
(2018) 11 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.1204 of 2018

**M/s Andritz Hydro Pvt. Ltd @APPELLANT@Hash SJVN Ltd. through its
General Manager (ECD) & Another**

Date of Decision : 06-11-2018

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : AIR 2019 (HP) 26

Hon'ble Judges : Sanjay Karol, J;Ajay Mohan Goel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Andritz,Votin,BHEL,GE

INR,INR,INR,INR

1,465,817, 074","177,757,996","1,666,871,562","1,549,621,393

â ? ? 2 8 . Preliminary

examination of Bids And

Determination of

Responsiveness

s",28.1,"The basis and methodology for evaluation of the Qualification Particulars and

technocommercial bids shall generally be as described in the supplement to

instructions to Bidders attached as Annexure -B to these ITB. The Employee

will examine the bids to determine whether they are complete, whether any

computational errors have been made, whether required securities and cost of

Bid Document have been furnished, whether the documents have been

properly signed, whether all the requisite declaration, undertakings have been furnished and whether the bids are generally in order.",

,28.2,"The Price Bid duly filled in electronic form in conformity with the tender specification on the portal only. The Price Schedule is to be filled in for filling rates of the items to be filled in by the Bidder. The calculation of amount by multiplying the quantities with the rates filled in by the bidder, sub-totals, total etc. shall be done by the formulae already provided in electronic form. In case of any discrepancy in the calculations, the rates shall be considered final and the amount calculated by using the same shall be corrected and considered as final. Where ever prices for items is left blank, in the Price Schedule, it shall be deemed to have been included in other items.",

,28.3,"The Employer may waive any minor informality, non-conformity or irregularity

in a bid that does not constitute a material deviation and that does not prejudice or affect the relative ranking of any Bidder as a result of the evaluation of Bids, pursuant to these Clauses.",

,28.4,"Prior to the detailed evaluation, the Employer will determine whether each Bid

is of acceptable quality, is complete and is substantially responsive to the Bid Documents. For purposes of this determination, a substantially responsive Bid is one that conforms to all the terms, conditions and specifications of the Bid Documents without material deviations, objections, conditionalities or reservations. A material deviation, objection, conditionality or reservation is one (i) that affects in any substantial way the scope, quality or performance of the Contract; (ii) that limits in any substantial way, inconsistent with the Bid Documents, the Employer's rights or the successful Bidder's obligations under the Contract; or (iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive bids. The Employer's determination of a Bid's responsiveness is to be based on the content of the Bid itself without recourse

to extrinsic evidence.",

,28.5,"If a Bid is not substantially responsive, it will be rejected by the Employer and

may not subsequently be made responsive by correction or withdrawal of the nonconforming deviation or reservation.",

,28.6,"All the bidders shall be informed, about their status of qualification/disqualification/technocommercial responsiveness, in a single letter.",

Bid Document for EM Works of
NMHEP (2x30) 60MW No. SJVN

CC/ ECD/ NMHEP/EM/17","Section-Vii Attachments
/","Page 16 of 227",

S.No,Clause No.,Deviation,"Remarks/

Justifications

GENERAL,,,

1.,,"The clarifications and Amendments issues pursuant to
the pre-bid meeting held on 13th November, 2017 shall
form an integral part of the Contract",

COMMERCIAL,,,

2.,GC 25.3.1(d),"Delete the following sentence any minor items
mentioned in GC Clause 24.7 hereof relevant to the
Facilities or that part thereof have been completed
and insert the following sentence at the end of GC
Clause 25.3.4 Notwithstanding anything contained
to the contrary under the Contract Documents, the
Completion of the Facilities under GC Clause 24.7 an
issuance of Operational Acceptance Certificate shall
not be withheld for completion of minor items which do
not hinder commercial operation of t","d

I

3.,"Clause(c)"Third

Party Liability

Insurance, Appendix-3

to the Contract

Agreement","Replace the following sentence â??Rs.0.5 million per person per occasionâ? with â??Rs.0.5 million per person per occasion and in aggregate.â??",

