. In support of his submissions, Mr. Das has referred to the decisions of the Hon'ble Supreme Court in - [i] **Poddar Steel Corporation vs. Ganesh Engineering Works and others**, reported in [1991] 3 SCC 273, Para 6; [ii] **Jagdish Mandal vs. State of Orissa and others**, reported in [2007] 14 SCC 517, Para 22; and [iii] **Tata Cellular vs. Union of India**, reported in [1994] 6 SCC 651, paras 70 & 77; and the decisions of the Hon'ble High Court of Maharashtra in the case of – [i] **Khare and Tarkunde Infrastructure Pvt. Ltd. vs. State of Maharashtra and others**, reported in 2015 [3] Mh.L.J. 668, Paras 14 & 27; and [ii] **Agrawal Roadlines Pvt. Ltd. vs. Indian Oil Corporation Ltd and others**, reported in 2003 [1] Mh.L.J. 610, Para 7.
8. Mr. Deka, learned counsel for the respondent no. 2 has submitted that what is under challenge in this writ petition is rejection of the Price Bid of the petitioner at the stage of opening of the Price Bids of the participant bidders. As per the NIT, e-Bids were invited from the bidders and the type of bid was a Global-Tender and Open Competitive bidding under single stage two-bid system comprising of Techno-Commercial Bid and Price Bid. As per Clause F[i][h], the Unpriced Bid i.e. the Techno-Commercial Bid was to be uploaded only in password protected files on the e-Procurement Portal. There was no stipulation of uploading the Price Bid in password protected BoQ Excel files. It is his submission that it is not the case of the petitioner that the petitioner had misconstrued Clause F[i][h] of the Bidding Documents. Clause F[tt] had made it clear that the Comparative Statement [BoQcomparativechart.xlsx] would be system generated after opening of the Price Bids without any manual intervention, meaning thereby, the e-Procurement Portal would automatically create a comparative statement. The bidders were informed before about the time [3-00 p.m.] and the date of opening [26.12.2023] of the Price Bids of the participant bidders whose bids were found responsive after the stage of



Techno-Commercial Bid opening and evaluation. At the scheduled time and date, the e-Procurement Portal had automatically generated the BoQ Comparative Statement. As there were only two bidders whose Techno-Commercial Bids were found responsive, that is, the petitioner and the respondent no. 4, their names were reflected in the System-generated BoQ Comparative Statement. While BoQ Excel file uploaded by the respondent no. 4 was opened automatically, the BoQ Excel file stated to be uploaded by the petitioner, could not be opened by the System, at the same time, on the e-Procurement Portal along with the BoQ Excel file uploaded by the respondent no. 4. As a result, the System-generated BoQ Comparative Statement reflected the data and the rates quoted by the respondent no. 4 only and the Comparative Statement did not reflect the data and the rates quoted by the petitioner in its Price Bid. As a result, the System-generated BoQ Comparative Statement identified the respondent no. 1 as the L-1 Bidder. He has referred to the consolidated BoQ defect details generated by the e-Procurement Portal in respect of the petitioner's Price Bid. The automatically generated Comparative Statement had specified the BoQ defects in respect of the Price Bid uploaded by the petitioner. When the reason behind non-opening of the BoQ Excel file stated to be uploaded by the petitioner on the e-Procurement Portal was looked into, it was found that the BoQ Excel file containing the Price Bid of the petitioner was a password protected one.

- 8.1. Drawing attention to Clause F[i][h], Clause F[aaa] and Clause F[bbb], Mr. Deka has submitted that the BoQ Excel file stated to be uploaded by the petitioner was not in the correct and proper format. He has contended that Clause 10.3 [Part-II] [Price Bid] had specifically indicated that the schedule of rates with prices were to be duly filled in in accordance with the Bidding Documents and the rates were to be filled by the bidders in accordance with instructions provided in the preamble to Schedule of Rates/SP-Forms, in the e-Procurement Portal, without making any changes in the format/names of the file/worksheet. But, the petitioner by uploading a password protected BoQ Excel file in respect of its Price Bid unilaterally changed the format and as a result of which, the Price Bid of the petitioner could not be opened at the same time along with Price Bid of the only other Techno-Commercially responsive bidder remaining at that stage. He has submitted that it is true that after opening of the Price Bid, there would be further evaluation of a Price Bid in terms of the Bidding Documents but that stage did not arrive in respect of the Price Bid of the petitioner as its Price Bid was found defective at the stage of its opening itself. He has



contended that the petitioner's reliance on Clause 30.3 and Clause 41.1 was seemingly fallacious as there was no obligation cast therein for the Tendering Authority/EPCM Consultant to consider the Price Bid of a bidder who was found responsive in respect of the Techno-Commercial Bids, in all situations even if its Price Bid was found to be not opening at the same time with other Techno-Commercially responsive bidders.

- 8.2. He has asserted that the respondent NRL authorities have made its stand clear in its counter affidavit, more particularly, in paragraph 3 and paragraph 5 thereof. By referring to Question & Answer [Q&A] no. 9 in the Frequently Asked Question [FAQ] circulated in the Central Public Procurement Portal [e-procurement] by the Government of India with regard to the contention made by the petitioner, he has submitted that if the bidder makes any mistake in uploading the BoQ and the System-generated Comparative Statement could not read the data from the uploaded BoQ resulting in missing out from the Comparative Statement, then the discretion was left for the Tendering Authority/EPCM Consultant to take a decision either to accept or to reject, depending on the nature of mistake. In the case in hand, when the Tendering Authority found that the BoQ Excel file uploaded on the e-Procurement Portal by the petitioner was not in the prescribed format being password protected and was not in conformity with the Bidding Documents, the decision was taken not to accept the Price Bid of the petitioner being defective for further evaluation and such decision cannot be challenged by the petitioner as the same cannot be dubbed as arbitrary and also cannot be a subject-matter of judicial review. As regard the contention advanced on behalf of the petitioner in respect of the decision taken by the IEMs, he has contended with reference to the Record Note of Discussions of the IEM, that the Meeting of the IEMs was held on 29.12.2022 and the Minutes of the Meeting was digitally signed on 04.01.2023. Thus, the contention that the decision of the IEMs was posterior to the decision to reject the Price Bid of the petitioner on 02.01.2023 is not correct. The petitioner was well aware that by the e-mail dated 27.12.2022, the Tendering Authority/EPCM Consultant had intimated the petitioner that the BoQ Excel file containing the Price Bid did not open at their ends and as a result, its content could not be viewed by them till that time as attempts to open the file resulted in seeking login credentials by the System. The e-mail dated 27.12.2022 had made it clear that the request should not be construed, in any way, to mean that the Price Bid of the petitioner would be used for further bid evaluation. Thus, the e-mail was clearly with the caveat and as such, it cannot, by

any stretch, be construed as a waiver. It is not open for the petitioner to raise any issue of prejudice. In a competitive bidding process, there is no space for raising the issue of prejudice as it is the decision-making process which can only be examined by way of judicial review and the decision is not to be made subject-matter of judicial review. In a competitive bidding process, there has to be free play at the joints for the Tendering Authority and unless the process adopted by the Tendering Authority is found to be shockingly arbitrary or perverse or mala fide, there is no necessity to interfere the decision of the Tendering Authority. He has referred to the decision of the Hon'ble Supreme Court of India in **Fasih Chaudhary vs. Director General, Doordarshan and others**, reported in [1989] 1 SCC 89, in support of his submissions.

