

(2007) 05 GAU CK 0047
In the Gauhati High Court

Brahmaputra Consortium Ltd. and Another	APPELLANT
Vs	
State of Assam and Others	RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Citation : (2007) 4 GLT 236

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. P.K. Goswami, learned senior Counsel for the writ petitioner and also Mr. K.N. Choudhury, learned Addl. Advocate General, Assam appearing for respondent Nos. 1, 2 and 3.

2. The present matter pertains to invitation of bids dated 22.12.2006 issued by the Chief Engineer, PWD (Roads) for construction/improvement of Pandit Hemchandra Goswami Path under North-Eastern Council (NEC)'s 10th five year plan programme. The works involved in the tender process have been divided into three separate packages namely J-3, J-4 and J-5.

3. The petitioner No. 1 claiming to be an experienced Company relating to contract works, responded to the invitation for bids by filing their tender documents within the prescribed period. The tender process was a two-bid-system, where the price bids were to be opened and considered only after deciding on the eligibility and responsiveness of the technical bids submitted by different tenderers.

4. The challenge in the instant writ petition is against the decision of the respondents giving a finding that the petitioner Company has failed to meet the eligibility criteria laid down in clause-4 of the ITB.

From the counter affidavit filed on behalf of the respondent Nos. 1, 2 and 3 as well as from the records made available, three grounds have been made the

basis for declaring the petitioner's bid to be deficient and non-responsive, for which the petitioner is considered to have failed to meet the eligibility criteria. The three grounds are extracted as below:

(i) The petitioner No. 1 failed to meet the eligibility criteria laid down in Clause 4.2 (f) of the ITB as it submitted audited balance sheets for only two years i.e., 2002 and 2003 instead of 5 years. The balance sheets so submitted for the remaining 3 years i.e., 2004, 2005 and 2006 were not audited.

(ii) The petitioner No. 1 failed to meet the eligibility criteria laid down in Clause 4.5(B)(b) in so far as the bio-data of the key personnel so enclosed with its bid itself shows that though the Project Manager is a B.E. (Civil), he has experience of only 1(one) year as Project Manager instead of the minimum requirement of 5 to 7 years. The Site Engineer is not a B.E. (Civil) and is in fact a Diploma (Civil).

(iii) The petitioner No. 1 also failed to meet the eligibility criteria laid down in Clause 4.5(B)(c) of the ITB as it submitted a conditional Bank Certificate, which is not in terms of the proper format of the ITB.

5. Amongst the three grounds mentioned above, which weighed with the decision making authority while holding the bid of the petitioner as ineligible, the ground stated in ground No. (i) (non-furnishing of audited balance sheets of the Company for three of the required 5 years) has since been abandoned by the State and the learned Addl. Advocate General, Mr. K.N. Choudhury, in course of the proceedings before this court on 12.4.2007 as well as on 18.5.2007, has categorically submitted that the petitioner Company is not being considered disqualified at this stage, for the reasons reflected in ground No. (i) as stated above.

6. The second ground for which the petitioner's bid has been held to be disqualified pertains to the criteria laid down in Clause 4.5(B)(b) of the ITB.

In Clause 4.5, there are two parts. Part-A specifies the requirement on fulfillment of which, would make a tenderer qualify for contract while Part-B contains the requirement from each bidder to further demonstrate certain additional features with regard to the intending bidder.

7. Under Sub-clause (b) of Clause 4.5(B), an intending bidder is required to demonstrate availability of key personnel for the work in question and the qualification and experience of the personnel are required to be informed as per Annexure-II.

7.1. Annexure-II requires a bidder to provide a list of key personnel to be deployed on contract work. The following qualification and experience requirements are indicated in Annexure-II for different categories of specified key personnel.

Minimum	No.	Personnel	Qualification	Sl. Key Minimum Requirement
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Manager	5 to 7 years	Exp. 1	2. Site	B.E. Civil +	Engineer	3 years	Exp. 1	3. Plant
B.E.	Mech.	Engineer	or	Dip.	Mech.	1	Total	3 Nos.

