

(2021) 11 SHI CK 0042

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.6434 Of 2021

M/S Bharat Construction (I) Private Limited Through

APPELLANT

Vs

M/S Himachal Pradesh Road Infrastructure Development
Corporation Limited (Hpridcl), Nirman Bhawan And Others

RESPONDENT

Date of Decision : 16-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2021) 11 SHI CK 0042

Hon'ble Judges : Tarlok Singh Chauhan, J; Satyen Vaidya, J

Bench : Division Bench

Advocate : B.C. Negi, Nitin Thakur, J.S. Bhogal, Srishti Verma, K.D. Shreedhar, Shreya Chauhan

Final Decision : Dismissed

Judgement

Satyen Vaidya, J

1. By way of instant petition, the petitioner has prayed for following substantive reliefs:-

"i. Issue a writ respondent No.1 to passed in favour of Hon'ble Court; and/or of mandamus directing the place on record letter of award respondent No.2 before this

ii. Issue writ of certiorari to quash and set aside the said award issued in favour of respondent No.2 by respondent No.1; and/or

iii. Issue a writ of certiorari to quash and set aside the financial bid of respondent No.2 declared vide notification dated 02.08.2021 (Annexure P-6); and/or

iv. Issue a writ of mandamus directing the respondent No.1 to issue the letter of award in favour of petitioner; and/or

v. Issue a writ of certiorari to quash and set aside the entire tender process; and/

or

vi. Issue a writ of mandamus directing the respondent No.1 to re advertise the tender in question;"

2. Respondent by way of two-bid system invited offers through Request for Proposal/Notice Inviting Bid (for short "RFP/NIB"), dated 15.06.2021 for construction of "2 Lane Road Tunnel" parallel to the existing Dhalli Tunnel under the Shimla Smart City Mission on EPC mode with estimated cost of Rs.53 crores. Petitioner and respondent No.2, in response to RFP/NIB dated 15.06.2021, submitted their respective bids. Both the bidders were declared technically responsive, their financial bids were evaluated on 2.8.2021 and Respondent No.2 was found "L-1". Letter of acceptance (for short "LOA") favouring respondent No.2 was issued on 12.08.2021.

3. On 3.8.2021, petitioner addressed respondent No.1, inter alia, taking exception to the financial bid of respondent No.2 being not in the format prescribed by RFP/NIB. Petitioner further extended certain clarification with respect to its own financial bid vis-a-vis the GST component. Respondent No.1 did not agree to the objections raised by the petitioner, and, replied to this effect vide correspondence dated 5.8.2021. Some further correspondence was exchanged inter se the petitioner and respondent No.1, but respondent No.1 adhered to its decision and issued LOA in favour respondent No.2, as noticed above.

4. The entire edifice of the case of the petitioner has been built on the premise that RFP/NIB specifically provided for a format in which the bidders were required to submit their respective bids. As per petitioner, the condition of RFP/NIB to the effect that the bids were to be submitted in a specified format was imminent and admitted of no exception. The petitioner has also contended that initially there was no requirement in RFP/NIB for the bidders to submit their financial quotes by including GST and other applicable taxes, cess etc., and it was only by way of "Corrigendum-1" incorporated in RFP/NIB through amendment dated 6.7.2021, that bidders were mandated to quote their financial bids by including GST and its incidence. The petitioner has taken exception to the fact that respondent No.2 did not submit its financial bid in the manner required by Corrigendum-1, dated 6.07.2021 and it was only after the petitioner raised objections, that respondent No.1 afforded opportunity to respondent No.2 to rectify its mistake/omission by confirming that bid price quoted by it, included component of GST at the rate of 12%.

5. Petitioner has further alleged that the terms of RFP/NIB specifically prohibited any correspondence between the employer and the bidders, whereas, the violation of such prohibition was evident from the fact that respondent No.1 after having received written objections dated 3.08.2021 from the petitioner had ventured into seeking clarification on material aspect of the tender from respondent No.2. According to the petitioner, it was this conduct of respondent

No.1 that gave undue advantage to respondent No.2 to make good the deficiencies in the financial bid.