9. Mr. Gogoi, learned Central Government Counsel [CGC] appearing for the respondent no. 1 has submitted that the Tendering Authorities are required to follow the procedure mentioned in Frequently Asked Questions [FAQ] published in respect of Central Public Procurement Portal [e-Procurement] by the Government of India.
10. Mr. Chetri, learned counsel appearing for the respondent no. 3 has adopted the submissions of Mr. Deka, learned counsel appearing for the respondent no. 2. It is submitted by him that the respondent no. 3 is the Engineering Procurement & Construction Management [EPCM] Consultant on behalf of the respondent M/s Numaligarh Refinery Limited in respect of the Contract-Work in question. He has submitted that the respondent no. 3 had scrupulously followed the procedure laid down in the Bidding Documents, published with the NIT dated 25.10.2022.
11. Dr. Saraf, learned senior counsel appearing for the respondent no. 4 has, at first, referred to the Order dated 06.01.2023 earlier passed in the writ petition whereby the writ petition was disposed of at the motion stage itself, and the Order dated 25.01.2023 passed by Division Bench when an intra-court appeal, Writ Appeal no. 13/2023 was preferred by the respondent no. 4 as the writ appellant against the Order dated 06.01.2023. It is submitted by him that by the Order dated 25.01.2023 passed in the intra-court appeal, the Order dated 06.01.2023 passed by a co-ordinate Bench of this Court was set aside and the writ petition was, accordingly, restored to file in its original number. In the Order dated 25.01.2023, it was observed that the respondent no. 4 i.e. the appellant in Writ Appeal no. 13/2023



would appear on 30.01.2023 before the Court to which the writ petition would be remanded.

- 11.1. Dr. Saraf has contended that the grievance of the petitioner regarding rejection of its Price Bid is not sustainable and it is only an afterthought. The petitioner has raised the grievance after being unsuccessful in the Price Bid stage due to its own non-compliance which could have been avoided if the petitioner was vigilant enough in checking the NIT/Bidding Documents prior to its Bid submission. The Price Bid of the petitioner did not open on the e-Procurement Portal as the petitioner had uploaded a password protected Price Bid in Excel BoQ format. Clause E of the Instructions to Bidders [ITB] had mandated that the bidders were required to make the proposals in a format as specified in the instructions to ensure a uniform proposal structure and, thus, it was incumbent for all the bidders to make sure that their bids could be accessed by the Tendering Authority at all times. He has highlighted that as per the petitioner itself, despite providing the login credentials on 27.12.2022, that is, one day after opening of the Price Bids, the Price Bid of the petitioner could not be opened either by the Tendering Authority or by the EPCM Consultant. Opening of the Price Bids must be a transparent process and at that stage, the Price Bids of all the bidders must be opened simultaneously. Opening of the Price Bid of a bidder at a subsequent stage is abhorrent to the principle of fairness and transparency, which is sine qua non in a global competitive bidding process. If the petitioner's Price Bid is allowed to be considered at a subsequent stage, the respondent no. 4 whose Price Bid was compliant to the terms and conditions of the Bidding Documents and the NIT, would be only affected party. It would, then, amount to rewarding an erring party and penalizing a party who did no wrong. He has contended that it is a requirement of a fair and transparent bidding process that the Price Bids of all the bidders are opened publicly, transparently and simultaneously.
- 11.2. It is his contention that the petitioner had committed a violation of a fair and transparent bidding process by submitting a password protected Price Bid, which required login credentials to open. The language in Clause F[i][h] was clear and unambiguous as it had clearly set forth that the bidders shall upload password protected PDF files in respect of its Unpriced Bid [Techno-Commercial Bid] only on the e-Procurement Portal. But, the petitioner also submitted its Price Bid in a password protected format, which was in contravention of the NIT/Bidding Documents, thereby, making its entire Bid defective. It was made clear in the



NIT/Bidding Documents that no complaint whatsoever shall be entertained against the System-generated BoQ Comparative Statement. Once the Price Bids were opened on 26.12.2022 and the BoQ Comparative Statement was visible on the e-Procurement Portal, the same became final. The System-generated BoQ Comparative Statement clearly showed no data and rates against the Price Bid of the petitioner while showing the data and the rates against the bid of the respondent no. 4. By referring to Clause 39 and Clause 44 of the ITB, he has contended that the Tendering Authority and the EPCM Consultant had rightly used the discretion to reject the Bid of the petitioner.

- 11.3. In support of his submissions, Dr. Saraf, learned senior counsel appearing for the respondent no. 4 has referred to the following decisions : - [i] **Montecarlo Limited vs. National Thermal Power Corporation Limited**, reported in [2016] 15 SCC 272, Para 26; [ii] **Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. New J.K. Roadways, Fleet Owners and Transport Contractors and others**, reported in 2020 SCC OnLine SC 1035, Para 15; [iii] **Agmatel India Private Limited vs. Resoursys Telecom and others**, reported in [2022] 5 SCC 362, Paras 24 & 26; [iv] **N.G. Projects Limited vs. Vinod Kumar Jain and others**, reported in [2022] 6 SCC 127, Paras 22 & 23; [v] **G.J. Fernandez vs. State of Karnataka**, reported in [1990] 2 SCC 488, Para 14; [vi] **Tata Cellular vs. Union of India**, reported in [1994] 6 SCC 651, Paras 70 & 77; [vii] **Raunaq International Limited vs. I.V.R. Construction Limited and others**, reported in [1999] 1 SCC 492, Paras 10 to 13; [viii] **Jagdish Mandal vs. State of Orissa and others**, reported in [2007] 14 SCC 517, Para 22; [ix] **Meerut Development Authority vs. Assistant Management Studies**, reported in [2009] 6 SCC 171, Paras 26, 27 & 40; [x] **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & another**, reported in [2016] 16 SCC 818, Paras 13 & 15; [xi] **Central Coalfields Limited vs. SLL-SML (Joint Venture Consortium)**, reported in [2016] 8 SCC 622, Paras 32 & 37; [xii] **Silppi Constructions Contractors vs. Union of India and another**, reported in [2020] 16 SCC 489, Para 20; and [xiii] **Bharat Coking Coal Limited and others vs. AMR Dev Prabha and others**, reported in [2020] 16 SCC 759, Paras 46 & 47.
12. In reply to the submissions and contentions advanced by the learned counsel for the respondents, Mr. Das, learned senior counsel for the petitioner has contended that the respondent no. 4 was only a co-bidder and not the successful bidder and as such, no legal rights of the respondent no. 4 would be affected if the writ petition is

allowed. In any view of the matter, the petitioner is not seeking any relief against the respondent no. 4 as it only seeks consideration of its Price Bid. Iterating his contention made earlier, he has submitted that there is no clause in the NIT/Bidding Documents which required a Price Bid without password nor it contemplated rejection of the Price Bid if a password had been put as apparently, there was no deviation in the format of the Price Bid uploaded by the petitioner on the e-Procurement Portal.

