(2015) 04 GAU CK 0046

In the Gauhati High Court

Case No : Writ Petition (C) No. 612 of 2015

Bharatiya-Shivam JV APPELLANT

Vs

The State of Assam and Others RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:
Constitution of India, 1950 — Article 226
Registration Act, 1908 — Section 17(1), 17(2)

Citation : (2015) 04 GAU CK 0046

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : D. Das, Senior Advocate and S. Khound, for the Appellant; B. Goswami, SC and Dubey, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Michael Zothankhuma, J.—Heard Mr. D. Das, learned senior counsel assisted by Mr. S. Khound, learned counsel for the petitioner and Mr. B. Goswami, Standing Counsel, Water Resources Department, Govt. of Assam for the official respondents. Also heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. R. Dubey, learned counsel for the respondent No. 5.

2. The petitioner''s case relates to Package No. ASWR/RNG/2014/11 whereby tenders were invited in connection with the flood management of river Ranganadi along with river training work on both embankments in Lakhimpur district. It may be stated here that Package No. 11 mentioned above is a part of 12 packages for flood management of river Ranganadi. The estimated cost of the Package No. 11 was Rs. 90,04,51,808/-.

3. Mr. D. Das, learned senior counsel for the petitioner submits that the tender process was a two bid system i.e. it consisted of the technical bid and the financial bid. The case in brief relates to Clause 4.4, 4.5 and 31 of the Instruction to Bidders (for short, hereinafter referred to as ''ITB''). Whether Clause 4.5 can be relaxed in case of the petitioner? Whether the respondent No. 5 fulfills Clause

4.4 and whether the clause can be relaxed? Whether the contract should be allotted to the lowest bidder as per Clause 31? Clause 4.5 of the Instructions to Bidders is reproduced below:

"4.5 A To qualify for award of the contract, each bidder in its name should have in the last five years as below:

a) Achieved a minimum annual financial turnover in any one year amount not less than 1.50 (one and half) times the value of their respective packages.

b) Satisfactorily completed (not less than 100% of the contract value) as prime contractor at least one similar work of value not less than amount 25% of estimated value of present contract."

In addition the bidder should in its name have completed the following specific to the packages as detailed below:

----Package ASWR/Rng/2014/01 to ASWR/Rng/2014/09-----

The bidder should have executed in the last 3 years by themselves, the minimum quantities of the following items of work as:

Construction work related to flood control structure such as construction of embankment at least 25% of the bid value

At least one work of earthwork in embankment by Truck carriage.

----Package ASWR/Rng/2014/10 and ASWR/Rng/2014/11----

Construction work involving one single work of river training works of at least 25% of the bid value.

----Package ASWR/Rng/2014/12---

Construction work involving river training works of at least 25% of the bid value."

4. In terms of Clause 4.5 of the ITB, the petitioner had submitted his annual financial turnover for five years. The comparative statement annexed with the writ petition shows that the petitioner''s annual financial turnover was between Rs. 60 Crores to Rs. 77 Crores for the five years in between 2008 and 2013. Mr. Das submits that as per Clause 4.5 of the ITB, the minimum annual financial turnover in any one year should not be less than 1 1/2 times the value of the respective packages, which in this case was Rs. 1,35,09,00,000/-. He submits that though the documents submitted by the petitioner showed their annual income turnover between 2008 to 2013 to the tune of Rs. 60 Crores to Rs. 77 Crores, the respondents had overlooked the IT Return and Certificates from the Income Tax Department which would show that they had a turnover of over Rs. 1.35 Crores as was required under Clause 4.5 of the ITB. Mr. Das also submits that the annual turnover as shown in the comparative chart relates only to Shivam JV while the petitioner, Bharatia Shivam JV is a joint venture and that the comparative chart also showed that the joint venture agreement of Bharatia

Shivam JV had been enclosed along with their tender documents. Mr. Das also submits that the combined annual turnover of the joint venture i.e. the petitioner is beyond Rs. 1,35,09,00,000/- and, as such, the State respondents have illegally disqualified the petitioner.

