

(2014) 07 AHC CK 0006
In the Allahabad High Court
Case No : C.M.W.P. No. 20725 of 2014

Hindustan Construction Company Ltd.	APPELLANT
Vs	
U.P. Jal Nigam and Others	RESPONDENT

Date of Decision : 31-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 226

Citation : (2015) 1 AWC 177

Hon'ble Judges : Vivek Kumar Birla, J;Amreshwar Pratap Sahi, J

Bench : Division Bench

Advocate : Shashi Nandan and Rahul Agarwal, Advocates for the Appellant; K.R. Sirohi, Q.H. Siddiqui, S.M.A. Kazmi, V.K. Rai and Safdar Kazmi, Advocates for the Respondent

Judgement

Amreshwar Pratap Sahi and Vivek Kumar Birla, JJ.—The challenge raised is to the correctness of the evaluation report resulting in rejection of the bid of the petitioner on the ground that it does not fulfil the parameters of long term financial soundness to execute the work. The prayer is for a judicial review of the illegality, irrationality and procedural impropriety of the impugned decision on the allegation that the rejection is arbitrary and contrary to the terms and conditions prescribed for evaluation and qualification.

The precise challenge broadly is that on facts the petitioner fulfils the eligibility criteria at the pre-qualification stage, and having satisfactorily crossed the first stage (Envelope-I) of Experience and Financial Capability, the petitioner could not have been eliminated, on allegations of deficiency of this stage that stood foreclosed for assessment, at the second stage of Technical Bid (Envelope-II). Moreso when the technical bid of the petitioner has been found to be valid. The thrust of the argument is that since the terms clearly provide participation for technical bid only after qualifying the first stage of eligibility, then this presumption strongly weighs in favour of the petitioner on facts, and accordingly a review or scrutiny afresh on the material of financial capability that already

existed before the invitation for technical bid, was impermissible at the stage of opening of technical bids.

Heard Sri Shashi Nandan, learned senior counsel assisted by Sri Rahul Agarwal for the petitioner, Sri S.M.A. Kazmi, learned senior advocate assisted by Sri Safdar Kazmi for the respondent Nos. 1 and 2 and learned standing counsel appearing for the respondent-State.

2. The present petition has been filed for the following reliefs:

"(a) Issue a writ, order or direction in the nature of certiorari quashing the determination of the respondent No. 1 that the petitioner's bid is not liable to be considered on ground of long term financial unsoundness and also quash the financial bid evaluation report dated 24.12.2013 and 27.12.2013.

(b) Issue a writ, order or direction in the nature of mandamus directing the respondent No. 1 to consider the petitioner's financial bids in respect of Contracts 5A and 5B called under notice inviting tender dated 31.5.2013 having No. UPJN/AWSP/5A, 5B and 5C Conduit Pipe (NIT No. 91/V-2) as the lowest bid and award the said contracts to the petitioner;

(c) Issue a writ, order or direction in the nature of mandamus restraining the respondent No. 1 from annulling the tender process and re-framing the tender conditions in a way which would disqualify/prevent the petitioner from participating in the tender process.

(d) Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

(e) Award costs of the petition to the petitioner throughout."

3. The facts in brief, as stated by the petitioner, for the purpose of disposal of the present controversy are that the U.P. Jal Nigam invited bids for the Agra Water Supply Project for transportation of Ganga Water from a place in District Bulandshahr to Agra. The aforesaid project is being funded by the Japanese International Co-operation Agency (hereinafter referred to as the "J.I.C.A."). The U.P. Jal Nigam (hereinafter referred to as "Jal Nigam") invited "Single Stage Three Envelops" bid for packages 5A, 5B, 5C and 7. In the present petition, we are concerned only with the items scheduled as 5A and 5B. The petitioner-Hindustan Construction Company Ltd. submitted its bid as a joint venture with Pratibha Pipes and Structural Ltd. on 2.8.2013. The procedure for invitation of the bids has the following features namely (a) Envelope-1 : Eligibility Requirements (Pre-Qualification) Experience and Financial Capability, (b) Envelop- 2 : Technical Bid and (c) Envelop-3 : Price Bid. All the three envelopes were received on 5.8.2013.

The said envelopes were opened against the tender notice dated 31.5.2013. On 26.8.2013 a report of the Chartered Accountant was obtained and on the basis thereof the tender committee at the headquarter level resolved on 27.8.2013 for

obtaining further information in relation to the financial soundness of the 11 firms that had made their bids for all the 4 packages, namely, 5A, 5B, 5C and 7. It is noteworthy to mention that it was a "Single Stage Three Envelops" bid that was being considered. It appears from the said resolution that a couple of factors that were required to be examined for financial soundness had not been adhered to and, therefore, this required further investigation. The Project Manager Mr. Sushil Kumar prepared a notesheet on 5.9.2013 that the report should also be called from the Financial Director of the Jal Nigam and the report of the Chartered Accountant should also be taken into account.