- 12.1. By referring to each of the decisions relied on behalf of the respondent no. 4 separately, he has contended that though most of the judgments are in respect of judicial review in relation to contractual matters, but the same are mostly limited to three circumstances, firstly, rejection of technical bid; secondly, challenge to the award of contract; and thirdly, challenge to a technical criterion provided in the tender. The case in hand, according to him, does not fall under any of the aforementioned three categories. He has contended that in the present case, the decision of the Tendering Authority was arbitrary for two reasons, firstly, there was no basis or explanation in the e-mail dated 27.12.2022 and the subsequent impugned rejection made vide e-mail dated 02.01.2023; and secondly, the FAQs have given a discretionary power to the respondent NRL to manually upload a price bid. The FAQs have contemplated a situation where a Price Bid may not open in the e-Procurement Portal due to some technical reason but it was/is open for the respondent NRL to open such Price Bid and to upload the same manually, which they did not do in the case in hand. Thus, arbitrariness in the decision-making process is apparent on the face of the record. It is his contention that the requirement of simultaneous opening of bid is only academic inasmuch as such simultaneous opening of bids was relevant only in case of a manual bidding process.
13. I have given due consideration to the submissions made by the learned counsel for the parties and have also meticulously gone through the materials brought on record by the parties through their pleadings. I have also gone through the contents of the NIT/Bidding Documents and the clauses therein, referred to by the parties, and the decisions cited at the Bar.
14. It may be mentioned that aggrieved by the reasons for which Price Bid of the petitioner for the Contract-Work was rejected, the present writ petition was moved on 06.01.2023 before a co-ordinate Bench of this Court. After hearing the learned

counsel for the petitioner and the respondent no. 2 and taking note of the submissions made by them, the writ petition was disposed of with a direction to the respondent no. 2 to take a decision in accordance with law by taking an independent view from the order of rejection on 02.01.2023. The writ petition was disposed of by an Order dated 06.01.2023 at the motion stage itself without issuing any notice to the respondents. Aggrieved by the Order dated 06.01.2023 whereby the writ petition was disposed of by a co-ordinate Bench at the motion stage without issuing notice to the respondents, the respondent no. 4 herein as the writ appellant preferred an intra-court appeal, Writ Appeal no. 13/2023. The Division Bench finding that the writ appellant-respondent no. 4 herein, who is one of the bidders in the bidding process, was not heard at the time of disposal of the writ petition, interfered with the Order dated 06.01.2023 passed in the present writ petition. By setting aside the Order dated 06.01.2023, the Division Bench while allowing the intra-court appeal by order dated 25.01.2023, remanded the matter back to the Single Bench for a fresh consideration of the writ petition, after hearing all the parties impleaded in the writ petition. In backdrop of afore-stated events, the writ petition was taken up for fresh consideration on 30.01.2023 and on that date, notices were issued to the respondents after hearing the learned counsel for the all the parties, making the notice returnable on 13.02.2023.

15. As has been mentioned above, the respondent no. 3 as the EPCM Consultant on behalf of the respondent no. 2, had published the NIT dated 25.10.2022 inviting e-Bids from eligible bidders through the website : <http://eprocure.gov.in/eprocure/app> for execution of the Contract-Work :- 'Supply of Reactor & Regenerator [RXRG] Package for PFCC Unit as per Technical Specifications for Numaligarh Refinery Limited, Assam, India'. The e-Bids were to be in total compliance to the Technical Specifications, Scope, terms & conditions of the Enquiry Documents/Attachments, from competent bidders which should have the technical and financial capabilities fulfilling the Bidder Qualification Criteria [BQC] stated in the NIT/Bidding Documents. The type of bid was Global Tender – Open Competitive Bidding under single stage two-bid system [Part-1 : Techno-Commercial Bid (Unpriced Bid) & Part-2 : Price Bid]. As per Clause 10 : Bidder Qualification Criteria [BQC] of the NIT/Bidding Documents, the bidders shall have to meet the minimum qualification criteria, detailed thereinbelow, to qualify and the bidders shall have to furnish proof of their qualification credentials and other relevant documents mentioned in the Bidding Documents along with Part-1 : Techno-Commercial Bid. Clause 10.1, Clause 10.2



and Clause 10.3 have set forth the Technical Experience Criteria, the Financial Criteria and the Commercial Experience Criteria respectively by indicating also the relevant documents to be submitted with the bid. As those Bidder Qualification Criteria [BQC] are relatable to the Techno-Commercial Bid [Unpriced Bid], a detail dilation is not necessary here as the issue involved in this writ petition is not related to the Techno-Commercial Bids [Unpriced Bids] of the participant bidders.

16. Clause 10 of the NIT had provided for the mode of submission of bids. As per Clause 12, the bids must be uploaded on the e-Procurement Portal, <http://eprocure.gov.in/eprocure/app> before the last date and time of submission of tender [Bid Due Date]. There is no controversy with regard to uploading of the bids by the two participant bidders on the e-Procurement Portal as both of them had successfully uploaded their Bids on the e-Procurement Portal before the last date and time of submission of bids [Bid Due Date].
17. Sub-clause [i] of Clause F – General mentioned about the Bidding Documents. By Clause F[i][a], bidders had been advised to go through the instructions provided as 'Instructions for online Bid Submission' provided at Appendix-A to the NIT. As per Clause F[i][e], both Techno-Commercial Bid and Price Bid were to be submitted concurrently. Clause F[i][h] is of relevance as the same is cited as one of the grounds of rejection of the bid of the petitioner. Clause F[i][h] reads as under :-

Clause F[i][h] - In order to maintain confidentiality of all documents and drawing submitted by Bidder in response to its Unpriced Bid only, Bidder[s] shall upload Password PDF Files only in the portal. For ease, same password shall be used for all the uploaded PDF documents, which will be subsequently shared by email to the officials of NRL/tkIS as per the details mentioned at Sr. no. 21 of NIT.

- 17.1. By Clause F[l], bidders were requested to get all the queries related to tender clarified before the Bid Opening and to ensure compliance of all provisions of the Bidding Documents. With Clause F[t], the owner had reserved the right to reject any or all of the bids or any parts of the bids so received and to cancel the bidding process in part or in full and also to extend the Bid Due Date without assigning any reason. Vide Clause F[x], it had been mentioned that during the tendering stage, all communications would be made through the e-Procurement Portal and post-



submission of bids, all communications/clarifications shall be sought outside the e-Procurement Portal.

17.2. Clause F[tt] had stated about opening of the Price Bids as follows :-

Clause F[tt] - Bidders to note that the Comparative Statement [boqcomparativechart.xlsx] generated after opening of the price bids is system generated and may not take into consideration of various loading and evaluation criteria, as defined in the Bid Document.

The actual comparative tabulation [In pdf format] considering all loading & evaluation parameters of the tender, for Techno-Commercially acceptable offers will be uploaded on CPP Portal by the tender inviting authority, after opening of price bids, and the same shall be considered as final.

Bidders to note that no contractual allegation or complaints whatsoever shall be entertained against the system generated BoQ Comparative Chart.

17.3. Clause F[uu] mentioned that post-evaluation of the bids, the Letter of Acceptance [LoA] would be issued to the successful bidder. As per Clause F[aaa], the bidders had been asked to adhere to the provisions of the Bidding Documents, mentioned therein, without taking any deviations, which included Price BoQ Format at Clause F[aaa][d]. It had been made clear by Clause F[aaa][d] that in the event of failure to adhere to the Price BoQ Format, the bid shall be considered non-responsive and would liable to be rejected.

17.4. Clause F[bbb] and Clause F[eee] of the NIT/Bidding Documents had provided as under :-

Clause F[bbb] - Bidders to ensure submission of Correct File Format in the portal. In case NRL/tkIS India cannot open the bids due to corrupt bids files/formats, the offer shall be rejected.

Clause F[eee] – The Owner, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to :

- [a] suspend and/or cancel the Bidding Process and/or amend the Bidding Process;



- [b] supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
- [c] consult with any Bidder in order to receive clarification or further information;
- [d] retain any information and/or evidence submitted to Owner by, on behalf of, and/or in relation to any Bidder; and/or
- [e] independently verify, disqualify, reject and/or accept any and all submissions or other information and/or evidence submitted by or on behalf of any Bidder.

17.5. Clause 5 : 'Clarification of Bidding Document, Pre-Bid Meeting and Site Visit' had inter alia provided for Pre-Bid Meeting in Clause 5.1. Bidders in the own interest were advised to take part in the Pre-Bid Meeting scheduled as per the details set out in the NIT, that is, at 14-00 hours IST on 02.11.2022 seriously by submitting their genuine queries and by attending the same through their authorized representatives in order to submit their best prices on the clear understanding of the works and the Bidding Documents. The bidders were asked to participate in the Pre-Bid Meeting after carefully studying the entire Bidding Documents and after identifying all technical and commercial points on which they need clarifications. It was mentioned therein that pursuant to clarifications provided after the Pre-Bid Meeting, the bidders in their own interest shall submit e-Bids fully complying to the Bidding Documents and the respondent NRL/Consultant reserved the right to proceed with evaluation of the available compliant e-Bids without raising any technical/commercial queries in accordance with the Bidding Documents.