5. Mr. D. Das submits that the petitioner''s bid documents was disqualified at the technical stage on the ground that "they have failed to produce qualifying maximum annual turnover." Mr. Das, thus, submits that the respondent State could not have disqualified the petitioner as the Income Tax Returns and Certificates issued by the Income Tax Department would have shown that the petitioner had complied with Clause 4.5 of the ITB. The counsel for the petitioner has also submitted that the contract work of Package-11 has been awarded to the respondent No. 5 in violation of Clause 4.4 of the ITB which is to the effect that "In case of joint venture, the joint venture agreement should be registered in India and should clearly mention the scope of services to be provided by either parties."

6. Mr. D. Das, relying upon the comparative chart submits that the joint venture agreement of the respondent No. 5 not being on stamp paper, clearly shows that they are not registered in India and, thus, should have been disqualified at the stage of technical bid as they did not fulfill the requirements of Clause 4.4 of the ITB, which was an essential condition of the tender/eligibility criteria.

7. The learned senior counsel for the petitioner has also relied upon the averments made by the respondent State in Para 13 of their affidavit-in-opposition to prove that the respondent No. 5 was not registered in India and also submits that the said paragraph shows that the decision making process of the respondent State while awarding the present contract was arbitrary. The relevant extract of Para 13 of the respondent State''s affidavit-in-opposition is reproduced below:-

"13. That as regards to paragraph 16 to the writ-petition, your deponent begs to state that the Clause 4.4 of the Bid Document, "in case of Joint Venture Agreement should be registered in India and should clearly mention scope of services to be provided by either parties." This qualification of the Joint Venture is not a prerequisite for awarding contract, but should be subsequently submitted to the Department before making any payment to the awardee. In the instant case the contract of the Package was awarded to M/s. EKM-Ras Will-PDA JV even though the Joint Venture agreement is not previously registered in India. It was given to understand before allotting the contract that they would take steps for registration of their Joint Venture in India before making any payment out of the execution of jobs."

8. Mr. Das also submitted that the respondent No. 5 could not have been awarded the contract in view of Clause 31 of the ITB which is to the following effect:-

"31. Award Criteria

31.1. Subject to Clause 32, the Employer will award the Contract to the Bidder whose Bid has been determined

(i) to be substantially responsive to the Bidding documents and who has offered the lowest evaluated Bid Price; and

(ii) to be within the available bid capacity adjusted to account for his bid price which is evaluated the lower in any of the packages opened earlier than the one under consideration.

In no case, the contract shall be awarded to any bidder whose available bid capacity is less than the evaluated bid price, even if the said bid is the lowest evaluated bid. The contract will in such cases be awarded to the next lowest bidder at his evaluated bid price."

9. Mr. D. Das also submits that out of the five original bids for Package No. 11, two bids including the petitioner''s were disqualified at the stage of opening of the "Technical Bids".

10. Counsel for the petitioner submits that as per the comparative chart prepared by the respondent State in respect of the remaining three valid tenderers out of five tenderers, viz. Yokoja (India) Pvt. Ltd., Flexituff SA Enterprise JV and the respondent No. 5; Flexituff SA Enterprise JV was the lowest bidder while the bid amount offered by the respondent No. 5 was the highest.

11. Mr. Das, thus submits that rejection of the petitioner''s bid is not proper and that the decision making process of the respondent State is arbitrary, in as much as, the respondent State while opening the technical bids in Package-11 should have considered the Income Tax Returns and Certificates of the Joint Venture. The counsel for the petitioner also submits that the reason for rejection of the petitioner''s bid on the ground that the petitioner has not submitted any document showing that he had an annual turnover 1 1/2 times the amount of estimate of the said contract, cannot be a reason for rejection of his bid in view of the fact that in respect of Pacakge-12, an entity who got selected and was awarded the contract also did not submit any document showing that he had an annual turnover of 1 1/2 times the estimated amount as per Clause 4.5 of the ITB. Thus, Mr. Das submits that the respondents should not have disqualified the petitioner at the time of opening of the technical bid and should have evaluated the financial bid of the petitioner and awarded the work order to it. Mr. D. Das also contents that Clause 4.5 of the ITB is not an essential condition of the tender.