4. On 10.9.2013, the respondent-Jal Nigam issued a letter to the petitioner requesting to clarify its financial position as per Clause 4.7 of the Instruction to Applicants For Eligibility Requirement as it was observed that the information submitted was not sufficient to prove the financial soundness beyond doubt. It is alleged that on 16.9.2013 the petitioner responded to the above letter and clarified the queries. A perusal of Annexures-3 to the writ petition clearly discloses that additional information regarding Debt Equity Ratio (D.E.R.) and Earning Per Share (E.P.S.) were sought to assess the financial soundness of the petitioner. The petitioner submitted its reply on 16.9.2013 (Annexure-4 to the petition). It is important to note that such letters were dispatched for collecting similar information from all the 11 bidders in respect of all packages without discrimination. A document which has been filed alongwith the counter-affidavit which is at page 82 thereof indicates an exercise undertaken at the level of Financial Director indicating the financial unsoundness of three firms including the petitioner.

5. The Jal Nigam vide letter dated 25.9.2013 wrote to the petitioner that the petitioner has been short listed for a captioned package and the Technical Bid will be opened on Friday 27th September, 2013 at 1.30 p.m. in the presence of the bidders' representatives. It is to be noticed that this letter was sent to only three bidders namely the petitioner-Hindustan Construction Company Ltd. in joint venture with Pratibha Pipes and Structural Ltd., Larsen and Tubro Ltd. in joint venture with M/s. Nagarjun Construction Company Ltd. and S.P.M.L. Infra Ltd. in joint venture with Megha Engineer Infra Ltd. (M.E.I.L.). The representative of the petitioner-company attended the opening of the said envelop. The same was with the concurrence of J.I.C.A. as is evident from Annexure-CA-8 to the counter-affidavit.

6. It is further stated that the Jal Nigam opened the financial bid of other bidders for contract 5A and 5B without mentioning the name of the petitioner. In January, 2014, the Jal Nigam released the Financial Bid Evaluation Report wherein the respondent-Jal Nigam found joint venture of Larsen and Toubro Ltd. in joint venture with M/s. Nagarjun Construction Company Ltd. to be the lowest price of Rs. 964,99,98,582.41 and in contract 5B the respondent-Jal Nigam found H.T.M.C. in joint venture with M.E.I.L. to be lowest price at Rs. 892,04,97,922. It is alleged that comparing both the projects the bid price offered by the petitioner

was substantially low to the tune of around Rs. 260 crores as narrated in paragraph 18 of the writ petition.

7. A counter-affidavit has been filed by the respondent Nos. 1 and 2. The case of the respondent-Jal Nigam is that an ambitious project of public importance to provide long term solution for "drinking water availability" known as Agra Water Supply (Ganga Jal) Project amounting to Rs. 2887.92 crore was approved jointly by the Government of U.P. and Jal Nigam. The project is being financed by Japan International Co-operation Agency (J.I.C.A.). This project comprises of tapping Upper Ganga Canal near Palra Fall in District Bulandshahr (U.P.) and transportation of 150 Cusec Ganga Water from Palra to Agra through a length of 130 kms. under gravity, water treatment facilities and various other rehabilitation of existing facilities in Agra City.

8. It is the case of the respondent-Jal Nigam that the said qualification criteria for contract package Nos. 5A, 5B and 5C were finalised during the meeting held on 12.5.2013 and 13.5.2013 under the Chairmanship of Principal Secretary, Nagar Vikas Vibhag, Government of U.P. and a draft tender document was prepared and forwarded to J.I.C.A. for concurrence. The Single Stage 3 Envelop Bid were invited against which admittedly the petitioner had filed bid documents and had also supplied the necessary information to the Jal Nigam. It is the case of the respondents that a strict time schedule was provided and was liable to be adhered to as instructed by J.I.C.A., the organisation that is providing financial help for the project. It has been stated that the audited balance-sheet of last 5 years were taken into consideration as clearly provided in Clause 4.7 of the instructions to assess the applicants for eligibility requirement. The case of the respondent is that the audited financial statement were not submitted by the petitioner. On 26.8.2013 the Chartered Accountant of the Jal Nigam submitted a report of financial soundness regarding observation of credential of different parties. This document is Annexure-5 to the counter-affidavit. The Debt Equity Ratio (D.E.R.) and Equity Per Share (E.P.S.) have been shown which in the case of the petitioner reflects in the negative. It is the case of the respondent-Jal Nigam that all powers to take decisions regarding the aforesaid bid were with the committee to consider pre-qualification on the basis of bid documents for assessing the financial soundness of a bidder.