While furnishing information of key personnel under Sub-clause (b) of Clause 4.5 (B), the petitioner Company in their tender provided information as follows:

Name	Qualification	Year	Years of	tion of	experi-	Experi-	ence	ence	Posi-
(Gene-	pro-	ral)	posed	posit-	tion				
Manas	B.E	Civil	16yrs.	1	yrs.	Manager			Posi- in the Project
Sudhir	Dip	(Civil)	8yrs.	6	yrs.	Engineer			Dutta Site
A.M.	Dip	(Mech.)	6yrs.	4	yrs.	Engineer			Kumar Plant
Biplab	B.E.	(Civil)	7	yrs.	1	yrs.	Surveyor		Bhuyan Quality
S.A	Dip	(Civil)	14	yrs.	6	yrs.	Material	Ahmed	Das Soil&
Sanjay	B.E.	Civil	4	yrs.	2	yrs.	Engineer		Engineer Survey Sarkar

7.2. Mr. P.K. Goswami, learned senior Counsel for the petitioner submitted that in so far as the Project Manager is concerned, the name of the Project Manager mentioned by the petitioner company is a BE (Civil) degree holder with 16 years experience. As the requirement of a Project Engineer is BE with 5 to 7 years experience (without specification of the nature of experience), the person mentioned as Project Manager by the petitioner Company, in its tender documents cannot be said to be a Project Manager who does not fulfill the criteria laid down in Annexure-II relating to Clause 4.5B(b) of the ITB. This submission is made as, in the tender filed by the petitioner company against this key person, apart from indicating 16 years experience, an additional last column is filled up showing 1 years experience in the proposed position.

7.3. In so far the requirement of Site Engineer is concerned, the name of the person mentioned in the tender documents furnished by the petitioner Company is a Diploma holder in Civil Engineering with 8 years experience, whereas the requirement as per the above-noted condition, is an Engineering degree holder with 3 years experience.

In this context, it is submitted by the learned senior Counsel for the petitioner that the petitioner Company has got a large number of experienced and qualified graduate Engineers working in the Company. Even in the tender filed by the

petitioner company, names of two other BE (Civil) degree holders have been furnished, far beyond the requirement stipulated in sub-clause (b) of Clause 4.5 B.

It is accordingly submitted that while providing a list of key personnel to be deployed on contract work, the petitioner Company indicated the name of a Diploma holder as the Site Engineer although additional persons with the required BE degree have been shown in the tender documents itself, indicating the availability of any of those persons to be posted as Site Engineer for the work in question.

Under such circumstances it is submitted that the defect, if it can be termed as one, should not be considered to be a non-rectifiable defect leading to disqualification of the bid of the petitioner Company, but if the respondent authorities were fair in their process of evaluation, the petitioner company would not be held to be disqualified only on the ground of specifying a Diploma holder in Civil Engineering as a Site Engineer, when it is indicated in the very same page of the tender document that two other Engineers possessing the requisite qualifications and experienced were available for deployment at site by the petitioner company and the respondent authorities could have considered any of these two graduate engineers as Site Engineers to meet the requirement of Clause 4.5 B (b), either on its own violation or upon seeking a specific clarification from the petitioner company.

8. As regards the 3rd ground stated for declaring the petitioner company to be ineligible under Sub-clause (c) of Clause 4.5 B of the ITB, it can be noticed that the said ground relates to the requirement of each tenderer to make information available to demonstrate on the credit facilities available to meet the working capital requirement for executing the contract. The said credit facilities were required to be given of a value not less than 10% of the estimated cost of the package of the contract.

To meet this requirement, a certificate from the bank was required to be given, certifying the credit worthiness of the tenderer and for this purpose, a sample format of certificate was also indicated in the ITB.