12. Mr. K.N. Choudhury, learned senior counsel appearing for the respondent No. 5 submits that the petitioner''s case can be broadly divided into two parts--one relating to rejection of the petitioner''s bid and the other relating to the challenge to the respondent No. 5 being awarded the contract. Mr. Choudhury at the outset submits that the respondent No. 5 is not registered in India. He submits that a joint venture agreement need not be registered under Section 17(1) of the Registration Act as it falls under Section 17(2) of the Registration Act. Mr. K.N.

Choudhury submits that Clause 4.5 of the ITB is an essential condition of tender/ eligibility and if the same is not fulfilled by any of the tenderer, the said tenderer has to be disqualified. In support of his contention, Mr. Choudhury relies upon Clause 26 of the ITB which is to the following effect:-

"26. Examination of Bid and Determination of Responsiveness

26.1 During the detailed evaluation of "Technical Bids", the Employer will determine whether each Bid (a) meets the eligibility criteria defined in Clause 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities and: (d) is substantially responsive to the requirements of the Bidding documents. During the detailed evaluation of the "Financial Bid", the responsiveness of the Bids will be further determined with respect to the remaining bid conditions i.e. priced bill of quantities, technical specifications, drawings.

26.2 A substantially responsive "Financial Bid" is one which conforms to all the terms, conditions, and specifications of the Bidding documents, without material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or performance of the Work (box) which limits in any substantial way, inconsistent with the Bidding documents, the Employers rights or the Bidders obligations under the contract; or (c) whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive Bids or (d) inconsistent with the bidding documents.

26.3 If a "Financial Bid" is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation."

13. Mr. K.N. Choudhury, learned senior counsel for the respondent No. 5 also submits that the petitioner not having submitted the documents showing the annual turnover as required under Clause 4.5 of the ITB, the petitioner was rightly disqualified by the respondent State at the stage of opening of the technical bid. He also submits that as Annexure-VIII to the writ petition which shows the annual turnover of the petitioner as a joint venture and which meets the requirement of Clause 4.5 of the ITB was issued on 1.12.2014, the petitioner had not submitted the annual turnover statement as required under the ITB at the time of submitting its bid documents, the last date for submission of bid documents being 16.6.2014. Mr. Choudhury also submits that the work order has been issued to the respondent No. 5 on 7.12.2014 and an agreement was executed between the respondent No. 5 and the State Government on 31.12.2014. The present writ petition having been filed on 31.1.2015, the petitioner is not entitled to any relief as there is a lot of delay in filing the writ petition and as the contract work is in full swing i.e. the respondent No. 5 has started the supply of geo bags which are to be placed on the embankments of the river. Mr. Choudhury, thus, submits that the petitioner''s bid having been

disqualified at the stage of opening of the technical bid, the petitioner has no locus standi to agitate the question of the respondent No. 5 being awarded the contract. In support of his contention, Mr. Choudury has relied upon the decision of the Apex Court in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, AIR 1999 SC 393 : (1999) 1 ARBLR 431 : (1998) 8 JT 411 : (1998) 6 SCALE 456 : (1999) 1 SCC 492 : (1998) 3 SCR 421 Supp : (1999) 1 UJ 600 : (1999) AIRSCW 53 . In Para 27 of the said judgment, it has been held:

"27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s. Raunaq International Ltd. is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s. IVR Construction Ltd. who have challenged this award of tender themselves do not fulfill the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfill the requisite criteria, seems to be misplaced.

14. Mr. K.N. Choudhry has also relied upon the judgment of the Supreme Court in Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp where the Apex Court held:

"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 black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness inaction."

15. Mr. Choudhury has also placed reliance upon the judgment of the Apex Court in Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, AIR 2012 SC 2915 : (2012) 4 BC 177 : (2012) 7 JT 446 : (2013) 1 RCR(Civil) 202 : (2012) 7 SCALE 414 : (2012) 8 SCC 216 : (2012) AIRSCW 4727 wherein the Apex Court held:

"24. 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"; and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

16. The counsel for the respondent No. 5, thus, submits that the petitioner''s bid having been disqualified on account of not complying with Clause 4.5 of the ITB which is an essential condition of the tender/eligibility criteria, the petitioner has no locus standi to make any challenge to the award of the present contract. He also submits that the registration of a joint venture agreement in India is curable and that Clause 4.4 of the ITB is an ancillary condition.