6. Respondent No.1 in its reply has contested the stand of the petitioner. Objection has been raised to the maintainability of the petition on the ground that the petitioner has suppressed material aspects of the tendering process. It has been clarified that before filing of the petition, the work had already been awarded to respondent No.1 on 12. 08.2021 and the agreement stood executed inter se the respondents, whereafter respondent No.2 had also furnished the performance and other required securities. On merits, it has been submitted that even original condition of the bid documents required bid price to be inclusive of all taxes and the "Corrigendum-1" was only clarificatory in nature. As per respondent No.1, EPC contract was integral part of RFP/NIB and as per clause 19.1, Sl. No. II, the contract price included all duties, taxes, royalty, cesses, charges and fees. Respondent No.1 further controverted the stand of the petitioner by submitting that the provisions of RFP/NIB as contained in clause 6.2(b), authorised the authority i.e. respondent No.1 to consult with any bidder in order to receive clarification and further information. Respondent No.1 raised specific plea that the quotation of financial bid as per "Corrigendum-1" was not the essential condition of the RFP/NIB as the rates in any event were required to be quoted inclusive of all taxes including GST. Respondent No.1 also raised plea of public interest by averring that Dhalli Tunnel, already in use, was in a very bad shape and might collapse any time causing loss of lives. The parallel tunnel for this reason has been envisaged under the Shimla Smart City Mission. The administrative approval for expenditure sanctioned amount of Rs.48 crores was already there and amount of Rs. 9.6 crores had already been deposited with respondent No.1 for the project. The time allotted for completion of work was only one year and funds, if not utilized within such period, were liable to lapse.

7. The successful bidder, respondent No.2, has also filed its reply on more or less on the same grounds as averred by respondent No.1. Additionally, it has been stated that since there is no challenge to the eligibility or qualification of respondent No.2, the petitioner had no right to challenge the award of work in favour of respondent No.2. Specific averment of respondent No.2 is that the RFP/NIB provided for pre-bid meeting of the bidders before submission of bids and it was respondent No.2 which had raised specific query with respect to the taxes being inclusive of bid price, as a result of which "Corrigendum-1" came to be issued. On the strength of this averment, respondent No.1 has maintained that it was aware from the very beginning that bid price was to include GST and other taxes, cesses, etc. and in this backdrop, it had submitted the bid of Rs. 39,60,00,000/- inclusive of GST component. It is further submitted that clauses 6.2(b) and 2.6 of the RFP/NIB authorised the authority to seek clarification from the bidders. According to respondent No.2, the petitioner could not have entered into any correspondence with respondent No.1. Respondent No.2 has also taken exception to the filing of petition by the petitioner on the ground that the owner of the project, having authored the tender document, was the best person to

understand and appreciate its requirement and interpret its documents. The petitioner was not one to suggest the mode and manner of interpretation of tender document to the author. As per respondent No.2, it has not only invested the amount by furnishing performance and other securities, but has also spent an amount of Rs. 52 lacs for placing certain work orders, requisite for start of work. It has been asserted that the bid price of respondent No.2 is Rs. 2,80,53,000/- less than the bid price of the petitioner and thus the award of work in favour of respondent No.2 will result in saving of public money.

8. We have heard the learned counsel appearing for the parties and have gone through the records.

9. The tender jurisdiction of Constitutional Courts, in the matters of "Public Contracts", by now is well settled and restricted only to oversee and protect from arbitrariness, irrationality, unreasonableness, bias and mala fide. These principles have been evolved by Hon'ble Apex Court from time to time by exposition of law. In one of the latest judgments passed by Supreme Court in *Uflex Ltd vs. Government of Tamil Nadu & Ors*, Civil Appeal Nos. 4862-4863 of 2021, decided on 17th September, 2021, the Hon'ble Supreme Court has observed as under:-

1. The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some

prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted."

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in *Michigan Rubber v. State of Karnataka* (2012) 8 SCC 216, as under: "

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."

10. Keeping in mind the restricted jurisdiction of this court in Government tenders, we proceed to examine the issues raised in the instant petition.