9. The minutes of the meeting dated 27.8.2013 have been annexed as Annexure-6 to the counter-affidavit which clearly shows that since only Turnover, Current networth, Bid capacity and Cash Flow for a period of Four Months were factors to be taken into consideration for assessing the financial soundness of a bidder, and whereas it was highlighted that E.P.S. and D.E.R. are also extremely important but they have not been asked for from the bidders, and therefore, the details thereof be called from the bidders and these two criteria should also be taken into consideration while preparing the Evaluation Report for the purpose of consideration of the report further by the head office level committee. It is for this reason the meeting dated 4.9.2013 by the Headquarter Tender Committee

was convened in pursuance whereof the letter dated 10.9.2013 was sent to all the participating bidders to furnish information in the light of the Chartered Accountant's finding. This letter is Annexure-7 to the counter-affidavit and the same contains the names of all the 11 participants.

10. The reply received in response to the aforesaid letter dated 10.9.2013 was submitted by the petitioner alongwith the information supplied by other bidders that was again forwarded to the Chartered Accountant for verification. The Chartered Accountant submitted his report after examination on 26.9.2013 which is on record as Annexure-5 to the counter-affidavit which has already been referred hereinabove.

11. It is further evident that since J.I.C.A. is the agency providing the financial assistance and its concurrence being essential part of the procedure, a consent was taken from J.I.C.A. that was received on 24/25/26 September, 2013 regarding opening of the technical bids.

12. On 25.9.2013 pursuance to the aforesaid concurrence of J.I.C.A., a letter dated 25.9.2013 was issued to the short listed bidders including the petitioner about opening of the envelop of the Technical Bid on 27.9.2013. Vide letter dated 3.10.2013 the Managing Director of the Jal Nigam directed the Project Manager of the Jal Nigam to take into consideration the departmental Chartered Accountant's report dated 26.8.2013 wherein he had opined that H.C.C. Ltd.-petitioner, I.V.R.C.L. "as financial position is not comfortable" in the light thereof the Technical Bid Evaluation be done. The aforesaid issue was also referred to J.I.C.A. vide letter dated 17.10.2013 for its concurrence which was considered by J.I.C.A. vide letter dated 29.10.2013, which is Annexure-12 to the petition. The said letter of J.I.C.A. is significant in the sense that it reiterates that the Jal Nigam may like to review/verify various eligibility requirements/claims including financial capability of the bidders and then submit the proposal for concurrence in the next stage of technical evaluation.

13. The aforesaid letter gains significance as it appears that the response of the petitioner dated 16.9.2013 and the doubts expressed with regard to the financial soundness was still under consideration and J.I.C.A. had called upon the Jal Nigam to review the same.

14. The financial bids relating to packages 5A and 5B were obtained on 24.12.2013 and that of 5C and 7 were obtained on 27.12.2013 and evaluation report was prepared, which is impugned in the present writ petition. on 24.12.2013 and forwarded to the tender committee in January, 2014. It is relevant to clarify at this stage that the tender has to pass through three stages. The first stage is at the pre-qualification stage, namely, adjudging the experience and financial capability. This prequalification bid has to be screened initially by the Zonal Tender Committee chaired by the Project Director, the Headquarter Level Tender Sub-committee headed by the Chief Engineer of the U.P. Jal Nigam and then finally by the Managing Director of the U.P. Jal Nigam for approval. The

concurrence by the J.I.C.A. is required in respect of such screening to be conducted at the prequalification level. The second stage of technical bids is required to be screened by the Zonal Tender Committee aforesaid and then by the Managing Director again with the concurrence of J.I.C.A. The third stage of the price bid is to be screened by the Zonal Tender Committee and the Headquarter Level Tender Subcommittee that will be chaired by the Chairman of the Tender Committee. This stage would also require the concurrence of J.I.C.A. These facts have been clearly stated, and appear to be undisputed, in the table that has been extracted as table 3 at page 8 of the counter-affidavit. Thus, there is an overall concurrence of J.I.C.A. at every stage for the purpose of approval of the three stages of the bids.

15. On the strength of the aforesaid, the case of the Jal Nigam is that no illegality or arbitrariness or unreasonableness can be attributed to the process and the case of all the bidders was considered that was within the jurisdiction of the respondent-Jal Nigam to look into long term financial soundness even before proceeding further with the technical bid after opening the same. It has been further contended that from the record it is very much clear that no final decision by the tender committee had been taken at the stage of envelop one regarding pre-qualification criteria. All the three bidders were invited without discrimination for the opening of the technical bid, whereas it is very much clear that on record the final decision regarding financial soundness of the short listed bidders by the Tender Committee was still pending. It is further contended that it was well within the competence of the Jal Nigam to consider the long term financial soundness of the petitioner at the technical stage bid.