Attachment 8(ii),,,

29. Record also demonstrates that at the time of preliminary examination of the bid and determination of responsiveness which took place qua techno,,,

commercial bid on 28.02.2018, respondent No.1 did not find the bid of respondent No.2 to be non-responsive. It is also a matter of record that",,,

pursuant to communications which took place between respondent No.1 and respondent No.2, the proposed deviations be it in Attachment 8(i) or",,,

Attachment 8(ii) stood withdrawn by respondent No.2 as on 11.04.2018, i.e. much before the date on which the price bids were opened i.e.",,,

18.04.2018.,,,

30. In other words, as on the date when the price bids of the bidders whose bids were found to be technically responsive were opened by respondent",,,

No.1, the deviations, which were proposed by respondent No.2 stood withdrawn.",,,

31. Therefore, it is not a case that as on the date when the price bids were opened by respondent No.1 any material prejudice was caused to either of",,,

the bidders, including the petitioner on the basis of proposed deviations, which were made by respondent No.2.",,,

32. At this stage, we observe as to what really is the meaning of words â??critical provisionsâ?. For such purpose, we do not have to travel beyond",,,

ITB. Clause 13.2 (h) itself illustrates as to what really would be critical deviations. Price adjustment is once such component. Also Clause 28.4 further,,,

illustrates as to what really would be critical deviations though referred to as material deviations. It is one of three components i.e. (i) that affects in,,,

any substantial way the scope, quality or performance of the Contract; (ii) that limits in any substantial way, inconsistent with the Bid Documents, the",,,

Employerâ??s rights or the successful Bidderâ??s obligations under the Contract;

or (iii) whose rectification would unfairly affect the competitive,,,

position of other Bidders who are presenting substantially responsive bids.,,,

33. When we peruse Attachment 8(i) so uploaded by respondent No.2, we find that there is no deviation with respect to price adjustment. Similarly,",,

we find it not to, in any manner affect the scope, quality or performance of the contract; limit in any substantial way the employer's rights or",,,

bidder's obligation under the contract or unfairly affect the competitive position of other bidders. Can it be said that the erroneous uploading of a,,,

document i.e. Attachment 8(ii) by a party would unfairly affect the competitive position of other bidder? In our considered view, the answer is in the",,,

negative.,,,

34. At this stage, we would also like to state that Attachment 8(i) and Attachment 8(ii) cannot be read disjunctively. They have to be read",,,

harmoniously, as per the contents of ITB, which provided that proposed deviations are to be mentioned in Attachment 8(i) and Attachment 8(ii) is only",,,

to contain withdrawal price thereof.,,,

35. In other words, nothing is to be read in Attachment 8(ii), save and except withdrawal price referred to therein, with regard to deviations, which are",,,

to be provided in Attachment 8(i). In our considered view, the scheme of the ITB is such that whether or not a Bid is responsive has to be gathered",,,

from the Attachments which are appended alongwith Envelope-1, which includes Attachment 8(i) and not from any other Attachment, which",,,

otherwise is not to be part of Envelope-1.,,,

36. It is not the case of petitioner that on the strength of those Attachments, which were to be uploaded alongwith Envelope-1, the Bid of Voith was",,,

non-responsive. Petitioner has harped only upon the contents of Attachment 8(ii) to justify that the Bid of Voith was non-responsive. As we have,,,

already held, because Attachment 8(ii) was not to be part of Envelope-1, therefore, erroneous uploading of the same, in our considered view, cannot",,,

render the Bid of Voith to be non-responsive, because for all intents and purposes, the same was liable to be ignored. We may also add, at this stage,",,

that it is not the case of the petitioner that as on 28.2.2018, the Bid of Voith was found to be technically responsive, only on the strength of the",,,

contents of Attachment 8(ii). Therefore, also we do not find any merit in the contention of the petitioner.",,,