11. Petitioner has placed reliance on clause 2.1.4 of RFP/NIB to support its contention that non-furnishing of financial bid in required format rendered the financial bid of respondent No.2 nugatory. Clause 2.1.4 of RFP/NIB reads as under:

"2.1.4. The BID shall be furnished in the format exactly as per Appendix-I i.e.

Technical Bid as per Appendix IA and Financial Bid as per Appendix IB. BID amount shall be indicated clearly in both figures and words, in Indian Rupees in prescribed format of Financial Bid and it will be signed by the Bidder's authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be considered"

In addition, petitioner has also highlighted the contents of Appendix 1B, more particularly, "corrigendum-1" relevant extract of which is as under:

CORRIGENDUM 1

NAME OF WORK: CONSTRUCTION OF 2 LANE HIGHWAY TUNNEL PARALLEL TO DHALLI TUNNEL ALONG WITH THE APPROACH ROAD IN SHIMLA IN THE STATE OF HIMACHAL PRADESH.

Sl. No.

Reference (EPCA/RF P/Schedule)

Clause

Original Clause

Modified Clause

1.

EPCA

Article 19.1(ii) 19 payments

The Contract Price includes all duties, taxes, royalty, cess, charges, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's Equipment, Plant, Materials, and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax including any tax that may be levied in India on profits made by it in respect of this agreement.

The Contract Price includes all duties, taxes, royalty, cess, charges, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's Equipment, Plant, Materials, and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax including any tax that may be levied in India on profits made by it in respect of this agreement

Goods and Service Tax (GST) will be paid as per GOI/Govt. Of Himachal Pradesh guidelines comes into effect time to time.

While claiming the GST the Bidders are required to adhere to the provisions available therein. The Contractors are required to populate the details of GST

paid by them in the GST portal, only upon which reimbursement of GST would be considered.

2.

RFP

APPEN DIX-IB Letter comprising the Financial Bid Sl. No. 7

I/We hereby submit our BID and offer a BID Price Rs. (Rs..... in words) for undertaking the aforesaid Project in accordance with the Bidding Documents and the Agreement

I/We hereby submit our BID and offer a BID Price Rs. (Rs..... in words) for undertaking the aforesaid Project in accordance with the Bidding Documents and the Agreement. I/We hereby submit our BID and offer a BID Price inclusive of GST Rs..... (Rs..... in words). The GST component for the aforesaid work is (@....%) of Rs. (Rs.....in word) for undertaking the aforesaid Project in accordance with the Bidding Documents and the Agreement.

12. Reliance has also been placed by petitioner on judgment passed by Supreme Court in Bakshi Security and Personnel Services Private Limited vs. Devkishan Computed Private Lomikted and others, (2016) 8 SCC 446, in which it has been observed as under: -

12. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/-which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender."

13. Thus, the questions that arise for determination in the instant case are (a) Whether failure of respondent No.2 to submit financial bid strictly as per Appendix 1B and more particularly with "corrigendum-1" would render said respondent disqualified from the contest? And (b) whether subsequent clarification by the employer from respondent No.1 was not warranted by RFP/

NIB and also such conduct of employer was reflective of its bias towards respondent No.1?

14. The employer i.e. respondent No.1 has taken a categorical stand that quoting rates as per "Corrigendum-1" was not the essential condition of the RFP/NIB as the rates in any event were required to be quoted inclusive of all taxes including GST, therefore, the form would not determine the merit of the bid.

15. Mr. Bipin Negi, Senior Advocate, representing petitioner has very fairly canvassed that there is no dispute to the settled legal position about right and entitlement of employer to interpret the tender document. He further maintains that an interpretation by the employer definitely shall have precedence being the author unless such interpretation is perverse or mala fide. To buttress his argument Shri Negi has relied upon following judicial precedents:-

A. In *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another*, (2016) 16 SCC 818, the Hon'ble Supreme Court has observed as under:-

"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."

B. In *Bharat Cooking Coal Limited and others vs. Amar Dev Prabha and others*, (2020) 16 SCC 759, the Hon'ble Supreme Court has observed as under:

"28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.⁵ However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

52. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual

interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality."