17.6. Clause 10.3[a] of Part-II [Price Bid] of the ITB mentioned that the Schedule of Rates with prices were to be duly filled in in accordance with the Bidding Documents. The rates were to be filled by the bidders in accordance with the instructions provided in preamble to Schedule of Rates/SP-Form, at the e-Procurement Portal, without making any changes in the format/names of the file/worksheet.

17.7. Clause 30 of Part-E of the ITB had, inter alia, set forth the procedure to be followed in submission and opening of bids. As per Clause 30.3 of Part-E of the ITB, the bidders were required to upload their e-Bid along with all supporting documents and Price Part on the e-Procurement Portal only. As per Clause 30.5 of Part-E of the ITB, the bidders were required to make the proposal in a format as outlined in the BDS [Bid Data Sheet] forming part of the Bidding Documents to achieve the objective of

maintaining a uniform proposal structure from all bidders. Clause 34 of Part-E of the ITB outlined about the procedure to be followed for Bid Opening. As on behalf of the petitioner, Clause 34.3, more specifically, Clause 34.3[ii] thereof, has been referred to, the contents of Clause 34.3 are quoted hereinbelow for ready reference :-

Clause 34.3. The order of part wise opening of E-Bid shall be as follows :

- [i] On scheduled date and time of unpriced bid opening,
  - [a] Scanned copy of Bid Security Declaration uploaded in E-Procurement Portal shall be opened first and verified that whether It has been furnished as per bid requirement or not.
  - [b] After that, opening of documents of Techno Commercial Bid [Part-1], submitted in electronic form shall be processed on the e-Procurement module of the E-Procurement Portal.
- [ii] Price Bid [Part-II] of E-Bid of only those Bidders whose Techno Commercial Bids are determined to be technically and commercially acceptable by the Consultant shall be opened. Bidders selected for opening of their Price Bids shall be informed about the date, time and place of Price Bid opening.

- 17.8. Clause 37, Clause 38 and Clause 41 of Part-F : 'Evaluation and Comparison of Bids' of the ITB had provided for 'Determination of Responsiveness', 'Clarification of Bids' and 'Opening of Price Bid' in the following manner :-

Clause 37 – Determination of Responsiveness

- 37.1 The Consultant's/NRL's determination of a E-Bid's responsiveness is to be based on the contents of the E-Bid itself, as defined in Clause 10 of ITB.
- 37.2 A substantially responsive E-Bid is one that meets the requirements of the Bidding Documents without deviation.
- 37.3 Bidder should not be under liquidation, court receivership or similar proceedings. Bidder shall submit self-declaration in this regard in the format set out in Attachment-IX to ITB, failing which, such E-Bids shall be reject and not considered for evaluation.

Clause 38 – Clarification of Bids

- 38.1 Bidders should ensure that the E-Bid submitted is substantially responsive E-Bid in the first instance itself. Evaluation may be completed based on the content of the E-Bid itself without seeking any subsequent additional information which may result in rejection of E-Bid. However, the Consultant/NRL may, at its discretion, may request Bidder to submit the

necessary information or documentation, within a reasonable period of time, to withdraw material deviation, reservation, or rectify omission in the E-Bid related to documentation requirements. Requesting information or documentation on such account shall not be related to any aspect of the Price Bid. The Consultant's/NRL's request for such clarification and the response to be provided by the Bidders shall be in writing.

38.2 No change, including any voluntary increase or decrease, in the Price Bid shall be sought, offered, or permitted post Bid Due Date. The Bidder shall not be allowed to submit any price implication or revised price after submission of E-Bid unless the same is called for by the NRL/Consultant in writing.

38.3 Any clarification submitted by a Bidder that is not in response to a request by Consultant/NRL shall not be considered. Failure of the Bidder to comply with the request may result in the rejection of its E-Bid.

38.4 If a Bidder does not provide clarifications of its E-Bid by the date and time set in the Consultant's request for clarification, its E-Bid shall be evaluated with available information which may result in rejection of their E-Bid.

#### Clause 41 – Opening of Price Bid

41.1 Price Bid [Part-II] of only those Bidders whose Techno Commercial Bids are determined to be technically and commercially acceptable by the NRL/Consultant shall be opened. Bidders selected for opening of their Price Bids shall be informed about the date, time and place of Price Bid opening.

17.9. Appendix - A to the ITB laid down the instructions for online bid submission. In Appendix - B, it had inter alia been set forth as under :-

Bidders are requested to note that they should necessarily submit their financial bids in the format provided and no other format is acceptable. If the priced bid have been given as a standard BoQ format with the tender document, then the same is to be downloaded and to be filled by all the bidders. Bidders are required to download the BoQ file, open it and complete the white colored [unprotected] cells with their respective financial quotes and other details have been completed, the bidder should have it and submit it online, without changing the filename. If the BoQ file is found to be modified by the bidder, the bid will be rejected.

18. At this juncture, the propositions which are projected by the learned counsel for the parties through the decisions, mentioned above, can be referred to.

18.1. In **Montecarlo Limited vs. National Thermal Power Corporation Limited**, reported in [2016] 15 SCC 272, the Hon'ble Supreme Court of India has observed as under :-

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

18.2. In **Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. New J.K. Roadways, Fleet Owners and Transport Contractors and others**, reported



in 2020 SCC OnLine SC 1035, the Hon'ble Supreme Court of India, in paragraph 14, has observed as under :-

14. In a series of judgements, this court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.**, [2016] 16 SCC 818, this Court held :

"15. We may add that the owner or the employer of a project having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

18.3. In **Agmatel India Private Limited vs. ResourSYS Telecom and others**, reported in [2022] 5 SCC 362, the Hon'ble Supreme Court of India, in paragraphs 24 and 26, has observed as under :-

24. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject-matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the three-Judge Bench decision of this Court in **Galaxy Transport Agencies** [supra] wherein, among others, the said decision in **Afcons Infrastructure** [supra] has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment.

\* \* \* \* \*

26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be best person to understand and appreciate its

requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.

**18.4. N.G. Projects Limited vs. Vinod Kumar Jain and others**, reported in [2022] 6 SCC 127, it has been held, in paragraphs 22 & 23, 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. 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.