17. At this stage, Mr. Das, learned senior counsel for the petitioner has submitted that the judgment of the Apex Court in Jagadish Mandal (supra) in fact supports the case of the petitioner and not the respondent No. 5, in as much as, the question as to whether the decision taken by the authority in awarding the contract to the respondent No. 5 is arbitrary and irrational has to be decided by the Court. If the answers to the said questions are in the negative, there should be no interference under Article 226 of the Constitution. He, however, submits

that the answers in the present case can only be positive in view of the fact that the respondent No. 5 was awarded the contract though he was not the lowest tenderer and as the joint venture agreement was not registered in India. He also submits that the decision of the Apex Court in Michigan Rubber (India) Ltd. (supra), relates only to a challenge to the terms and conditions of a tender document and whether the same is open for judicial review. However, in the present case, the challenge is only with regard to the decision making process of the respondent State and not to the validity of the terms and conditions of the tender documents.

18. Mr. D. Das, counsel for the petitioner has submitted that delay in filing this writ petition is on account of the fact that the petitioner had earlier filed a writ petition which was subsequently withdrawn. He submits that as the financial bids were not opened on the fixed date the same were to be opened, the petitioner submitted application under the RTI Act seeking necessary information and prior to submitting the application under the RTI Act, the petitioner had filed a writ petition in respect of Package Nos. 8, 10 and 11 for which the petitioner had submitted tenders. The said writ petition was registered as WP(C) 6831/2014. Subsequently, on receiving information under the RTI Act on 28.1.2015, the petitioner withdrew WP(C) 6831/2014 and thereafter has filed the present writ petition.

19. Mr. B. Goswami, Standing Counsel, Water Resources Department submits that the petitioner having failed to meet the criteria of Clause 4.5 of the ITB, his bid was rightly rejected at the technical stage. However, Mr. Goswami submits that in respect of Package-12 wherein the petitioner was not a bidder, M/s. Samco Construction Company also did not meet the criteria of Clause 4.5 of the ITB. However, as per the official records, Clause 4.5 of the ITB was relaxed in that case and M/s. Samco Construction Company was eventually allotted the contract under Package-12. Mr. Goswami submits that this decision in respect of Package-12 was taken in the pre-bid meeting held on 10.3.2014.

Mr. Goswami has also produced the official records and I have gone through the same.

20. A perusal of the official records shows that both the partners of the petitioner joint venture have signed and submitted their annual turnover which does not meet the criteria of Clause 4.5 of the ITB.

21. I have also found in the official records that in the 267th meeting held on 8.12.2014 in the office of the Secretary, Water Resources Department it has been observed "After threadbare discussion, the Committee decided to allot the tender committee packages at the absolutely lowest rates (Annexure-1)."

22. To a query made by this Court, the Standing Counsel, Water Resources Department has submitted that the records produced before the Court today are the only records that pertain to the 12 packages including Package No. 11 relating to the present case. On being asked as to why the lowest tenderer has

not been awarded the contract, the learned Standing Counsel has submitted that Flexituff SA Enterprise JV, the lowest tenderer had also participated in the tender for Package-10 and as he was awarded Package-10, Package-11 was not given to the said company. However, there is no noting in the official records supporting the contention of the Standing Counsel, Water Resources Department with regard to the above statement. The Standing Counsel has further submitted that there is no official noting showing reasons as to why the respondent No. 5 has been awarded the contract i.e. Package No. 11.

23. The question that is relevant in this case is whether Clause 4.5 of the ITB is an essential condition of the tender. The Apex Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, AIR 1991 SC 1579 : (1991) 2 ARBLR 94 : (1991) 2 CompLJ 275 : (1991) 2 JT 577 : (1991) 1 SCALE 928 : (1991) 3 SCC 273 : (1991) 2 SCR 696 : (1991) 2 UJ 181 , has held:

"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 details, 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."