C. In *Central Coalfields Limited and another vs. SLL SML (Joint Venture Consortium) and others*, (2016)8 SCC 622, the Hon'ble Supreme Court has held as under:-

"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

16. It is trite law that the owner/author of the tender is the best person who can correctly interpret the terms of the contract. Such interpretation needs to be accepted even by the Courts unless the action of the author in making such interpretation is found perverse and mala fide.

17. It is not in dispute that the RFP/NIB provided for two bid system. The bidder who qualified the technical evaluation would become eligible for opening of their financial bids. In order to answer the questions formulated hereinabove, reference to certain relevant provisions of RFP/NIB shall not be out of place.

1.1.5 The Authority shall receive BIDs pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Authority pursuant to this RFP (Collectively the "Bidding Documents"), and all BIDs shall be prepared and submitted in accordance with such terms on or before the BID due date specified in Clause 1.3 for submission of BIDs (the " BID due Date").

2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Agreement.

2.7.2 The draft agreement provided by the Authority as part of the BID Documents shall be deemed to be part of this RFP

2.8 Clarifications.

2.8.1 Bidders requiring any clarification on the RFP may notify the Authority in writing by e-mail in accordance with Clause 1.2.9. They should send in their queries on or before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Authority shall endeavour to respond to the queries within the period specified therein, but not later than 15 (fifteen) days prior to the BID Due Date. The responses will be sent by fax or e-mail. The Authority will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.

2.8.2 The Authority shall endeavor to respond to the questions raised or clarifications sought by the Bidders. However, the Authority reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the Authority to respond to any question or to provide any clarification.

2.9.1 At any time prior to the BID Due Date, the Authority may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda/Corrigendum. Addenda/Corrigenda shall take priority over the Notice Inviting Bid and Bid Documents issued previously. Bidder shall acknowledge receipt of all HPRIDCL issued addenda/corrigenda and include them in their Bid Submittal.

3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose BID is adjudged as responsive in terms of Clause 3.1.6 and who quotes lowest price shall be declared as the selected Bidder (the "Selected Bidder").

6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to,;

(b) consult with any Bidder in order to receive clarification or further information;

(d) independently verify, disqualify, reject and/or accept any and all submission or other information and/or evidence submitted by or on behalf of any Bidder.

18. A reading of the aforesaid terms of the RFP/NIB along with other terms thereof implies that the bid price as defined in the RFP/NIB cannot be construed to have a different meaning than the meaning of term "contract price" used in EPC agreement. Draft agreement indubitably is part of RFP and it provided for "Contract Price" to include taxes. The term "taxes" is defined in Clause 1.1 (ii) of EPC Agreement which reads as under:-

" "Taxes" means any Indian taxes including GST, excise duties, customs duties, value added tax, sales tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or Local) on the goods, Materials, equipment and services incorporated in and forming part of the Project charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;"

Therefore, it was clearly held out through RFP that eventual final award would be for price which would include taxes. Judged in this backdrop, the Corrigendum-1, which on one hand clarified the contract price and on the other required the bidders to quote bid price inclusive of GST component with specific condition to detail the percentage of amount of GST component of the bid price, was merely clarificatory. This being so, the grievance raised by the petitioner becomes meaningless, especially when the petitioner itself had not mentioned the component of GST in its financial bid correctly as becomes evident from the clarification provided by the petitioner to respondent No.1 vide its communication dated 3.8.2021, whereby the petitioner sought to add additional 7% of the bid amount to be inclusive of GST component, whereas in its financial bid the same had been submitted at 5% only. Thus, it can be said with certainty that there was no confusion or ambiguity in construing the term "Bid Price and Contract Price", as used in the RFP/NIB to be synonymous and having the same meaning.