18.5. In **G.J. Fernandez vs. State of Karnataka**, reported in [1990] 2 SCC 488, the Hon'ble Supreme Court of India, in paragraph 14, has observed as under :-

14. Secondly, whatever may be the interpretation that a court may place on the NIT, the way in which the tender documents issued by it has been understood and implemented by the KPC is explained in its "note", which sets out the general procedure which the KPC was following in regard to NITs issued by it from time to time. Para 2.00 of the "note" makes it clear that the KPC took the view that para I alone incorporated the "minimum pre-qualifying/eligibility conditions" and the data called for under para V was in the nature "general requirements". It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but, on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the appellant that para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future NITs that only the fulfilment of pre-qualifying conditions would be mandatory. If a party has been consistently and bona fide interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

18.6. In the celebrated and oft-quoted decision of the three-judges Bench of the Hon'ble Supreme Court of India in **Tata Cellular vs. Union of India**, reported in [1994] 6 SCC 651, the Hon'ble Supreme Court of India has observed, in paragraphs 70 & 77, as under :-

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent

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

\* \* \* \* \*

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

- [i] Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- [ii] Irrationality, namely, Wednesbury unreasonableness.
- [iii] Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R.V. Secretary of State for the Home Department, ex Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of

proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

18.7. In **Raunaq International Limited vs. I.V.R. Construction Limited and others**, reported in [1999] 1 SCC 492, the Hon'ble Supreme Court of India has observed as under :-

10. What are these elements of public interest? [1] Public money would be expended for the purposes of the contract. [2] The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. [3] The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. [4] The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work thus - involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages retardation of industrial development, hardship to the general public and substantial cost escalation.
11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect public money by deciding the dispute in favour of one tenderer or the other tender. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any retendering is prescribed, cost of the project can escalate substantially. What is more important is that ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public is a power project which is thus delayed, the public may lose substantially because of shortage in electricity supply and the consequent obstruction in industrial development. If the project is for the construction of a road or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial setback to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

18.8. The contents of paragraph 22 in **Jagdish Mandal vs. State of Orissa and others**, reported in [2007] 14 SCC 517, are referred extensively in many subsequent decisions and the same states as under :-

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.

18.9. In **Meerut Development Authority vs. Assistant Management Studies**, reported in [2009] 6 SCC 171, the Hon'ble Supreme Court of India has observed as under :-

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to

perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

\* \* \* \* \*

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

\* \* \* \* \*

40. There is no difficulty to hold that the authorities owe a duty to act fairly, but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.

18.10. In paragraphs 13 & 15 of **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & another**, reported in [2016] 16 SCC 818, the Hon'ble Supreme Court of India has observed as under :-

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

\* \* \* \* \*

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

18.11. In **Central Coalfields Limited vs. SLL-SML [Joint Venture Consortium]**, reported in [2016] 8 SCC 622, the Hon'ble Supreme Court, in Paragraphs 32 & 37, has observed as under :-

32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

\* \* \* \* \*

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

18.12. In **Silppi Constructions Contractors vs. Union of India and another**, reported in [2020] 16 SCC 489, the Hon'ble Supreme Court of India, in paragraph 20, has observed as under :-

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 requirements 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.

18.13. In **Bharat Coking Coal Limited and others vs. AMR Dev Prabha and others**, reported in [2020] 16 SCC 759, the Hon'ble Supreme Court of India has observed as under :-

46. With regard to other allegations concerning condonation of Respondent 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons in **Shobikaa Impex [P] Ltd. v. Central Medical Services Society**, reported in [2016] 16 SCC 233, it has been noted that :

20. .... the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point."

47. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays.





18.14. The Hon'ble Supreme Court of India in **Poddar Steel Corporation vs. Ganesh Engineering Works and others**, reported in [1991] 3 SCC 273, has observed as under :-

6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in **G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488]** a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon **Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489]** but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

18.15. In **Khare and Tarkunde Infrastructure Pvt. Ltd. vs. State of Maharashtra and others**, reported in 2015 [3] Mh.L.J. 668, the High Court of Bombay, has dealt with a matter of disqualification of a bidder of the petitioner who had not uploaded the scanned

copy of the registration of firm from original. By following the decisions of the Hon'ble Supreme Court of India in **G.J. Fernandez vs. State of Karnataka**, reported in [1990] 2 SCC 488; **Poddar Steel Corporation vs. Ganesh Engineering Works and others**, reported in [1991] 3 SCC 273; and **Rashmi Metaliks Ltd. and another vs. Kolkata Metropolitan Development Authority and others**, reported in [2013] 10 SCC 95, it is held that the condition requiring uploading of the scanned copy of the registration of firm from original cannot be construed to be an essential condition so as to non-suit a tender.

18.16. In **Agrawal Roadlines Pvt. Ltd. vs. Indian Oil Corporation Ltd. and others**, reported in 2003 [1] Mh.L.J. 610, the Bombay High Court has dealt with submission of a demand draft towards earnest money along with the tender form. Three Oil Marketing Companies - IOCL, HPCL and BPCL - invited tenders for award of separate contracts for transportation of bulk LPG by road in tank trucks and the tender form was required to be submitted with a demand draft of Rs. 1,200/- in the name of the particular Corporation. The petitioner submitted one tender form to the IOCL along with a demand draft purchased in the name of HPCL, while the other tender form submitted to BPCL was accompanied by a demand draft purchased in the name of the IOCL. Tender forms were rejected on the ground that the demand draft annexed to the tender form were not in the name of the Corporation to which the tender was submitted. It was in the backdrop of such events, it has been held that if an administrative decision is based on a hypertechnical approach by treating a non-essential condition of the tender notice as an essential condition, such administrative decision ceases to be fair and lacks reasonableness warranting interference in suitable deserving cases under Article 226 of the Constitution of India.

18.17. In **Fasih Chaudhary vs. Director General, Doordarshan and others**, reported in [1989] 1 SCC 89, the Hon'ble Supreme Court of India has emphasized that fair play in action in matters of award of contract is an essential requirement and similarly, 'free play in the joints' is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

19. Before proceeding further, two aspects related to uploading of BoQ Excel file for Price Bid on the e-Procurement Portal and the Frequently Asked Questions [FAQs] in relation to the e-Procurement Portal, urged by the parties, require a mention.



- 19.1. After non-opening of the BoQ Excel file containing the Price Bid of the petitioner on and from 26.12.2022 onwards without login credentials, the respondent NRL made a query to the National Informatics Centre [NIC] on 18.01.2023 as regards possibility of making any change in such BoQ Excel file after expiry of the Bid Due Date. The query was to the effect that once the Price Bid had been uploaded on the e-Procurement Portal whether any one including the bidder, could make any changes to the already uploaded BoQ Excel file after elapse of the Bid Due Date. The query was responded to by the NIC on 19.01.2023 stating that once the Bid Due Date was over, the bidder cannot modify the BoQ and he cannot modify the Bid also.
- 19.2. In the Frequently Asked Questions [FAQs] available at the e-Procurement Portal, Question no. 9 is to the effect that if after generation of the BoQ Comparative Statement the data of one of the bidders does not get reflected in such generated BoQ Comparative Statement what would be the option available for the Tendering Authority. As answer, it is mentioned that the System generates the Comparative Statement from the BoQ uploaded by the bidders. If the bidders make any mistake in the Sheet Name or any of the values, then the system will not be able to read the data from the BoQ uploaded and hence, may get missed out from the Comparative Statement. In such situation, the Department user, meaning thereby, the Tendering Authority may take a decision to accept or reject that depending on the nature of mistake and re-regenerate the Comparative Statement manually and upload such Comparative Statement along with the financial summary, which can be seen by the general public.
- 19.3. Keeping the aforesaid aspects in mind, it is necessary to find out what had exactly happened at the time of opening of the Price Bids of the two participant bidders on the e-Procurement Portal on 26.12.2022. It is noticed from Q&A no. 7 in the FAQ that all documents including the technical documents and the financial documents are encrypted and safely stored with the help of technology and they remain in encrypted format till the Bid opening date and time and cannot be seen by anyone till such time. With the arrival of the time for opening of the Price Bids, the System in the e-Procurement Portal automatically generates the BoQ Comparative Statement. In the case in hand, the automatically generated BoQ Comparative Statement for the Contract-Work which was uploaded in the e-Procurement Portal after the Bid Due Date [26.12.2022], was in the following form :-