24. Thus, the question that has to be answered is whether the respondent authorities had deviated from Clause 4.5 of the ITB and did not insist upon strict literal compliance of the condition.

25. Mr. B. Goswami, Standing Counsel of the Water Resources Department has submitted that in case of M/s. Samco Construction Company who was eventually awarded the contract in respect of Package No. 12, Clause 4.5 of the ITB was relaxed. Package 1 to 12 which is a project for "Flood Management of River Ranganadi along with river training work on both bank embankments in Lakhimpur District (Assam)", has a total package value of Rs. 331,00,22,000/-. The said project has been divided into 12 packages. The Invitation for Bid (IFB) and Instructions to Bidders (ITB) are all the same in all the 12 packages though there are a few differences in respect of Package Nos. 1 to 9 on one hand, 10 and 11 on the other and a third category, being Package No. 12 in the latter part of Clause 4.5, which relates to past experience. Though a careful reading of the ITB indicates that Clause 4.5 of the ITB seems to be an essential condition of eligibility, if Clause 4.5 of the ITB could be relaxed and deviated upon by the authorities in Package No. 12, the same could/should also have been done in respect of Package No. 11. Once a condition was deviated upon and the authorities did not insist upon strict literal compliance of the condition, then the said condition can be said to be an ancillary or subsidiary condition. In view of

the fact that the State authorities have relaxed Clause 4.5 of the ITB in the pre-bid meeting held on 10.3.2014 as submitted by the Standing Counsel of the Water Resources Department, I find that the same yardstick should also be applied to the other packages.

26. As per the comparative chart annexed to the writ petition, Flexituff SA Enterprise JV was the lowest tenderer. However, according to the counsel for the Water Resources Department, Flexituff SA Enterprise JV were not given the contract of Package No. 11 as they had been allotted the contract work of Package No. 10. However, no reason has been given by the counsel for the Water Resources Department as to why the second lowest tenderer i.e. Yojaka (India) Pvt. Ltd. was not allotted Package No. 11 which was allotted to the respondent No. 5. The official records do not indicate any reason as to why Flexituff SA Enterprise JV and Yojaka (India) Pvt. Ltd. were not allotted the work of Package No. 11.

27. It has been held by the Supreme Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, AIR 2001 SC 682 : (2001) 2 JT 524 : (2001) 1 SCALE 255 : (2001) 1 SCR 352 : (2001) AIRSCW 322 : (2001) 1 Supreme 154 that the principle of awarding contract to the lowest tenderer applies when all things are equal. Clause 4.5 of the ITB having been relaxed in respect of Package No. 12, the respondents should have given reasons as to why the said clause for Package No. 11 was not relaxed. However, no noting has been noticed in the official records with regard to Clause 4.5 in respect of Package No. 11. No doubt, under Clause 32 of the ITB an employer has the right to accept or reject any or all the bids, however, the same has to be informed with reason and cannot be arbitrary. Also it was recorded in the 267th meeting held on 8.12.2014 that the tender packages would be allotted at the lowest rates. The State respondents do not seem to have considered Clause 31 of the ITB also.

28. The counsel for the respondent No. 5 had submitted that this Court should interfere only when there is public interest but not to make a legal point. It is true that the Court should not interfere only to make a legal point. However, in the instant case, I find that the respondent authorities have acted arbitrarily in applying deviations in Clause 4.5 of the ITB, that is to say, while the respondents relaxed Clause 4.5 in Package No. 12, no reason has been given as to why the relaxation has not been made in respect of Package No. 11. If a clause of the ITB can be relaxed, then it is not an essential condition of eligibility/tender. It is in public interest to adhere to the rules and conditions subject to which the bids are invited. It is equally in public interest to apply the same yardstick of relaxation to all bidders. Mr. K.N. Choudhury had submitted that Clause 26 of the ITB makes Clause 4.5 an essential condition of tender/eligibility criteria as Clause 26.1 states that each bid has to meet the eligibility criteria defined in Clauses 3 and 4. If the argument of Mr. K.N. Choudhury is to be accepted, then not only Clause 4.5, but also Clause 4.4 of the ITB will have to construed to be an essential condition of eligibility. Clause 4.4 of the ITB having clearly stated that in case of

joint venture, joint venture agreement should be registered in India, the respondent No. 5 not having a joint venture agreement registered in India, the allotment of Package No. 11 to the respondent No. 5 is hit by Clause 4.4 of the ITB and it should have been disqualified at the stage of opening of the technical bid also.