8.1. In the present case, the petitioner company has provided a Bank certificate dated 12.1.2007 from the Indian Overseas Bank to meet the requirements of Clause 4.5(B)(c) of the ITB. The said certificate certifies the petitioner company to be a reputed company with good financial standing with assurance of the bank to meet the working capital requirement for executing the contract in question. The entire bank certificate is worded strictly as per the sample format shown in the ITB. In addition to verbatim reproduction of the sample format, the bank certificate also contains the extra words "subject to fulfillment of Bank requirements".

On the basis of the incorporation of the said sentence in the Bank's certificate, the respondent authorities have held the petitioner's technical bid to be ineligible

for being cleared for consideration of the financial bids given by the petitioner.

8.2. It is contended on behalf of the petitioner that the requirements of Bank certificate has been substantially complied with by the Tenderer and the incorporation of the extra word in the Bank's Certificate cannot be ground for a decision do not to treat the certificate as deficient to meet the requirement of Clause 4.5B (c). It is also contended that any doubt on the certificate could have been easily clarified from the petitioner or their Bank and there is no failure to demonstrate availability of credit availability by the petitioners.

9. Mr. Goswami, learned senior Counsel for the petitioner further submitted that the respondent authorities would naturally be anxious to ensure that only a financially sound creditworthy contractor is declared to be technically qualified so that the work does not suffer for want of financial strength of a selected tenderer. In this context, it is submitted that by requiring a tenderer to furnish information on the annual financial turn over for preceding 5 years under Clause 4.5 (A) and declaring the said requirement incorporated in ITB as qualification criteria, the respondent authorities have taken adequate steps to ensure that the financial capacity of an intending bidder for the purpose of qualifying him in the technical bid is fully met and satisfied. This part of the requirement given in Clause 4.5 (A) has been clearly preceded by the words "to qualify for the award of contract".

9.1. In view of the said qualifying statement incorporated at the beginning of Clause 4.5 (A) of the ITB, it is submitted on behalf of the petitioners that the requirements mentioned in Part-A of Clause 4.5 are essential requirements and unless a tenderer fulfills the said essential requirements, he cannot be considered to be eligible for being qualified in the technical bid.

9.2. Under part (B) of Clause 4.5, a bidder is required to further demonstrate certain additional features. However, the requirements stipulated in Part-B of Clause 4.5 begins with the words "each bidder should further demonstrate;" In view of such words at the beginning in Part B of Clause 4.5 of the ITB, it is submitted that the requirement under Sub-clause (b) and (c) of Part-B of Clause 4.5 under which the petitioner is held to be disqualified by the respondents are non-essential requirements and there could not have been a decision of disqualification of the bid of the petitioners, on the ground of not fulfilling the requirements stipulated under Part-B of Clause 4.5 of the ITB.

10. It is further contended that if the papers furnished by the petitioner company with regard to the non-essential requirements under Part B of Clause 4.5B, the respondent authorities could have obtained requisite clarification from the petitioner company as provided for in the ITB itself. However, as the respondent authorities were not considering the bid submitted by the petitioner in a fair and reasonable manner and were looking for opportunities to disqualify the petitioner company, the non-essential requirements were treated as essential requirements and permissible rectifications were also not permitted to be carried out nor any

clarifications were sought either from the petitioner or from the petitioner's banker with regard to alleged non-fulfillment of the requirements under Sub-clause (b) and (c) of Clause 4.5(B) of the ITB.

Attention of the Court has been drawn by the learned Counsel of the petitioners to Sub-clause (i) of Clause 4.2 of the ITB which permits the authority to seek references from bidder's bankers.

Sub-clause (ii) of Clause 23.4 has also been cited to indicate that the authority may ask a bidder to clarify or modify his technical bid, if necessary, within 10 (ten) days from opening of the technical bid, with regard to any of the rectifiable defects.

In the instant case, it is submitted that deficiencies, if any, in the bid of the petitioner company are rectifiable and clarifiable and they cannot be made the basis to disqualify the bid.