19. The author of the tender document i.e. respondent No.1, cannot be said to be unreasonable in holding out a similar interpretation to the aforesaid terms used in RFP/NIB. In the facts of the instant case, we are of the considered view that no malafide can be attributed to the author by rendering the interpretation to the terms " bid price and contract price" as detailed above. Reason being, in any case, respondent No.2 shall not derive any undue advantage over the petitioner or other bidders as the financial bid of respondent No.2 will remain the lowest, even if, the price of Rs.39,60,00,000/-quoted by it, is assumed to be without GST component. We are constrained to observe so from the conduct of the petitioner, who itself had mentioned 5% to be component of GST in its bid price of Rs.42,40, 53,000/-. On the same analogy, in case 7% more is added to the aforesaid bid price quoted by the petitioner, the same shall again be higher than the bid price quoted by respondent No.2.

20. The question (a) formulated above is answered in negative and in view of findings on question (a), the question (b) is rendered infructuous. Otherwise also contention of petitioner, giving rise to question (b), does not hold good in the facts of the case. The various clauses of the RFP/NIB make it abundantly clear that respondent No.1 being the employer/authority, had the power and jurisdiction to seek clarification from bidders at various stages. As noticed above, firstly, the pre-bid meeting envisaged under the RFP/NIB; secondly, the power vested in respondent No.1 to seek clarification with respect to the information provided in technical bids by the bidders and lastly, under clause 6.2(b),

respondent No.1 had unfettered jurisdiction to seek clarification from the bidders. Thus, no malafide can be attributed to respondent No.1 in seeking clarification from respondent No.1 after opening of financial bid, more particularly when the petitioner had raised a question in this regard on 3.8.2021.

21. The bonafides of employer can also be tested on the touch stone of factors envisaging "Public Interest". Reference in this regard may be made to *Raunaq Internation Ltd. vs.*

I.V.R. Construction Ltd. And others, (1999) 1 SCC 492, in which the Hon'ble Supreme Court has observed as under:

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be :

- (1) The price at which the other side is willing to do the work;
- (2) Whether the goods or services offered are of the requisite specifications;
- (3) Whether the person tendering has the ability to deliver the goods or services as per specifications.

When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer, and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services

become available to the public expeditiously.

(4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

Respondent No.2 has admitted that its bid price of Rs.39,60,00,000/- was inclusive of 12% GST component, which eventually benefits the public interest as huge amount of public money will be saved. Admittedly, the estimated costs of the project evaluated by respondent No.1 is Rs.53 crores and respondent No.2 has agreed to execute the said work for Rs.39,60,00,000/-. It can also not be assumed that the work to be executed by respondent No.2, will be comprised on quality. The work is to be executed under the strict supervision of qualified supervisory engineers of respondent No.1. Thus, there hardly is any possibility of work being allowed to be compromised on quality. The apprehensions raised by the petitioner before this Court, to this effect, are without any basis. The petitioner is otherwise estopped from raising such apprehensions when it had also quoted the bid price of Rs. 42,40,54,000/-, which is again much less than the estimated costs assessed by respondent No.1.

22. It is the employer/authority who has to assess, the viability of success of project before its award to a particular bidder. It is always in the sole discretion of the employer to either award the work to the successful bidder or to recall the tenders for justifiable reasons. In the present case, there is nothing on record to suggest that the selection of respondent No.2 as L-1, was in any manner shrouded with any motive which can be referred to as ulterior. The reasons assigned by respondent No.1 that the original Dhalli Tunnel outlived its life and

has become dangerous and there is dire need to have an alternative tunnel to save the valuable lives of the people and that the availability of finance under the Smart City Mission/Project shall lapse in case the project is delayed, cannot be doubted in the light of material placed on record.

23. It is also notice worthy that there is substance in the allegations of the respondents that the petitioner has not approached this Court with clean hands. It did not intentionally disclose at the time of filing of the petition that the work had already been awarded and EPC contract had been executed besides the investments already incurred by respondent No.2. This definitely allowed the petitioner to succeed in obtaining interim directions from this Court. The non disclosure of material facts by the petitioner may not be fatal to its case at the stage of final adjudication, but it definitely can be taken to be a factor for determining that the motive of the petitioner in filing the petition was sheer act of vengeance and definitely not bonafide.

24. In the light of the above discussion, we find no merit in the instant petition and the same is dismissed. All pending applications, if any, are also accordingly disposed of.