e-Procurement System Government of India Created By : AMAR SONSALE Created Date/Time : 26-Dec-2022 03:48 PM Tender Title : Supply of REACTOR and REGENERATOR PACKAGE for PFCC UNIT for NREP Tender ID : 2022_NRL_719735_1							
Tender Inviting Authority : Mr. Sushant Deshpande (Chief Manager-Procurement thyssenKrupp Industrial Solutions (India) Private Limited)							
Name of Work : supply of REACTOR and REGENERATOR (RXRG) PACKAGE for PFCC UNIT for NREP PROJECT							
Contract No. : 565733							
SCHEDULE OF WORK/ITEM(S)							
Sl.No.	Description of Work/Item(S)	No. of Qty	Units	Estimated Rate	GR ENGINEERING PRIVATE LIMITED (GSTN-77AAACH8828G1ZE)		Technip Energies India Limited (GSTN-NA)
					Rate	Amount	Rate
							Amount
							L1 Vendor
1.00	SUPPLY OF REACTOR & REGENERATOR (RXRG) PACKAGE for PFCC UNIT for NREP PROJECT The scope of work comprises of project management, residual process design, detailed engineering of REACTOR & REGENERATOR (RXRG) PACKAGE, other equipment & packages as per MR, piping, structural, instrumentation, electrical etc., HAZOP/SIL Study and other safety studies as mentioned in Bidding Documents, 3D modeling, Site development and enabling jobs, soil investigation and underground scanning as mentioned in the Bidding Documents and co-ordination for the same with Owner/ Consultant, total procurement (including chemicals, first fill of chemicals and lubricants consumables, including all refractory/abrasive lining, fabrication (shop/site), special tools and tackles, pre-commissioning spares, commissioning spares, start-up spares and mandatory spares), engagement of different agencies, deployment of resources, destructive and non-destructive test, PWHT as per code, stage wise inspection including third party inspection (shop / site), transportation of all the equipment/ materials to work site, arranging the land outside the refinery on his own for construction of ware house/storage of material, and work shop with monsoon protection, structural/ piping/ supports, earthing lugs/name plates (except the area for fabrication of						
1.01	ENGINEERING PRICE (RESIDUAL PROCESS DESIGN AND DETAIL ENGINEERING in INR CURRENCY	1.00	Lumpsum		676936000.00	676936000.00	
1.02	ENGINEERING PRICE (RESIDUAL PROCESS DESIGN AND DETAIL ENGINEERING in FOREGIN CURRENCY-1	1.00	Lumpsum		0.00	0.00	
1.03	ENGINEERING PRICE (RESIDUAL PROCESS DESIGN AND DETAIL ENGINEERING in FOREGIN CURRENCY-2	1.00	Lumpsum		0.00	0.00	
1.04	SITE WORK/SERVICES FOR COMPLETION OF SCOPE OF WORK AS PER BIDDING DOCUMENT in INR CURRENCY	1.00	Lumpsum		2901150000.00	2901150000.00	
1.05	SITE WORK/SERVICES FOR COMPLETION OF SCOPE OF WORK AS PER BIDDING DOCUMENT in FOREIGN CURRENCY-1	1.00	Lumpsum		0.00	0.00	
1.06	SITE WORK/SERVICES FOR COMPLETION OF SCOPE OF WORK AS PER BIDDING DOCUMENT in FOREIGN CURRENCY-1	1.00	Lumpsum		0.00	0.00	
Total in Figures					3578085000.00		
Lowest Amount Quoted By : GR ENGINEERING PRIVATE LIMITED (3578085000.00)							
676936000.00	GR ENGINEERING PRIVATE LIMITED						
0.00	GR ENGINEERING PRIVATE LIMITED						
0.00	GR ENGINEERING PRIVATE LIMITED						
0.00	GR ENGINEERING PRIVATE LIMITED						
2901150000.00	GR ENGINEERING PRIVATE LIMITED						
0.00	GR ENGINEERING PRIVATE LIMITED						
0.00	GR ENGINEERING PRIVATE LIMITED						

Consolidated BoQ Defects Detail Tender Title : Supply of Reactor and REGENERATOR PACKAGE for PFCC UNIT for NREP Tender ID : 2022_NRL_719735_1		
Sl.No.	Bidder Name	BoQ Defects
1	Technip Energies India Limited	Sheet 'BoQ1' not found", Sheet 'BoQ2' not found", Sheet 'BoQ3' not found", Sheet 'BoQ4' not found", Sheet 'BoQ5' not found", Sheet 'BoQ6' not found"

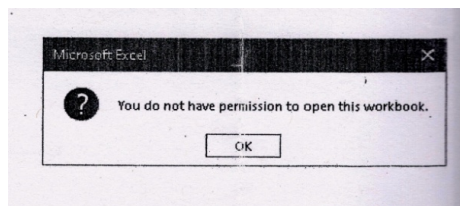
- 19.4. From a look at the above System-generated BoQ Comparative Statement, it is evident that the BoQ Comparative Statement had only reflected the data and the rates from the Price Bid in BoQ Excel file format uploaded by the respondent no. 4. Though the petitioner has also claimed that it had uploaded the BoQ Excel file containing its Price Bid successfully on the e-Procurement Portal, the BoQ Comparative Statement, automatically generated on 26.12.2022, did not reflect the data and the rates submitted by the petitioner for its Price Bid in BoQ Excel file format. In fact, the System-generated BoQ Comparative Statement was blank in so far as the data and the rates of Price Bid of the petitioner were concerned. It is pertinent to mention that the System in the e-Procurement Portal automatically generates the BoQ Comparative Statement without any manual intervention. One more look at the automatically generated BoQ Comparative Statement goes to show that the respondent no. 4 was declared as the 'L-1 vendor' therein on 26.12.2022 itself by showing Rs. 357,80,85,000.00 as 'L-1 amount'. Thus, it is evidently clear that it was on 26.12.2022 itself, the respondent no. 4 was declared as 'L-1 vendor' in the automatically generated BoQ Comparative Statement, created on the e-Procurement Portal at 03-48 p.m. From that moment [03-48 p.m.] onwards, a distinction was made between the petitioner and the respondent no. 4 with the respondent no. 4 having emerged as the 'L-1 vendor' and the petitioner being mentioned as the one whose Price Bid had suffered from defects.
20. By the time the petitioner had instituted the writ petition, the respondent no. 4 had already emerged as the 'L-1 vendor' in the BoQ Comparative Statement, automatically generated at 03-48 p.m. on 26.12.2022. It has been emphasized in **Afcon Infrastructure Limited** [supra] that in a writ petition instituted by a bidder who has been declared ineligible, there is requirement to implead the eligible bidders as parties for several reasons. One of such reasons cited therein is to the effect that there could be occasions where an eligible would bring to the notice of the owner or employer of the project that the ineligible bidder is ineligible for additional reasons or reasons that are not within the contemplation of the owner or employer of the project. It has been emphasized therein that it is to avoid such a situation, it is more appropriate for the constitutional courts to insist on all eligible bidders being made parties to the proceedings filed by an unsuccessful or ineligible bidder. In such view of the matter, the submission advanced on behalf of the petitioner that no legal rights of the respondent no. 4 would be affected due to institution of the instant writ proceedings and the respondent no. 4 is not required to be heard, cannot be



countenanced. Moreover, the Division Bench in its Order dated 25.01.2023 passed in the writ appeal, Writ Appeal no. 13/2023 had allowed participation of the respondent no. 4 in the present writ proceedings.