37. In view of the above discussion, in our considered view, it cannot be said that the uploading of Attachment 8(ii) alongwith Envelope-1, amounted to",,, deviations from a critical condition even if, the term "price adjustment" was mentioned therein. Similarly, it cannot be said that SJVN in an illegal",,, improper, irregular, arbitrary or with malafide intention considered technical bid of Voith as responsive. On the strength of documents appended by the",,, petitioner, it could not be substantiated that the competitive position of the petitioner was anyway affected to its disadvantage by the act of uploading",,, of Attachment 8(ii) alongwith Envelope-1 by Voith. While arriving at the said decision, we have not been influenced by the fact that contents",,, contained in Attachment 8(ii) were termed as suggestion by SJVN. On an independent appreciation of the contents of the said Attachment vis-a-vis,, terms of ITB, we have come to the conclusion that erroneous uploading of the said Attachment alongwith Envelope-1, including the contents of the",,, same cannot be said to have had rendered the bid of Voith to be unresponsive. The condition that Clause 13.2(h) stipulated deviations except,, "critical deviations" also per se does not has any bearing on the responsiveness of the bid of Voith because the deviations were to be reflected in,, Attachment 8(i) and there were no critical deviations mentioned in the said Attachment.,,,

38. Further, ITB contemplated that deviations mentioned anywhere except Attachment 8(i) had to be ignored and therefore, also in our considered",,, view, reference of certain deviations in Attachment 8(ii) is not fatal to the cause of Voith.",,,

39. It is a matter of record that the deviations be it in Attachment 8(i) or Attachment 8(ii) were withdrawn by Voith on 11.04.2018 i.e. much before,, the date when the Price Bids were opened. It is also a matter of record that Prince Bid of Voith was approximately Rs.33 Crores less than the,, petitioner and in our considered view even otherwise, if the tender process is set aside at this stage, public exchequer undisputedly will be fastened of",,, additional financial burden. It is a settled principle of law that it is the employer who is best judge as to whether a bidder is responsive or not. In the,, present case, according to the employer the bid of Voith has been found to be responsive. In our considered view, this view of the Experts can",,, otherwise also not substituted by the Court until or unless it is shown to the

Courts on face of it that the decision so taken by the employer is,,,
erroneous. In the facts of this case, petitioner has not been able to prove that
the acceptance of the bid of Voith by SJVN on the face of it is an",,,
erroneous act.,,,

40. It cannot be disputed that Clause 13.2(h) is mandatory, however, its violation
by respondents has not been proved by the petitioner. It can also not",,,
be said that any relaxation has been given by SJVN in favour of Voith to
accommodate the said respondent though Voith was not conforming to the,,,
bid conditions. In our considered view, from the record, it cannot be said that
SJVN has favoured Voith. It is no ones case that the Rules of the Game",,,
or condition of ITB were at any stage altered or changed by SJVN to favour Voith.
No unfair advantage has been given to Voith as is claimed by the,,,
petitioner nor the doctrine of legitimate expectation has been violated. This is for
the reason that before Price Bid was opened on 18.05.2018, none",,,
knew as to who was the lowest bidder. Much before that, deviations stood
withdrawn by Voith which is a matter of record. Herein it is not a case that",,,
any essential condition of ITB was either relaxed or deviated and therefore, also
it cannot be said that by entertaining the bid of Voith the employer",,,
has acted in an arbitrary manner.,,,

41. We have at length examined as to whether the process adopted or decision
made by the authority is hit by malafides or was intended to benefit,,,
someone or whether the process adopted or decision made is arbitrary or
whether public work is affected which in the instant case is none.,,,

42. In Jagdish Mandal vs. State of Orissa & others, (2007) 14 SCC 517 Honâ??
ble Supreme Court has held that judicial review of administrative",,,
action is intended to prevent arbitrariness, irrationality, unreasonableness, bias
and mala fides. A contract is a commercial transaction and evaluating",,,
tenders and awarding contracts are essentially commercial functions. Principles
of equity and natural justice stay at a distance. If the decision relating,,,
to award of contract is bonafide and is in public interest, courts will not, in
exercise of power of judicial review, interfere even if a procedural",,,
aberration or error in assessment or prejudice to a tenderer, is made out.",,,

