

(2023) 08 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : Writ Petition (C) No. 1875 Of 2023

Mohd Yousuf Shan

APPELLANT

Vs

UT Of J&K And Others

RESPONDENT

Date of Decision : 03-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2023) 08 J&K CK 0006

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Gagan Basotra, Mohinder Kumar, Ravinder Gupta, P. N. Raina, Ravi Abrol

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

1. Vide e-NIT No. 11 of 2023-24 dated 03-06-2023, e-tenders were invited from approved and eligible contractors for construction of link road from Bus Stand Ukhral to Ragoon Top under NABARD- RIDF XXVIII. The petitioner along with other contractors, including respondent No.4, submitted their e-bids. Apart from completing various formalities enumerated in the bid document, the contractors seeking consideration were also supposed to upload scanned copies of various documents including a statement showing the value of existing commitments and ongoing works as well as the statutory period of completion remaining for each of the works listed, duly countersigned by the Engineer-in-Charge not below the rank of Executive Engineer or equivalent [2.2.2 (5) of Section 2 of the bidding document].

2. The petitioner claims that he had substantially complied, inter alia, with the aforesaid requirements. The technical bids submitted by all the contractors including the petitioner and respondent No.4 were evaluated by the Technical Evaluation Committee in the office of the Chief Engineer PWD (R&B) Jammu.

Apart from others the technical bid submitted by the petitioner came to be rejected by the Technical Evaluation Committee on the following grounds:-

(i) The bidder has not uploaded the undertaking in accordance with Clause 2.2.1 of SBD.

(ii) The certificate of existing commitments uploaded by the bidder is not in accordance with clause 2.2.1(5) of SBD.

3. On the other hand, the two bids, one by the respondent No.4 and one by M/S Ghulam Qadir Natnoo were found responsive. Since the Respondent-Chief Engineer had, while declaring the technical evaluation result, given opportunity to the aggrieved bidders to file objections within a period of two days of the date of uploading of the result, as such, the petitioner submitted his objections to the manner in which his bid stood rejected by the Technical Evaluation Committee. The objections were submitted by the petitioner on 08-06-2023. It was the plea taken by the petitioner that he had uploaded the requisite undertaking as also the list of ongoing projects and the details thereof. The petitioner also made an allegation that respondents had declared "responsive" similarly situated contractors who too had uploaded their documents exactly in the manner it had been done by the petitioner. The respondent-Chief Engineer considered the objections raised by the petitioner and vide his communication No. CEJ/TS/9748 dated 12-07-2023 rejected the same as meritless and baseless. The petitioner was informed that he had uploaded one statement in which he had clearly shown three existing commitments but had only got one ongoing work duly countersigned by the concerned Executive Engineer. No information with respect to the rest of the two ongoing works, certified/countersigned by the Executive Engineer was uploaded in the bid by the petitioner. The petitioner even served a legal notice but the same was also disposed of by the respondent-Chief Engineer vide its communication No. CEJ/TS/10161 dated 14-07-2023 on the same grounds. The objection of the petitioner in respect of the bids too was dealt with and communicated to the petitioner vide the aforesaid communication.

4. After having rejected the objections filed by the petitioner, the price bid was opened and respondent No.4, being the lowest bidder, was allotted the work in question by Chief Engineer, PWD(R&B) Jammu, vide communication No. CEJ/TS/10162-66 dated 15-07-2023. The respondent No.4 having executed the formal agreement has already commenced the execution of the work.

5. The petitioner is aggrieved of rejection of his technical bid and also the acceptance of non-responsive bid of the respondent No.4 followed by allotment of contract in favour of respondent No.4. The petitioner seeks inter alia a writ of certiorari to quash the technical evaluation result dated 08-07-2023 issued by respondent No.2 and also allotment order dated 15-07-2023 issued by respondent No.2 in favour of respondent No.4.

6. Having heard learned counsel for the parties and pursued the material on record I am of the considered opinion that there is not much dispute on facts and

the only question that arises for consideration is whether the technical bid submitted by the petitioner was substantially compliant with the terms and conditions of the e-tender issued by respondent No.2 and whether the condition enumerated in clause 2.2.1(5) is a mandatory or an ancillary condition of contract.