11. It is submitted by Mr. P.K. Goswami, learned senior Counsel that only in case of a material deviation a bid can be declared to be non-responsive as per Clause 26.2. Material deviations are indicated in Clause 26.2 to be such deviations which (a) affects in any substantial way, the scope, quality or performance of the works; (b) which limits in any substantial way, in consistent with the bidding documents, the employer's right or the bidder's obligation under the contract; or (c) whose rectification would effect unfairly the competitive position of other bidders presenting substantially responsive bid.

11.1. With reference to the aforesaid Clause 26.2 of the ITB, it is submitted that in so far as nomination of a Diploma holder in Civil engineering instead of BE (Civil) as the qualifications requirement for a Site Engineer, in view of availability of such qualified persons, as has also been mentioned in the tender documents itself by the petitioner, the deficiency should have been considered by the authorities to be a rectifiable defect which could have been clarified in no time, if the respondent authorities were interested for a bonafide evaluation of the bid furnished by the petitioner.

11.2. Similarly, the objection to the Bank's certificate for incorporation of certain additional words, could have also been clarified by the respondent authorities from the petitioner's banker, if they were prepared to evaluate the bid of the petitioner by the standard of a reasonable man without any extraneous consideration.

11.3. In none of the aforesaid situations there would have been any infringement of the requirement of Clause 26.2 inasmuch as the clarification, if sought and given, would not have affected in any substantial way the scope, quality or performance of the works, nor such rectification would have unfairly affected the competitive position of the other bidders.

12. It is further contended on behalf of the petitioners that because of the interim order passed by this court, the price bids of other tenderers who have

been declared as technically qualified have not yet been opened and considering the nature of the alleged deficiencies pointed out in the bid submitted by the petitioner, to keep out financial bid of the petitioner from consideration would not under any circumstances, be justified.

13. In support of the contentions advanced on behalf of the petitioner, the decision of the Supreme Court reported in *Khudiram Das Vs. The State of West Bengal and Others*, has been cited to show the nature of the conduct of a reasonable man.

By referring to the above decision, the learned senior Counsel submitted that the action of the respondent authority is so obviously unfair and unreasonable that it fails the touchstone of fairness while considering and evaluating the tenders and, accordingly, the impugned decision making process has been clearly vitiated, requiring interference of this court to enable consideration of the financial bid given by the petitioner company.

14. The Supreme Court decision reported in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, has also been cited by the learned senior Counsel to indicate that, in the tender process, there could be two categories of qualification criteria. In so far as the essential qualification criterion is concerned, it needs to be rigidly and strictly enforced and non-fulfillment of the essential qualification criteria should lead to disqualification of a tenderer.

However, with regard to the ancillary or subsidiary requirement to be incorporated by a tenderer such as the requirements specified in part (B) of Clause 4.5 of the ITB, rigid insistence on fulfillment of the said criterion specified in part (B) of Clause 4.5 of ITB, may not be justified.

The unreasonableness of the decision making process with regard to disqualification is all the more glaring in view of the rectifiable nature of the defects, if they are at all considered as deficiencies and the failure of the respondent authorities to seek clarification, it is submitted, has led to vitiating the decision making process.

15. Two decisions of this Court, namely, *Azharul Islam v. State of Assam and Ors.* (1996) 2 GLR 330 and *Bidhu Bhushan v. Union of India* and Anr. 2000 (1) GLT 341 have been also cited by the learned senior Counsel to indicate what could be termed as essential requirements in a tender and what could be considered as ancillary requirements in a tender.

The decision of *Bidhu Bhushan* (supra) is cited specifically to indicate an instance of furnishing a bank guarantee in a wrong name, which was later on clarified by the bank and on the basis of such clarification, the concerned bank guarantee was found acceptable in a tender process.

On the basis of the above decisions, the learned senior Counsel for the petitioner submitted that, in the instant case, the respondent authorities were obviously motivated by extraneous considerations to declare the bid of the petitioner as

non-responsive by treating the alleged deficiencies to be non-clarifiable.