43. In Michigan Rubber (India) Limited vs. State of Karnataka & others, (2012) 8
SCC 216, the Honâ??ble Supreme Court has held that in the",,,
matter of formulating conditions of tender documents and awarding contract,

greater latitude is required to be conceded to the State Authorities." ,,,

Unless action of the tendering authority is found to be malafide and is a misuse of statutory powers, interference of Courts is not warranted. It has" ,,,

been further held that 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. If the State or its instrumentalities act reasonably, fairly and in public" ,,,

interest in awarding contract, again interference by Court is very restrictive since no person can claim a fundamental right to carry on business with" ,,,

the Government. ,,,

44. Honâ??ble Supreme Court in *Michigan Rubber (supra)* further held that Court would not normally interfere with the policy decision and in ,,,

matters challenging award of contract by the State or Public Authorities. As per the Honâ??ble Supreme Court interference can only be if a party ,,,

establishes that the award is contrary to public interest and beyond pain of description or unreasoning. ,,,

45. Similarly in *Tejas Constructions and Infrastructure Private Limited vs. Municipal Council Sendhwa and another*, (2012) 6 SCC 464, Honâ??ble" ,,,

Supreme Court while reiterating the principles laid down in *Tata Cellular vs. Union of India*, (1994) 6 SCC 651; *Raunaq International Ltd. vs. I.V.R.*" ,,,

Constructions Ltd., (1999) 1 SCC 492; *Reliance Airport Developers (P) Ltd. vs. Airports Authority of India*, (2006) 10 SCC 1 etc., has held that in the" ,,,

absence of any malafides or arbitrariness in the process of evaluation of bids and determination of eligibility of bidders, there cannot be any" ,,,

interference by the Court. ,,,

46. In *Air India Limited vs. Cochin International Airport Ltd. & others*, (2000) 2 SCC 617 the Honâ??ble Supreme Court has held that even when" ,,,

some defect is found in the decision making process, Court must exercise its discretionary powers under Article 226 of the Constitution of India with" ,,,

greater caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. ,,,

47. In *B.S.N. Joshi & sons Ltd. vs. Nair Coal Services Ltd. & others*, (2006) 11 SCC 548 the Honâ??ble Supreme Court has held that it may be true" ,,,

that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor, same ordinarily being within" ,,,

its domain, Courts interference in such matters should be minimized.",,,

48. In *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & another*, (2016) 16 SCC 818 the Honâ??ble Supreme Court Held",,,,

that owner or 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 malafide",,,,

or perversity in the understanding or appreciation or in the application of the terms of the tender condition. It has also been held that it is possible that",,,,

the owner or the 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.,,,,

49. In *JSW Infrastructure Limited & another vs. Kakinada Seaports Limited & others*, (2017) 4 SCC 170 the Honâ??ble Supreme Court while",,,,

reiterating the principles laid down in *Tata Cellular vs. Union of India*, (1994) 6 SCC 651 held as under: -",,,,

Â â??8. â?|We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint",,,,

while dealing with contractual matters. A Three Judge Bench of this Court in *Tata Cellular vs. Union of India*, 1994 6 SCC 651 held that:",,,,

(i) there should be judicial restraint in review of administrative action;,,,

(ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process",,,,

(iii) the court does not usually have the necessary expertise to correct such technical decisions.;,,,

(iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.â??",,,,

50. In *Central Coalfields Limited & another vs. SLL- SML (Joint Venture Consortium) & others*, (2016) 8 SCC 622 the Honâ??ble Supreme Curt",,,,

has again reiterated the findings in *G. J. Fernandez vs. State of Karnataka*, (1990) 2 SCC 488 and *Ramana Dayaram Shetty vs. International Airport*",,,,

Authority of India, (1979) 3 SCC 489 that deviation from the terms and conditions is permissible so long as the level playing field is maintained and it",,,,

does not result in any arbitrariness or discrimination.,,,,

51. In Montecarlo Limited vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272, reiterating the law declared by the Honâ??ble",,,
Supreme Court in Sterling Computers Ltd. vs. M&N Publications Ltd., (1993) 1 SCC 445, that by way of judicial review, the court cannot examine the",,,
details of the terms of the contract which have been entered into by the public bodies or the State and that Courts have inherent limitations on the",,,
scope of any such inquiry. In view of the aforesaid discussions, the present petition is dismissed. Pending applications, if any, also stand disposed of",,,
accordingly.,,,