7. If, on analytical examination of the tender document, in particular, clause 2.2.1 of Section 2 of the bidding documents, this Court comes to the conclusion that requirement of uploading a statement of existing and ongoing projects of the bidder duly countersigned by the engineer-in-charge of the work not below the rank of Executive Engineer, is only an ancillary condition and does not impact the execution of the work, there would be no difficulty to accept the contention of Mr. Gagan Basotra, learned Senior Counsel appearing for the petitioner that deviation from or non-compliance of such ancillary condition does not render the bid of the petitioner "non-responsive". However, if this Court concludes that the condition or term of the contract is mandatory, then there is no escape to the bidder from strictly complying with the condition. The failure to comply with such condition would definitely render the bid "non-responsive" and the bidder ineligible to participate in the price bid. Equally interesting would it be to deal with the argument of Mr. Gagan Basotra, learned senior counsel predicated primarily on the doctrine of "substantial compliance".

Essential Condition vs. Ancillary Condition

8. With a view to reach at some conclusion it is relevant to refer to Section 1 of the Standard Bidding Document (SBD), which deals with "instructions to the bidders" (ITB). Clause 4 of Section 1 deals with Technical Bid Qualification of the bidder and provides thus:-

"4.1 All Bidders shall provide in Section-2, Forms of Bid and Qualification Information, preliminary description of the proposed work method and schedule, including drawings and charts, as necessary. The proposed methodology should include programme of construction backed with equipment planning and deployment duly supported with broad calculation and quality assurance procedures along with Quality Assurance Plan (QAP), proposed to be adopted justifying their capability of execution and completion of work as per technical specifications, within stipulated period of completion." (emphasis supplied)

9. From a reading of Clause of 4.1 of Section 1 of SBD, it becomes abundantly clear that the information sought and the documents requisitioned as detailed in Section 2 are meant for evaluating the capability of the successful bidder of execution and completion of the work within the stipulated period of time. Clause 2.2. of Section 1 of SBD lays down the qualification criteria, which reads thus:-

"2.2. Qualification will be based on applicants meeting all the following minimum pass/fail criteria regarding the applicants general and particular experience, personal and equipment capabilities, and financial position, as demonstrated by the applicants responses in the forms attached to the letter of applications

(specified requirements for joint ventures are given below). Subcontractors experience and resources shall not be taken into account in determining the applicant's compliance with the qualification criteria."

10. Similarly clause 2.2.1 relates to mandatory information for the bidders. Apart from other terms and conditions, sub clause 5, which has been invoked by the respondents to declare the petitioner "non-responsive" reads thus:-

"5. The statements showing the value of existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer-in-charge not below the rank of an Executive Engineer or equivalent."

11. Clause 2.2 and 2.2.1(5) of Section 2 read with Clause 4 of Section 1 of the Bidding Documents clearly provides that the information required to be submitted by the bidders is mandatory to enable the respondent No.2 to evaluate the personal and equipmental capabilities, experience and financial position of the bidder. Such condition in the tender cannot, by any stretch of reasoning, be said to be an ancillary condition, which may, in given circumstances, be waived of by the employer. Admittedly, the petitioner has failed to strictly comply with sub clause 5 of clause 2.2.1, in that, the petitioner has shown three existing commitments and ongoing works but has got only one of three such ongoing works countersigned by the Engineer-in-charge of the works i.e. the Executive Engineer concerned. The intent and purpose of getting these statements, showing value of existing commitments and ongoing works, as also their stage, duly countersigned by the Engineer-in-charge/Executive Engineer only, is to ensure that the information supplied by the bidder in the form of statement, is factually correct. Indisputably, it is the Engineer in-charge of the work who can certify the stage of the ongoing work, the stipulated period of completion of the remaining work etc. else the contractor/bidder may work out the details of the ongoing work as per his own guess work which may or may not be factually correct. The petitioner having failed to get two of his ongoing works and other details countersigned by the Executive Engineer concerned, cannot be said to have strictly complied with sub clause (5) of clause 2.2.1 of Section 2 of the SBD. The evaluation Committee has thus taken a correct decision and declared the petitioner "non-responsive". The Chief Engineer also found objections raised by the petitioner meritless and devoid of any substance. The Chief Engineer has also found the allegation of the petitioner, that the similar statement of existing commitments and ongoing works submitted by respondent No.4 has been accepted by the Technical Evaluation Committee, equally untenable and factually incorrect.