16. The petitioner appears to have written a letter to J.I.C.A. on 24.2.2014 and the letter written to the Jal Nigam on 3.2.2014. This was followed by a sort of a legal notice by a counsel of the company on 27.3.2014. The Zonal Tender Committee had also taken stock of the situation in relation to financial bids on 15.3.2014. Ultimately, the Managing Director cleared the matter for proceeding with the lowest bidder on 30.3.2014 keeping in view the evaluation report dated 24.2.2013. It is noteworthy to mention that the petitioner company had also annexed alongwith its letter dated 27.3.2014 the communication by the I.C.I.C.I. Bank dated 12.7.2013 on behalf of the consortium of several banks to finance the project for which the petitioner had filed the bid. It also accompanied the letter of the chairman of the company which is at page 104 of the paper book of the supplementary affidavit, filed by the petitioner, which mentions that a bank consortium of 27 banks have agreed to consider the restructuring of the total debt to the company of around Rs. 3,300 crores through Corporate Debt Restructuring (C.D.R.). Sri Sushil Kumar gave a reply to the petitioner on 7.4.2014, which is Annexure-1 to the supplementary-affidavit, adding more facts and alleging that the petitioner had concealed relevant material pertaining to the financial losses of the company and its debt restructuring documents.

17. The funding agency, namely, J.I.C.A. after studying the entire documents

submitted including the recommendation of the Managing Director dated 30.3.2014 as well as the query in relation to Clause 4.7 of the bid documents of financial soundness concurred with the said proposals vide letter dated 15.4.2014 which is Annexure-CA-24 to the counter-affidavit.

18. On page 13 of the supplementary-affidavit, the D.E.R. and E.P.S. have also been shown, and on page 20, it has been mentioned that pursuant to C.D.R. arrangement, promoters have in brought 68 crores and that the company has also warrants convertible into equity shares.

19. A rejoinder-affidavit has been filed wherein the contents of the counter-affidavit are denied. The petitioner company has refuted the contention of the Jal Nigam regarding C.D.R. and have also filed bank certificates to show the willingness of the bank to extend overdraft/credit facility to the extent of Rs. 6,500 billion to meet the working capital for executing the contract.

20. For the purpose of proper appreciation of the controversy involved, it is necessary to consider the conditions of eligibility requirement which are contained in Annexure-1 to the writ petition.

21. These clauses are quoted herein below :

"INSTRUCTIONS TO APPLICANTS FOR ELIGIBILITY REQUIREMENTS.

2.0. This is a Single Stage Three Envelope System Bid. Envelop I shall consists of information and forms pertaining to eligibility requirements (experience and financial capability). Envelope II shall consist of all the Technical Information. Envelope III shall consist of Financial Bid for this project.

This section relates to the eligibility requirements of bidders. All applicants must meet the following criteria for experience and financial capacity, to be considered eligible for technical evaluation.

4.6. Financial Position :

The applicants shall demonstrate that he has access to, or has available, working capital, liquid assets, available lines of credit, and other financial means sufficient to meet the required cash flow for execution of Contract for a period of 4 months during the duration of the contract, estimated as I.N.R. 962 million equivalent, net of the applicant's commitments for other contracts. The requisite information to be furnished shall be supplemented by enclosing relevant certified documents with the application in order to satisfy the above criterion.

4.7. The current net worth (assessed as total assets minus total liabilities in the latest completed financial year) shall be positive, for which the applicant wishes to bid. The requisite information shall be furnished duly certified by a Registered Accountant.

The audited financial statements for the last five years shall be submitted and must demonstrate the soundness of the applicant's financial position, showing

long-term profitability. Where necessary, the Employer will make inquiries with the applicant's bankers.

4.8. The Bidding Capacity : The bidder shall have the available bid capacity not less than I.N.R. 10815 Million.

Bid Capacity shall be assessed on present value of completed contract and contract in hands by following methods Bidding Capacity = $2 \times A \times N - B$ where.

A= Minimum turnover during the last three financial year ending on 31.3.2013 (corrected to the current level of value).

N= Stipulated period of execution of contract in years.

B= value of existing commitments to be completed during the execution period of bid.

8. Pass/Fail criteria :

All the bidders (either as a Single Company or as a Joint Venture) meeting the above criteria will be considered passed and eligible for further Technical Evaluation.

27. Clarification of Bids :

27.1. To assist in the examination, evaluation, and comparison of the Technical and Price Bids, and qualification of the Bidders, the employer may, at its discretion, ask any Bidder for a clarification of its bid. Any clarification submitted by a Bidder that is not in response to a request by the employer shall not be considered. The employer's request for clarification and the response shall be in writing. No change in the substance of the Technical Bid or prices in the Price Bid shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the employer in the evaluation of the Price Bids in accordance with I.T.B. 31.

37. Employer's Right to Accept Any Bid, and to Reject Any or All Bids.

37.1. The employer reserves the right to accept or reject any

bid, and to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to Bidders. In case of annulment, all bids submitted and specifically, bid securities, shall be promptly returned to the Bidders.

22. Section II which relates to bid Data Sheet also includes several important clause which are also being extracted herein below :

"I.T.B. 19.6 Clause 19.6 shall be rewritten as follows :

The bid security may be forfeited :

(a) If a Bidder withdraws its bid during the period of bid validity specified by the

Bidder on the Letter of Bid.

(b) if the successful Bidder fails to :

(i) sign the Contract in accordance with I.T.B. 40; or

(ii) furnish a performance security in accordance with I.T.B. 41.

(c) If at any time, it is found that the bidder has given false information/data/document or concealed facts.