29. As stated in the earlier paragraphs, I find that the State respondents having deviated and having relaxed Clause 4.5 of the ITB in respect of Package No. 12, Clause 4.5 of the ITB is not an essential condition of eligibility. Further, if Clause 4.5 of the ITB could be relaxed in Package No. 12, a similar relaxation should have been made in respect of Package No. 11. Also the State respondents could have asked the petitioners for clarification as to whether their annual turnover for the last five years was as per Clause 4.5 of the ITB and asked for additional documents, as the petitioners had, as submitted by their learned counsel, submitted Income Tax Returns, Certificate from the Income Tax Department purportedly showing that their annual turnover was more than 1 1/2 times of the estimated amount. Also reasons should have been given for not relaxing Clause 4.5 in Package No. 11. The rules of fairplay require that the State respondents treats all persons who are in competition for the State largesse equally and fairly. I also find that the actions of the State respondents is not in public interest. On this ground alone, I am of the view that the actions of the State respondents are arbitrary and liable to be set aside.

30. Secondly, Clause 4.4 of the ITB has also not been given strict effect to by the State respondents, in as much as, the respondent No. 5 whose agreement is not registered in India has had his financial and technical bids approved, thereby implying that Clause 4.4 is also not an essential condition of eligibility. Thus, Clause 4.4 and 4.5 of the ITB do not seem to be essential conditions of the tender/eligibility. Thirdly, the State respondents have not recorded any reason in the official records as to why the lowest valid tenderer Flexituff SA Enterprise JV was not awarded Package No. 11. There is also no noting as to why the next lowest valid tenderer i.e. Yojaka (India) Pvt. Ltd. was not allotted Package No. 11, but was allotted to the respondent No. 5. There is nothing in the records to show that negotiation had been done by the State with any of the three remaining valid tenderers in respect of Package No. 11 so as to be able to come to a decision to allot the said work to the respondent No. 5 whose bid was at a higher rate. As stated earlier, the Supreme Court has held that the tenderer who quotes the lowest bid should be given the tender as it is in public interest provided all other things are equal.

31. A perusal of the official records also does not show as to why the respondent No. 5 was allotted Package No. 11. It is not in dispute that the employer/State respondents has to take into consideration not only the viability of the bids but also the fact that the contractor would be able to discharge its contractual obligations. However, no such noting has been made to show the reason as to why the respondent No. 5 has been selected instead of Flexituff SA Enterprise JV

or Yojaka (India) Pvt. Ltd.

32. Considering the fact that huge public money is involved in the present 12 Packages out of which we are concerned with Package No. 11, the selection of tenderer and allotment of work has to be fair and transparent. In my considered view the selective relaxation of Clause 4.5 of the ITB, method of application of Clause 4.4 of the ITB and the award of the contract not having been done as per Clause 31 or in a fair and transparent manner, but being discriminatory and arbitrary, the disqualification of the petitioner''s technical bid is arbitrary and not in public interest. I accordingly direct the State respondents to re-consider the technical bid of the petitioner and not to insist upon strict literal compliance of Clause 4.5 of the ITB as has been done in Package No. 12.

33. Accordingly, the impugned order dated 17.12.2014 in respect of Package No. ASWR/RNG/2014/11 issued by the respondents and any subsequent order passed in respect of Package No. ASWR/RNG/2014/11 is hereby set aside. The respondents shall after reconsideration of the petitioner''s technical bid, consider the financial bid of the petitioner along with other eligible tenderers.

34. The writ petition accordingly stands disposed of. No cost.