21. As have been mentioned hereinabove, there were exchange of communications between the petitioner on one side and the respondent no. 2 & the respondent no. 3 on the other side, through e-mails, between the period from 27.12.2022 to 02.01.2023, after the stage of opening of the Price Bids of the two participant bidders on 26.12.2022 resulting in the System-generated BoQ Comparative Statement in the manner, depicted hereinabove.
- 21.1. By the e-mail dated 27.12.2022 [at 12-18 p.m.], the respondent no. 3 informed the petitioner that while opening the petitioner's Price Bid [BoQ Excel file] for Tender Reference no. TK-1P25A-MP-RFQ-0034 for the supply of Rx-Rg Package, it was found that the Excel file was not opening. The petitioner was thereby requested to analyse and revert back as to why the Price Bid [BoQ Excel file] could not be opened to view the contents. It was informed that when the respondent no. 3 attempted to open the BoQ Excel file, it was found to be seeking login credentials. The petitioner was, however, asked to note that the request to enable opening of the Price Bid [BoQ Excel file] must not be construed in any way to mean that the prices and/or the petitioner's offer would be used for further bid evaluation. It was also informed that further bid evaluation, if any, shall be subject to the terms and conditions of the NIT and the applicable laws and the respondent NRL reserved the right to reject the petitioner's offer in accordance with the tender provisions and applicable laws.
- 21.2. The e-mail was responded by the petitioner through its e-mail dated 27.12.2022 [at 14-20 hours] expressing surprise to note that the BoQ Excel file was not opening. Informing that the petitioner was able to open the BoQ Excel file in its system without any issue or prompt, the petitioner mentioned that in case the BoQ Excel file system was asking for login credentials for opening in the respondents' system, the respondents can use e-mail id tender at technipenergies.com as the login name and the password for the e-mail id was 'passd#0987'.
- 21.3. In response, the respondent no. 3 reverted back to the petitioner on 27.12.2022 [at 4-46 p.m.] by an e-mail informing the petitioner that the respondents were still

unable to open the BoQ Excel file till then and shared a screenshot for information of the petitioner.



- 21.4. Thereafter, the petitioner responded by its e-mail dated 27.12.2022 [at 4-45 p.m.]. In the same mail, the petitioner mentioned that the petitioner checked the matter again with its IT team who had confirmed that with the login credentials given to the respondent no. 3 already, the document i.e. the BoQ Excel file should open in the System of the respondent no. 3 as well. The respondent no. 3 was asked to check with their IT team if there was some issue to be resolved in their System which had prevented the file i.e. BoQ Excel file from opening. The petitioner had asked the respondent no. 3 alternatively, to check the status of document opening with the respondent NRL authorities, if they were able to open the document i.e. BoQ Excel file in their System and to share the same with them i.e. the EPCM Consultant [the respondent no. 3].
- 21.5. Neither any of the parties nor the materials in the case records indicates to any other e-mail exchanged between the parties during the subsequent period, other than the e-mail dated 02.01.2023 [at 10-03 a.m.] sent from the end of the respondent no. 3 to the petitioner whereby the petitioner was informed that its Price Bid could not be considered for further evaluation as the contents of the Price Bid were not viewable without login credentials. The said e-mail, as indicated earlier, referred to Clause F[i][h] and Clause F[i][bbb] of the NIT of the Bidding Documents for the Contract-Work and applicable laws, including laws of equity as the reasons for rejection of the offer of the petitioner submitted in respect of the Contract-Work.
22. What has emerged in clear terms from the above exchange of communications between the parties is that the petitioner had put a password in the BoQ Excel file containing its Price Bid while uploading it on the e-Procurement Portal. It has further emerged that at the time of opening of the Price Bids on the e-Procurement Portal automatically, the BoQ Excel file of the petitioner remained password protected. As a result, the password protected BoQ Excel file did not allow access to the data and



the rates contained therein to the System at the e-Procurement Portal for automatic generation of the BoQ Comparative Statement and the same had resulted in non-reflection of the data and the rates quoted by the petitioner for its Price Bid, thereby, depriving the public in general including the other participant bidder from seeing them and the Tendering Authority from examining and analyzing them. What has further emerged, also in clear terms, is that even after the stage of Price Bid opening was over, the BoQ Excel file containing the Price Bid of the petitioner remained password protected and one could see the data and the rates quoted in the Price Bid of the petitioner only if the requisite login credentials/password is put.

23. In view of such fact situation obtaining in the case, this Court is of the unhesitant view that the afore-mentioned communications exchanged between the parties took place at the stage of post-invalidation of the Price Bid of the petitioner with the respondent no. 4 already identified as the 'L-1 vendor' by the System-generated BoQ Comparative Statement, created and uploaded on the e-Procurement Portal on 26.12.2022 without any manual intervention. It was on and from the time the BoQ Comparative Statement got created and uploaded on the e-Procurement Portal on 26.12.2022, the petitioner and the respondent no. 4 were not equal footing as the petitioner became the bidder whose Price Bid was declared defective and the respondent no. 4 emerged as the valid L-1 bidder. The exchange of communications post-26.12.2022 and post-invalidation stage of the Price Bid of the petitioner had started on 27.12.2022 with a caveat that the request to enable opening of the Price Bid of the petitioner which had asked for login credentials, must not be construed to mean that the prices and/the petitioner's offer would be used for further evaluation. It was made clear that further bid evaluation, if any, shall be subject to the terms and conditions of the NIT and the applicable clause. Had it been a case that the Price Bid of the petitioner was not generated automatically on the e-Procurement Portal at the stage of Price Bid opening due to fault not attributable to the petitioner and due to fault attributable on the part of the Tendering Authority or any third party, a decision to invalidate the Bid of the petitioner could have been a matter for consideration from the principle of equality enshrined in Article 14 of the Constitution. But, such was not the case here. It was due to an action attributable solely at the end of the petitioner, the Price Bid of the petitioner did not give access to the e-Procurement Portal and the data and the rates contained therein were not reflected in the automatically generated BoQ Comparative Statement, created and uploaded on the e-Procurement Portal on 26.12.2022.



24. From the text and tenor of the contents of the communications exchanged from the ends of the respondent no. 2 and the respondent no. 3 during the period from 27.12.2022 and 02.01.2023, it is discernible that the Tendering Authority wanted to know the exact reason as to why the BoQ Excel file containing the Price Bid of the petitioner did not open at the stage of Price Bid opening. Clause F[x] and Clause F[eee][c] of the NIT/Bidding Documents permitted such communication. After being aware about the exact reason behind such non-opening of the Price Bid of the petitioner, which had resulted due to inaccessibility of the data and the rates contained in the password protected BoQ Excel file barring the System at the e-Procurement Portal to reflect the same in the automatically generated BoQ Comparative Statement, the information conveyed by the e-mail dated 02.01.2023 to the effect that the Price Bid of the petitioner could not be considered for further evaluation due to its non-viewability without login credentials, was only an affirmation of the fact of rejection of the Price Bid of the petitioner at the post-invalidated stage. By the e-mail dated 02.01.2023, the Tendering Authority had only reiterated the fact of invalidation of the Price Bid of the petitioner which had already been invalidated on 26.12.2022, after being ascertaining itself fully about the exact reason behind the defective nature of the petitioner's Price Bid. The exercise so undertaken by the Tendering Authority subsequent to invalidation of the Price Bid of the petitioner due to its defective nature cannot, by any stretch, be regarded as arbitrary. Rather, the exercise undertaken is found to be consistent with the principles of fairness and transparency required to be followed in a competitive bidding process of such nature, thereby, removing the possibility of existence of arbitrariness from the decision-making process. The exercise undertaken is found to be an exercise which had completely ruled out any possibility of treating unequals as equals incurring violation of the principle of equality enshrined in Article 14 of the Constitution.
25. Clause F[i][h] of the NIT/Bidding Documents had mentioned about uploading of the Techno-Commercial Bid [Unpriced Bid] only on the e-Procurement Portal in a password protected PDF file and it did not ask for uploading of the Price Bid in a password protected file. By Clause F[bbb], the bidders had been asked to ensure submission of correct file format on the e-Procurement Portal and the same was with a caution that in case the Tendering Authority or the EPCM Consultant could not open the Bids due to corrupt bids/formats, the offer shall be rejected. By Clause