I.T.B. 25.1. Replace I.T.B. 25.1 as follows :

The Employer shall open the Bid Security first and envelope I comprising the "Eligibility Requirements" in public, in the presence of Bidders" designated representatives and anyone who choose to attend, at the following venue, time and date :

Street Address : 4/4 Sanjay Place City : Agra, Uttar Pradesh Z.I.P. Code : 282-002 Country : India Date : 15th July, 2013 Time : 1500 hours

The Bidders" representatives who are present shall sign a register evidencing their attendance.

The Technical and Price Bids (Envelopes II and III) will remain unopened and will be held in the safe custody of the employer until the time of their opening.

After evaluation and screening of the "Eligibility Requirements", the employer will invite, qualified bidders to attend the opening of the Technical Bids.

The Employer Shall open the Technical Bids of qualified Bidders in Public, in the presence of Bidders" designated representatives and anyone who choose to attend.

The Price Bids will remain unopened and will be held in the custody of the Employer until the time of their opening to be specified in accordance with I.T.B. 25.7.

E. Evaluation, and Comparison of Bids.

I.T.B. 29 Change I.T.B. 29 "Preliminary Examination of Technical Bids" to "Preliminary Examination of Bids."

I.T.B. 29.1 Replace I.T.B.. 29.1 as follows :

The Employer shall examine the Bidders" documents submitted in Envelope I- "Eligibility Requirements" to confirm that all documents (including completeness of the documents submitted) as required under Part I in support of the qualifications of the Bidder have been provided.

Failure to provide information that is essential to evaluate the Bidder's qualifications as required in Part I, may result in disqualification of the Bidder.

The Employer will examine each bid to determine whether the Bidder meets the minimum eligibility requirements as stipulated in Part I of this document before considering the Bid for further Technical Evaluation. If a Bidder (singly or as Joint Venture) does not satisfy the minimum eligibility requirements, for experience as well as financial capability, his Bid will not be considered for further Technical Evaluation.

Under Technical Evaluation, the Employer shall only examine the Technical Bids of eligible Bidders to confirm that all documents and technical documentation requested in I.T.B. 11.2 have been provided, and to determine the completeness of each document submitted.

I.T.B. 30.1 Amend I.T.B. 30.1 as follows :

The Employer shall carry out evaluation of the Technical Bids of Eligible Bidders only, previously determined to have satisfactorily met the bid's eligibility requirements.

The Employer's determination of Technical Bid's responsiveness is to be based on the contents of the bid itself, as defined in I.T.B. 11.

I.T.B. 32 Amend I.T.B. 32 as follows:

32.1. The Employer shall determine to its satisfaction during the evaluation of the "Eligibility Requirements" that the Bidder meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

32.2. The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to I.T.B. 17.1.

32.3. An affirmative determination shall be a prerequisite for the evaluation of a Bidder's Technical Bid. A negative determination shall result in disqualification of the bid, in which event the Employer shall return the Technical Bid and unopened Price Bid to the Bidder.

23. It is also relevant to extract the relevant portion of the resolution recorded against the petitioner whereby the committee found that the bid of the petitioner was not considered responsive for long term financial soundness by the U.P. Jal Nigam, even though found technically valid. Relevant extract of the Summary of the report of Financial Bid Evaluation Report is extracted hereinbelow :

"Summary :

Notification was issued on 25.9.2013 to three (3) eligible bidder intimating them the opening of technical bids on 27.9.2013 at 1.30 p.m. It may be mentioned that tenders were called earlier on single stage three envelop system (Eligibility, Technical and Financial). Hence, no sale of technical and financial tenders was involved now.

The Technical bids were opened on appointed day and time in the presence of

the Bidders" representatives in the office of the Project Director, U.P.J.N., Agra.

Based on the technical evaluation, the bids submitted by two of the bidders, listed below in Table-1, were found substantially responsive. The bid belonging to M/s. Hindustan Construction Co. Ltd., New Delhi (who is in joint venture with M/s. Pratibha Pipes and Structural Ltd.) was not considered responsive on long term financial soundness grounds by U.P.J.N. even though they were found to qualify technically. After getting concurrence on technical evaluation from J.I.C.A., the financial bids of two responsive bidders were opened on 24.12.2013 at 2.00 p.m. in the office of the Project Director, Agra in the presence of Bidder's representatives."

24. The crux of the arguments of Sri Shashi Nandan, learned senior counsel for the petitioner, is that once the petitioner's financial capability had been found fit as per the eligibility requirements, it was only then that the petitioner was invited at the opening of the technical bid. Thus, there remained nothing to be reconsidered or reviewed on the financial capability of the petitioner which had been evaluated and determined to the satisfaction of the respondents. He submits that in such a situation the presumption that has to be drawn in favour of the petitioner is that he fulfilled all the eligibility requirements of financial capability and his information contained in Envelope-I as clarified on 16.9.2013 had been found complete that the bidder would be entitled to participate in the technical bid.