16. In this context, it is submitted that the petitioner company has wide experience of dealing with State Public Works Department and has executed a number of projects for the Department as a chosen contractor including some major projects. The officers who have evaluated the technical bid of the petitioner and who have held the said technical bid to be non-responsive in the instant case, have considered other bids submitted by the petitioner company to be responsive in respect of financial strength as well as man power strength of the petitioner. With such intimate knowledge about the man power capability and financial strength of the petitioner company, the decision making authorities could not have declared the petitioner to have submitted a non-responsive bid, particularly with reference to the non-essential nature of the requirements which could have been easily clarified, were the respondent authorities interested in a fair evaluation of the technical bid of the petitioner company.

Accordingly, it is submitted that the entire decision making process, which is being scrutinized by this court, leading to disqualification of the petitioner company for the grounds and reasons mentioned, is vitiated in law and the same is liable to be interfered with by this court.

17. One further submission is being made on behalf of the petitioner company to show that the decision making process with regard to the evaluation of the technical bid of the petitioner company has been vitiated by stating that it is only during the course of hearing of the present case, that the ground No. 1 pertaining to furnishing of audited balance sheets has been conceded by the learned Addl. Advocate General to be not a valid ground, for declaring the technical bid of the petitioner company to be non-responsive. But, during the decision making process by the officers of the Department, the said ground No. 1 very much weighed in the minds of the decision making authority and have also influenced the decision making process. It is accordingly submitted that the impugned decision is obviously influenced by at least 1 irrelevant factor, which has been conceded by the learned Counsel appearing for the respondent authorities to be a non-germane ground. Accordingly the decision making process leading disqualification of the petitioner company is clearly vitiated.

18. Responding to the final submissions made on behalf of the petitioners as indicated in the preceding paragraph, Mr. K.N. Choudhury, learned Addl. Advocate General submits that the evaluation of the tenders have been made on the basis of objective consideration. Three such grounds have been made the basis for non acceptance of the technical bid of the petitioner. It is submitted that either of the three grounds could be considered to be a good and sufficient ground for holding the tender of the writ petitioner to be non-responsive. Thus even if one of the grounds is perceived to be non-germane ground, if the other two grounds are accepted as valid grounds by this Court, no interference in the decision making process would be justified in law.

19. Mr. K.N. Choudhury further contended that the condition incorporated in sub Clause (b) and (c) of Clause 4.5 B are mandatory conditions which are required to be fulfilled by all the bidders for qualifying during the process of evaluation of technical bids. The mandatory nature of the requirements are evident, according to the submissions made, because fulfillment of the said requirement pertaining to posting of key officers at the work site for execution of work, as well as availability of funds for execution of the work, would indicate the qualification of the bidder to execute the contract.

20. A further contention made on behalf of the respondents with reference to the Apex Court decision reported in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, Basing on the decision, a submission is advanced that Court must not exercise discretionary power in matters of contract, only on making, out of a legal point, but Court should intervene only when overwhelming public interest requires intervention of the Court.

21. Mr. Choudhury submits that the writ petitioner while responding to the requirement under sub Clause (b) of Clause 4.5 B of the ITB has indicated the name of Manas Dutta to be the Project Manager. But Manas Dutta has only one year experience in the position of Project Manager though he is stated to have sixteen years of general experience as an engineer. It is accordingly contended that the requirement indicated in sub Clause (b) of Clause 4.5 B is not fulfilled by the writ petitioner as the requirement specifies 5 to 7 years experience for the position of Project Manager.

22. Similarly, with regard to Sudhir Kumar who is nominated as the Site Engineer by the writ petitioner firm in its tender, he is only a diploma holder in Civil Engineer whereas the requirement shown is that of a B.E. Degree. Accordingly, it is submitted that because of such deficiencies, the petitioner has not been able to fulfill the essential requirement of the tender.

23. The learned Addl. Advocate General has further argued that Bank certificate dt. 10.1.07 given by the writ petitioner does not fulfil the requirement of Clause 4.5.B (c) of the ITB and without satisfaction of the said Clause, the financial competency of the petitioner to execute the contract cannot be judged. Accordingly it is contended that the technical bid of the petitioner has been rightly held to be non-responsive by the authority.