F[tt], bidders were made aware that the Comparative Statement generated after opening of the Price Bids would be System-generated and no complaints whatsoever shall be entertained against the System-generated BoQ Comparative Statement. Bidders were made aware by Clause F[aaa][d] that in the event of failure to adhere to the Price BoQ Format, the bid shall be considered non-responsive and would be liable for rejection. By Clause 10.3[a] of Part-II [Price Bid] of the ITB, it was inter alia mentioned that the bidders had to give the rates in accordance with the instructions and without making any changes in the format/names of the file/worksheet. In Clause 37 of Part-F of the ITB, it had been stipulated that a substantially responsive e-Bid would be one which would meet the requirements of the Bidding Documents without deviation. With a Price Bid in BoQ Excel File format with password given by the petitioner itself denying access of its contents to others including the Tendering Authority/EPCM Consultant, the Price Bid uploaded on the e-Procurement Portal was clearly with deviation and therefore, its declaration as non-responsive cannot be faulted with. Appendix - A of the ITB had specifically set forth the condition that if the BoQ file was found to be modified by the bidder, the bid would be rejected. The contention of the petitioner that Clause 34.3[ii] had cast an obligation on the part of the Tendering Authority to open the Price Bid of the petitioner whose Techno-Commercial bid had been found responsive, in all situations, is found not tenable. Clause 34.3[ii] had mentioned that the Price Bid of e-Bid of only those bidders whose Techno-Commercial bids were determined to be technically and commercially acceptable by the EPCM Consultant, shall be opened. Clause 34.3[iii] did not cast an obligation to open the Price Bid of a bidder whose Techno-Commercial bid was determined to be technically and commercially acceptable, if the Price Bid of the bidder did not even open by the System on the e-Procurement Portal at the stage of Price Bid opening. In the present case, Clause 34.3[iii] did not get operational in view of non-opening of the Price Bid of the petitioner due to its defective nature. Insistence of the petitioner that its Price Bid was not corrupt and as such, the rejection of the Price Bid was arbitrary does not hold any water as the NIT/Bidding Document had set forth the condition specifically that the a bidder had to submit the correct file format, that is, BoQ Excel file format without any password on the e-Procurement Portal. It was also a stipulation that if the BoQ file of a bidder was found to be in a modified form, the bid would entail rejection. The said conditions clearly embraces within its fold a defective Price Bid of the nature under consideration here. Any exercise of the discretion, indicated in Q&A no. 9 of the FAQ, by the Tendering Authority would have made the invalid Price Bid



of the petitioner a valid one and such validation would have been in violation of the principle embodied in Article 14 of the Constitution of India.

26. From the Record Note of Discussions of the IEMs, it is noticed that the Meeting of the IEMs was held on 29.12.2022 wherein the matter of Price Bid of the petitioner was listed as Agenda no. 3. After discussion on the Agenda, the IEMs had observed that the petitioner had made a serious mistake by submitting a password protected file, thereby, subverting the transparency of the tender process. It had further observed that the tender provisions were clear to the effect that in case the Bid [other than the Unpriced Bid] was in different format [i.e. encrypted or password protected format] and can not be opened, it was liable for rejection. The IEMs had viewed that since the Price Bid of the petitioner could not be viewed on the date of bid opening, their offer cannot be considered for further evaluation making it liable for rejection. It is averred in the additional affidavit filed on behalf of the respondent no. 2 to the effect that the IEMs were made aware of the situation as to why the BoQ Excel file uploaded by the petitioner for its Price Bid could not be accessed and also about the relevant clauses in the NIT. In any view of the matter, the decision of the IEMs dated 29.12.2022, which was digitally signed on 04.01.2023, was only re-affirmation of the fact of invalidation of the petitioner's Price Bid, which was already notified on 26.12.2022 without any manual intervention in the System-generated BoQ Comparative Statement.
27. From the authorities cited above, the propositions as regards the power of judicial review in contractual matters, relevant in the fact situation obtaining the case in hand, can be summarized, though not exhaustively, as follows :-
- [i] The power of judicial review can be invoked if the approach adopted is found to be arbitrary or mala fide or if the procedure adopted is meant to favour one. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias or mala fide.
- [ii] If the decision relating to the award of contract is taken bona fide and is not against public interest, the court will not in exercise of the power of judicial review to interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Where the decision is found to have been taken bona fide

and a choice has been exercised on legitimate considerations, which are not arbitrary, the constitutional court is not to exercise its power of judicial review.

[iii] The satisfaction whether a bidder satisfies the tender condition is primarily upon the Tendering Authority. A mere disagreement with the decision-making process or the decision of the administrative authority cannot be a reason for the constitutional court to interfere. Only when the elements of arbitrariness, irrationality or perversity are apparent the constitutional court can interfere with the decision-making process or the decision. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 of the Constitution with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. A constitutional court is not concerned with the merits or correctness of the decision and is concerned only with the manner in which the decision is taken or the order is made. Where a decision is taken, in essence, in consonance with the language of the tender document or to subserve the purpose for which the tender is floated, the court shall follow the principle of restraint.

[iv] The tendering authority which authors the tender document is the best person to understand and appreciate its requirements and thus, its interpretation is not to be second-guessed by a constitutional court while exercising its discretionary power of judicial review. The court has to proceed on the notion that the tendering authority having authored the tender document is the best person to interpret the same. The constitutional courts must defer to such understanding and appreciation of the tender document, unless there is mala fide or perversity with the understanding or appreciation or in the application of the terms of the tender conditions. Even when the tendering authority gives an interpretation to the tender document that is not acceptable to the constitutional court but that by itself is not a reason for interfering with the interpretation given. If two interpretations are possible then the interpretation of the author is to be accepted ordinarily, unless there is arbitrariness, irrationality, bias, mala fide or perversity.

[v] In matters of contract involving the State or an instrumentality or agency of the State, the court does not sit like a court of appeal over the appropriate authority. In exercising the power of judicial review, a constitutional court cannot substitute its own opinion for the opinion of the authority deciding the matter. The writ court

should refrain itself from imposing its decision over the decision of the tendering authority as to whether to accept or not to accept the bid of a tenderer. The approach of the writ court should be not to find fault, as it only examines as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions.

[vi] While exercising the power of judicial review in contractual matters, the constitutional court should pose to itself two 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", and [ii] whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226 of the Constitution of India.

[vii] Lastly, a bidder participating in a tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to a notice inviting tender in a transparent manner and free from any hidden agenda.

28. When by keeping the above propositions as regards the power of judicial review in contractual matters in purview, the decision-making process adopted by the Tendering Authority leading to the decision of rejection of the Price Bid of the petitioner has been examined, this Court has not been able to find any element of arbitrariness, irrationality or unreasonableness in the decision-making process. The power of judicial review is to be exercised to prevent any kind of arbitrariness, irrationality or unreasonableness and its purpose is to check whether the decision is made lawfully and not check whether the decision is sound. From the discussions made above, this Court is of the unhesitant view that the process followed by the Tendering Authority right from the stage of opening of the Price Bids on 26.12.2022 at which the Price Bid of the petitioner stood invalidated for reasons solely attributable to the petitioner only, till the decision of giving information to the petitioner that its Price Bid could not be considered for further evaluation due to its non-viewability without login credentials has been found to be a fair and transparent one.



29. For the discussion made above and for all the reasons recorded therein, this Court is of the considered view that there is no infirmity in the decision-making process as well as in the decision to reject the Price Bid of the petitioner. In such view of the matter, the writ petition is found devoid of any merit and is liable to be dismissed. Thus, the writ petition fails and is, therefore, dismissed. Interim order, if any, stands recalled. There shall, however, be no order as to cost.

**JUDGE**

**Comparing Assistant**