25. On such facts he contends that there was an affirmative determination as per 32.3 and not a negative one so as to disqualify the petitioner from participating in the technical bid. It is for this reason that the petitioner on 25.9.2013 was found as one of the applicants entitled to participate in the technical bid. For this Sri Shashi Nandan has invited the attention of the court to the letter dated 16.9.2013 to urge that this assessment had preceded the invitation dated 25.9.2013 as the petitioner had given full and complete reply to whatever was required under the letter dated 16.9.2013.

26. With the aid of the supplementary-affidavit Sri Shashi Nandan has urged that the same Project Director Sri Sushil Kumar had been issuing these letters allowing the petitioner to participate in the technical bid and who was aware of every fact. He submits that the reply which was sent to the lawyer of the petitioner by the said Sri Sushil Kumar on 7.4.2014 demonstrates the indication of an additional reason of some material fact being concealed by the petitioner in respect of his financial soundness. Sri Shashi Nandan submits that this reason is not to be found in the impugned resolution and even otherwise the same is absolutely incorrect inasmuch as the petitioner in response to the letter dated 16.9.2013 had admittedly sent his reply, copy whereof has been filed to the Annexure-2 to the supplementary-affidavit that includes herewith each fact relating to the query raised and also all facts relating to Corporate Debt Restructuring (C.D.R.).

27. He submits that these were all part of the financial document that was required to assess the capability and soundness of the petitioner company's financial status, including the chairman's declaration which also incorporates the Director's report and the Auditor's report. He further submits that the loss of one year by the company does not in any way dilute the financial capability of the petitioner's company that had withstood business for almost 50 years except for the period of one year about which mention has been made by the Chartered Accountant report. There is nothing which may indicate the diminishing financial status of the company. He contends that there is a total non-consideration of such factors and the action suffers from perversity as the impugned resolution and evaluation report nowhere indicates consideration of the letter dated 16.9.2013 and the reply sent by the petitioner company to the same. Sri Shashi Nandan reiterated that it was after being satisfied with all such documents on record that the petitioner on 25.9.2013 was invited for the technical bid which took place thereafter. The contention, therefore, is that the respondents cannot turn around against their own terms and conditions of the tender documents and they cannot be allowed to plead that the petitioner company deserves to be non-suited. He, therefore, submits that the action is arbitrary and it violates Article 14 of the Constitution of India inasmuch as the resolution has been tailored to eliminate the petitioner company whose bid is approximately 250 crores lower than the company which has been finally short-listed. The contention is that the transaction is being mala fide sought to be executed which deserves to be forestalled as the petitioner's bid is being wrongly excluded.

28. Sri Shashi Nandan has relied on three judgments to contend that the parameters as laid down by the Apex Court in the said decisions do not permit the respondents to act contrary to the tender conditions and the impugned evaluation resulting in the disqualification of the petitioner is illegal, irrational and procedurally improper. He submits that the petitioners have been denied a level playing field and as such the impugned action deserves to be struck down being in violation of Articles 14 and 19(1)(g) of the Constitution of India. The judgments relied upon by him are in the case of *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, ; *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, and *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, .

29. Sri S.M.A. Kazmi, learned senior counsel for the Jal Nigam, contends that the primary concern of the Jal Nigam was to observe all the terms and conditions of the tender and in consultation with Japanese International Co-operation Agency (J.I.C.A.) as the project is being financed by it. He submits that it was in the discussion which was held on 27.8.2013 by the tender committee that a decision was taken to obtain information which had been neglected in relation to the financial capabilities, particularly, the two factors of Debt Equity Ratio (D.E.R.) and Earning Per Share (E.P.S.) capacity of the bidders. He submits that this resolution dated 27.8.2013 which was passed by the tender committee was

much prior to the opening of the first envelope. He submits that it is in pursuance thereof that the letter dated 16.9.2013 was sent and no objection was raised by the petitioner to the same. To the contrary, the petitioner acquiesced to this query and sent the information.

30. Sri Kazmi submits that the petitioner company has failed to demonstrate that it satisfied the queries as per the requirements inasmuch as no affirmative decision was taken accepting the explanation by the petitioner to the said queries. He contends that these parameters about which the queries had been raised were essential for the purpose of appropriately assessing the financial capability of a company and he submits that even if all the facts had been disclosed by the petitioner company, the tender committee had the authority to assess the financial capabilities as well, and the mere invitation to participate in the technical bid does not amount to waiving of all future consideration on this count that is permissible as per I.T.B. 32 and I.T.B. 37.

31. He submits that from the record it is clear that the petitioner company under the terms of the bid was required to give at least 3 years continuous audit reports verified by the Chartered Accountant and the said reports, admittedly, indicate a loss by the petitioner company in one of the years. It is this which was taken into consideration for the purpose of assessing the claim of financial soundness of the company. The contention, therefore, is that there was no bar merely because the terms of the tender indicated the opening of the technical bid on assessment of the financial capability as contained in envelope one. He submits that the petitioner has been unable to demonstrate that the tender committee was debarred from looking into the issues touching upon the financial capability at the time of opening of technical bid and this could not prevent the answering respondents from rejecting the bid of the petitioner on such a ground.