24. It would now be appropriate to examine whether the decision making process got vitiated in the instant case on the basis of the contentions raised by the parties.

25. With regard to the experience requirement of the Project Manager, it can be seen that ITB requirement was for posting of BE (Civil) with 5 to 7 years experience, without categorically specifying that such 5 to 7 years experience should be in the capacity of Project Manager only.

26. Under such circumstances, when the Project Manager nominated by the

petitioner company has experience of 16 years, no deficiency vis-a-vis the requirement of Clause 4.5 (B)(b) is perceived by this Court in so far as the requirement of 5 to 7 years experience, in the case of Project Manager for the subject contract.

27. As regards the requirement of Site Engineer to be a BE (Civil) degree holder with 3 years experience, the petitioner firm indicated the name of one Sudhir Kr. who is a diploma holder in Civil Engineering with 8 years experience. Normally a diploma holder cannot be accepted as a Site Engineer in terms of the requirement of sub clause (b) of Clause 4.5B.

28. However, in the same very page of the tender papers filed by the writ petitioner, names of at least two other BE (Civil) Engineers namely, Biplab Das and Sanjoy Sarkar have been mentioned by the petitioner company with experience of 7 years and 4 years respectively. Biplab Das has been shown as a Quality Surveyor and Sanjoy Sarkar has been shown as Survey Engineer, by the writ petitioner as additional key personnel who would be deputed at work site in connection with the subject contract.

29. Amongst the requirement of key personnel, the Department had not asked for either a Quality Surveyor or a Survey Engineer in the ITB. Thus, these two additional personnel were nominated by the petitioner company on their own without any specific necessity for providing for such personnel under the terms of ITB.

30. Under such circumstances the irregularity in nominating Sudhir Kr. as the Site Engineer, who is only a diploma holder, could have been easily taken care of by nominating either Biplab Das or Sanjoy Sarkar as the Site Engineer for the purpose of present contract.

31. As availability of these two graduate Engineers with requisite years of experience have been specified in the very page of the tender document, although they have not been shown as the Site Engineer, the bona fide of tender evaluation process could have been better established if the decision making authority would have sought a clarification from the petitioner with specific query on the placement of the Site Engineer for overseeing the work in question.

32. However, the respondent authorities while sending the communication dt. 20.1.07 (Annexure-VIII of counter affidavit) seeking general clarifications, did not specify their reservation on posting of a diploma holder as a Site Engineer. If such a specific clarification would have been sought, any of the other two persons who have been nominated as Quality Surveyor and Survey Engineer respectively who clearly possess the requisite education and experience qualification to be posted as a Site Engineer, could have been easily nominated as the Site Engineer by the petitioner towards fulfillment of the requirement of sub clause (b) of the relevant Clause of the ITB. However, the authorities did not seek such a clarification.

33. The aforesaid deficiency in the perception of the Court was a curable deficiency, more particularly in the context of availability of other graduate Engineers with requisite experience, who could have been deployed a Site Engineer to meet the requirement of the ITB.

34. Accordingly, I am of the opinion that the decision making process leading to the disqualification of the writ petitioner for alleged non fulfillment of the requirements under Clause 4.5B (b) of the ITB in so far as the requirement of posting the Project Manager and Site Engineer, is vitiated in law.

35. As regards the Bank certificated provided by the petitioner company to meet the requirement of Clause 4.5.B (c) of the ITB, the said requirement as is already noted is an additional requirement to indicate the financial competency of the bidding company to execute the contract. But financial competency of the bidder is to be assessed not only on the basis of the Bank certificate, but also on the basis of evaluation of the balance sheets of the company for the previous five years from the date of the bid.

36. The petitioner company has submitted its balance sheet for the years 2002, 2003, 2004, 2005 and 2006 which more than any other document would demonstrate the financial strength of the company.

37. That apart, the petitioner company is also involved with various other works as a contractor of the PWD including some major works. Thus the financial strength of the company would normally be known to the officers who are involved with the bid evaluation process as the same set of officers are involved in evaluation in other contracts of the PWD.