12. The distinction between "mandatory or essential conditions" and "ancillary conditions" in a contract is aptly brought out by Hon'ble the Supreme Court in para 14, 15 and 16 of *Vidharbha Irrigation Development Corporation vs. Anoj Kumar Agarwala and ors*, (2020) 17 SCC 577, which is reproduced below:-

"14. The law on the subject is well settled. In *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors.*, (2016) 8 SCC 446, this Court held:

"14. The law is settled that an essential condition of a tender has to be strictly complied with. In *Poddar Steel Corpn. v. Ganesh Engg. Works* [*Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)

"6. ... 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."

15. Similarly in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* [*B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;..."

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties."

15. However, the learned counsel appearing on behalf of the appellant strongly relied upon *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

"14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India* [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

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

16. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

13. The view I have taken is, thus, fortified by the legal position expounded by the Apex Court in myriad pronouncements. In *B. S. N. Joshi & sons vs. Nair Coal Services Ltd.*, (2006) 11 SCC 548, Hon"ble Supreme Court has enumerated some principles in para 66, which, for facility of reference is reproduced below:-

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :

- i) If there are essential conditions, the same must be adhered to;
- ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing

iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction..

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint."

14. Equally noteworthy are the principles set out in para 23 and 24 of the judgment rendered by Hon"ble the Supreme Court in *Michigan Rubber (India) Ltd. vs. State of Karnataka*, (2012) 8 SCC, 216:-

" 23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest

in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

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) (ii) Whether the public interest is affected.

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

23. I have gone through the record produced and I find that all the existing commitments and ongoing works of respondent No.4 indicated by him in his statement are duly countersigned by the Executive Engineer concerned. It seems that the petitioner has placed on record some documents indicating the statement of some commitments and ongoing works submitted by the petitioner in response to some other tender. Learned senior counsel was confronted with the aforesaid position, and to be fair to him, he conceded that some mistake may have been committed while placing on record the documents pertaining to respondent No.4.

24. Equally unfruitful is the attempt of learned senior counsel to invoke the doctrine of "substantial compliance". Substantial compliance in a contract would occur when the broader objectives of the contract have been met, but technically, not all of the formal requirements have been met. Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with. A bid is substantially compliant if any departures from the tender call concern mere irregularity. The Court is in fact not in a good vantage position, as the employer would, to decide if the decision of the respondents to reject the bid of the petitioner on the ground of non-compliance of the terms and conditions of tender.

25. Hon"ble Supreme Court in the case of Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal and ors, 2011 (1) SCC 236 has to say, thus, on the doctrine of substantial compliance:-

"DOCTRINE OF SUBSTANTIAL COMPLIANCE AND `INTENDED USE':

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise

of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential."

26. Recently, Hon^{ble} the Supreme Court, again confronted with the same issue in the case of National High Speed Rail Corporation Limited vs. Montecarlo Limited and another, (2022) 6 SCC 401, apart from elaborating the scope of doctrine of substantial compliance in the matter of contracts, also reiterated the principles of judicial intervention in contractual transactions of the Government and held thus:-

" 28.6. In the case of Maa Binda Express Carrier & Anr. Vs. North Eastern

Frontier Railway & Ors., (2014) 3 SCC 760, this Court had an occasion to consider the scope of judicial review in the matters relating to award of contracts by the State and its instrumentalities. In paras 8 to 10 this Court has observed and held as under:

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn. of Management Studies* [(2009) 6 SCC 171] and *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617].

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India*, *Raunaq International Ltd. case* [*Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492] and in *Jagdish Mandal v. State of Orissa* besides several other decisions to which we need not refer."

27. It is thus a trite law that the Court cannot sit in appeal over the decision of technical experts who are entrusted with the job of evaluating the tender bids. The decision of the Technical Evaluation Committee consisting of experts, is not to be readily interfered with unless mala fides and unfairness is sufficiently demonstrated. Indisputably, there are no allegations of mala fide or unfairness on the part of the committee which evaluated the tender documents of the bidders and declared the petitioner "non-responsive" and respondent No.4 along

with two others as “responsive”.

28. As explained above, given the nature of stipulation contained in clause 2.2. and clause 2.2.1 of Section 2 of the SBD read with clause 4 of Section 1 of the SBD, the condition found to have been not strictly complied with by the petitioner, is mandatory and an essential condition of the NIT. It touches upon the personal and equipmental capability and financial position of the bidder to execute the work in question. Such condition cannot be termed as mere ancillary to the contract capable of being waived by the employer or that a bidder may plead its substantial compliance rather than strict compliance.

29. Viewed from any angle, I find no merit in this petition. The writ petition is, accordingly, dismissed.