32. He submits that general terms and conditions of the tender as noted above clearly indicate that the bid would not be final unless the capabilities financially and technically were fulfilled. This according to Sri Kazmi can be assessed even before award of the contract at any stage. He submits that so far as the letter sent by Sri Sushil Kumar on 7.4.2014 is concerned, the same was absolutely unwarranted and any aberration in communications cannot in any way disentitle the tender committee which is the authority responsible to take a decision and inform the petitioner accordingly.

33. He submits that if the norms are not fulfilled then, it is in order to save the project from being carried out by an incapable firm, that such precautions are engrained in the terms and conditions of tender which was being observed by the tender committee. The contention of the petitioner that the tender bid of the petitioner committee was being selectively eliminated for mala fide reasons is thus unfounded. He submits that even if there was a slight variation in the time table of the terms of contract, the proceedings were being conducted in order to avoid any further delay and it is in this exercise that it was thought fit to invite the petitioner as well for the technical bid which was obviously subject to the

resolution dated 27.8.2013.

34. Sri Kazmi submits that even on facts it is evident that the Debt Equity Ratio, admittedly, clearly reflected that due to having suffered losses, that the company had negotiated the reconstruction of debts under a scheme for which financial institutions are stated to have offered packages. He submits that such offer of packages as urged on behalf of the petitioner does not in any way lead to the presumption that such packages had led to the improvement in the company financial status and that its debts had all been cleared. He submits that they were mere offers and that cannot be treated to be an asset of the company. The fact remains that the twin conditions under the resolution dated 27.8.2013 were not fulfilled by the petitioner's company in the preceding year of the bid offer as required under the tender conditions. The financial status previously or even thereafter of the company would not be material except the relevant years which had been mentioned in the tender notice.

35. Sri Kazmi in support of his submissions relating to minor abrasion and other aspects argued, has relied on the decisions in the case of Jagdish Mandal Vs. State of Orissa and Others, and the decision in the case of the petitioner's company itself rendered by the Lucknow Bench in M.B. No. 3363 of 2014, decided on 9.5.2014.

36. Having considered the aforesaid submissions we find that the petitioner company has been non suited on the ground of not fulfilling the tender requirements relating to financial capability as per the resolution dated 27.8.2013. In our opinion, the invitation given to the petitioner on 25.9.2013 was definitely subject to such a resolution and the petitioner himself had responded to it by supplying the information as per the notice dated 16.9.2013. Consequently, such information was to be assessed and taken into consideration for the purpose of adjudging the financial capability of the petitioner. It was thus, not the mere report of the Chartered Accountant dated 26.8.2013 that had led to such queries. On the other hand, it was a conscious decision of the tender committee to obtain further information with regard to the two elements referred to in the resolution dated 27.8.2013 indicated hereinabove not only from the petitioner, but from all bidders. Sri Shashi Nandan has urged that as a matter of fact there was no such requirement under the tender conditions. This argument cannot be accepted inasmuch as the petitioner did not object to the information being furnished through the queries dated 16.9.2013. To the contrary, the petitioner himself provided the entire information on the said subject that amounts to a submission touching acquiescence. This conduct of the petitioner therefore, does not estopp the respondents from evaluating such information.

37. The respondents gave ample opportunity on 16.9.2013 to the petitioner to inform the respondents about the financial incapability or unsoundness on the factors which have been incorporated in the impugned evaluation report. Nonetheless, since, this is a contract which entails both elements to be adjudged for the purpose of award of contract, we do not find the action of the respondents

to be arbitrary in considering the documents which were supplied by the petitioner in response to the query dated 16.9.2013. A procedural aberration which is not substantial in nature, cannot take away the right of the respondents to adjudge the financial capability of the petitioner. The arguments of Sri Shashi Nandan that once the petitioner has been invited on 25.9.2013 then the respondents cannot reopen the issue relating to financial capability does not appear to be acceptable in the aforesaid background. The respondents retain the authority and power to either accept or reject a bid even at the stage of final preparation provided their action is not arbitrary and does not violate Article 14 of the Constitution of India. The contention of the petitioner that it was in order to mala fide eliminate the lowest bid that this decision has been taken cannot be accepted at this stage inasmuch as even a lowest bidder, if he does not satisfy the financial capabilities cannot claim the award of contract as a matter of right. Sri Shashi Nandan tried to submit that even otherwise the response given by the petitioner after the notice dated 16.9.2013 establishes the financial soundness of the petitioner company.