38. Under such circumstances, if there was any reservation on the Bank certificate because of the additional words inserted therein by the Bank, the respondent authorities could have easily sought clarification on the said certificate from the concerned Bank.

39. In the certificate furnished by the petitioner company, their Bankers had clearly indicated that they would provide requisite financial support to the petitioner company for executing the work in question. The said undertaking of the Bank was clear and unambiguous.

40. In view of above, it is difficult to accept that ground No. III alleging non fulfillment of the requirement of Clause 4.5 B(c) could be one of the relevant grounds, for considering the bid of the petitioner to be non-responsive.

41. In any event, the respondent authorities could have also sought a clarification from the petitioner's banker, if they had any reservation on the commitment of the Bank to finance the petitioner company. But such clarification was not sought.

42. By seeking clarification with regard to the perceived deficiencies in the tender of the petitioner company under ground Nos. II and III, there would not have

been any substantial weightage in the scope, quality or performance of the works, nor seeking of such clarification would have limited the employer's right or the bidder's obligation under the contract. Rectification could have been permitted by the respondents in the context of the grounds No. II and III, without affecting unfairly, the competitive position of the other bidders.

43. Under such circumstances, the decision taken by the respondent authorities to declare the bid of the petitioner to be non-responsive is held to be vitiated in law because as is already discussed the requirements stipulated in Part B and sub-clause (b) and (c) of 4.5 of the ITB are additional requirements unlike the essential requirements specified in Part A of Clause 4.5 of the ITB. The Part B requirements cannot be placed in the same footing as the part A requirements, when the part A requirements are preceded by the words "to qualify for the award of contract."

There is thus a clear distinction between the requirements of Part-A and Part B of Clause 4.5 of the ITB.

Although it is important for a tenderer to fulfill the requirements of both Part A and Part B of Clause 4.5, yet in so far as Sub-clause (b) and (c) of Part B is concerned, they are clarifiable or curable requirements and fair consideration would require the respondents to seek clarification for the said deficiencies.

Under such circumstances the conduct of the respondent authorities in not seeking clarifications from the petitioner of their Banker, fail the test of conduct of a reasonable man as indicated by the Supreme Court in Khudiram Das (supra).

44. The Court must now consider as to whether public interest would require intervention of the Court with the decision making process in light of the Air India case (supra) relied upon by the respondent's Counsel.

45. In the present case because of interim order passed by this Court, the financial bids of the technically qualified tenderers have not yet been opened. Now if rejection of the technical bid of the petitioner company is held to be vitiated, the petitioner's technical bid would have to be declared as responsive. In such situation, the financial bid of the writ petitioner is also to be considered along with the financial bids of other technically qualified tenderers.

46. With the participation of the petitioner in the financial bid stage, additional competition would be generated, which would not certainly be contrary to public interest. If the bid of the petitioner is found to be lower than others, by the selection of petitioner, for the award of the contract, the contract can be executed at a lower price, saving public money. On the other hand, if the petitioner's financial bid is not found competitive, another qualified tenderer would be selected for award of the contract.

47. In view of the above discussions, I am of the opinion that cause of public interest would be served by interfering with the impugned decision making process since, in the perception of this Court, the authorities erred in deciding

the bid of the writ petitioner to be non-responsive.

48. Therefore, the writ petition is allowed. The respondent authorities are permitted to make a fresh assessment on the responsiveness of the bid of the writ petitioner, in the light of the discussion made hereinabove.

49. In the instant case, as the perceived deficiencies have been declared to be clarifiable, the authorities may seek clarification from the petitioner company with regard to the deficiencies indicated as ground Nos. II and III. On such clarifications being furnished, the authorities are required to make a fresh consideration of the technical bid of the petitioner in the light of the direction given in this judgment. After such fresh evaluation, consequential opportunity may also be provided to the petitioner company to enable consideration of their financial bid.

The writ petition is allowed as above. No cost.