38. With the three tier deliberation and the concurrence of J.I.C.A. as noted in the facts hereinabove with regard to the prequalification bid, particularly, the letter of J.I.C.A. dated 29.10.2013 clearly authorises the committee to review all qualifications including financial capability before proceeding to finalize the same. The petitioner company is trying to take advantage of the fact that the invitation for the technical bid foreclosed all options for the respondents to review any consideration of the pre-qualification stage. We are unable to agree with this submission inasmuch as the Tender Committee by the resolution dated 27.8.2013 had consciously taken a decision to obtain more information and this was a decision not merely on the report of the Chartered Accountant, but also followed by a deliberation of the Financial Director of the Jal Nigam, and further concurrence of the J.I.C.A. which are important authorities and who have a hold over the finalization of the bid stages. This was done prior to the issuance of the letter dated 25.9.2013. Merely because the petitioner's bid is substantially lower, the same by itself does not fulfil the pre-condition of the long term financial soundness capacity of the company which had to be considered under the parameters indicated hereinabove.

39. Even assuming that the petitioner's company had been assured by financial investors and banks to support the cash flow required for execution of the contract, the same does not exclude the consideration of the yearly financial statements for the last five years and the financial status of the company in the preceding three years. This was an essential condition to which objections were taken even before the petitioner company had been finally invited for the technical bid. The action of the respondent-Jal Nigam, therefore, cannot be said to be mala fide or arbitrary so as to deliberately exclude the petitioner from participation, inasmuch as the resolution dated 27.8.2013 was passed for obtaining reports not only from the petitioner's company, but from all the 11 participants in respect of the 4 packages which is evident from the letter dated

10.9.2013. Therefore, to our mind it was no predetermined motive against the petitioner that can be attributed to the respondents inasmuch as it was a collective decision taken in respect of all the competing firms to supply additional information in respect of a couple of more ingredients that had been left out to be assessed in this regard.

40. From the record we find that this final assessment affirmatively with regard to the eligibility requirements according to Clause 32.3 is a pre-requisite for the evaluation of the technical bid. The said clause, therefore, clearly provides for a decision at the stage of the technical bid as well before accepting it. What is necessary is that the affirmative determination should precede the evaluation of the technical bid. A negative determination authorises the tender committee to disqualify the bidder whereafter the technical bid has to be returned, and the price bid will remain unopened. The distinction clearly is that the technical bid shall be returned and the price bid shall remain unopened. This clearly to our mind authorises an affirmative decision to be taken to proceed for the evaluation of the technical bid. It is at this stage that even though the technical bid of the petitioner-company "was found to be within the parameters, yet the company was not found to be financially sound on long term basis due to the objective assessment relating to the financial soundness on the strength of Corporate Debt Restructuring (C.D.R.) and Debt Equity Ratio deficiency of the petitioner company, vis-?-vis, the financial years as required under the tender conditions. This information, to our mind, was sufficiently assessed and considered before non-suiting the petitioner company for further competing in the bid.

41. This assessment by the expert Tender Committee therefore, does not fall for a reassessment by this Court in the exercise of Article 226 of the Constitution of India. It has to be by the experts or by the tender committee who are entrusted with this obligation under the terms of the contract to assess the same. It appears that this exercise of assessment had been undertaken, the only flaw which appears to be is non-communication of the assessment pending consideration to the petitioner before inviting him vide letter dated 25.9.2013. In our opinion, this by itself cannot be a ground to reject the impugned action of the respondents. The reason is that the respondents are entitled to assess the information and there cannot be a presumption of an affirmative decision in favour of the petitioner when the facts on record are otherwise. The petitioner has not been able to refute the figures relating to the loss suffered by the company in the financial year in question. In such circumstances, the arguments of the respondents' counsel has to be accepted. The judgments, therefore, relied upon by Sri Shashi Nandan on behalf of the petitioner do not come to the aid of the petitioner for the reasons given hereinabove.

42. Over and above this Clause 37 of the bid documents, which is extracted hereinabove, is an omnibus clause that clothes the tender committee and the authorities with the power to refuse to negotiate with any of the bidder at any stage before the award of the contract.

43. We, therefore, do not find any merit in the claim of the petitioner as raised before us so as to exercise our jurisdiction under Article 226 of the Constitution of India as we have found that procedurally the material which was supplied by the petitioner appears to have been taken notice of and the decision has been consciously taken which is authorized under the tender bid conditions as discussed hereinabove.

At the same time, we would further like to observe that in the present case J.I.C.A. is the concurrent authority and has, therefore, to concur with any final decision being taken in respect of the price bids about which an argument has been raised by Sri Shashi Nandan that the prices have been lowered down by one of the competing companies and which obviously is on account of reducing the quantity of pipes and its composition as against that which was advertised. Such relaxation in conditions and allowing the company to reduce its price bids is also arbitrary and clearly tailored to further one of the competing bidders. Whether such relaxation was actually given and is not in accordance with the bid conditions or is otherwise in relation thereof would not improve upon the petitioner's claim, but at the same time the project being of such financial magnitude, we direct the U.P. Jal Nigam to review this project in concurrence with J.I.C.A. before actually commencement of the work by the successful bidders.

With the aforesaid observations, this writ petition is dismissed.