
(2011) 07 DEL CK 0095

In the Delhi High Court

Case No : Writ Petition (C) No. 532 of 2011

Paharpur Cooling Towers Ltd.

APPELLANT

Vs

NTPC Ltd. and Others

RESPONDENT

Date of Decision : 14-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 4 BC 378 : (2011) 181 DLT 683

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Rakesh Munjal, Amit Prasad and Ruchika Pathak, for the Appellant; Vikas Singh Bharat Sangal Vernika Tomar Amrita and Srijana Lama for R-1/NTPC, Ravinder Agarwal, CGSC and Nitish Gupta, for R-2/BRBCL, Jayant Bhushan Deepak Khurana and Shobhit Chandra for R-3/Lanco Infratech Ltd., for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—In the process of setting up the Nabinagar Thermal Power Project at Stage-1, Respondent No. 1 issued an invitation for bids (ITB) dated 20.08.2008 for an induced draft cooling tower package (in short, IDCT) required for the said turnkey project. It is the say of the Petitioner that from 20.08.2008 till 27.10.2009 various clarifications were issued and amendments made and it is only on 27.10.2009 that the bids submitted in pursuance to the instructions to bidders (in short, ITB) were opened. The Petitioner was declared second lowest bidder (in short, L-2) while Respondent No. 3 as lowest bidder (in short, L-1).

2. The grievance of the Petitioner in the present writ petition under Article 226 of the Constitution of India is that R-3 was declared as a successful bidder although it did not possess the necessary and mandatory qualifying requirements, as contemplated under Clause 8.3 (c) (i) of the ITB read with Clause 6.1 of the Invitation for Bids (in short, IFB). The Petitioner sent various representation to

Respondent No. 1 pointing out what they perceived to be the lack of qualification of Respondent No. 3, but to no avail.

3. In order to appreciate the controversy before us, it is necessary to reproduce the relevant clauses of both the ITB and IFB.

8. Documents Comprising the Bid....

8.3 Each Bidder shall submit with its bid the following documents:

....

c) Attachment 3: Bidders? Qualifications

....

The Bidder shall provide satisfactory evidence that he and/or, where applicable, his collaboration/associate/partner(s) of Joint Venture:

i) is a manufacturer, who regularly manufactures equipment of the type specified and/or undertakes the type of work specified and has adequate technical knowledge and relevant experience for the works covered in the bidding documents.

"6.0 Qualifying Requirements

6.1 In addition to the satisfactory fulfillment of the requirements stipulated u/s ITI ((Instruction to Bidders), the following shall also apply:

6.1.1 The bidder should have designed, constructed and commissioned at least one (1) number Induce Draught Cooling Tower in RCC Construction with splash type fill, of capacity not less than 1300 M3/hr which is in successful operation for at least one (1) year as on date of bid opening.

The reference cooling towers should be of the same type i.e. cross flow splash type Cooling tower or counter flow splash type cooling tower as is being offered by the Bidder.

6.1.2 Bidders who do not fulfill the requirement in Clause 6.1.1 above can also participate provided the bidder has designed, constructed and commissioned at least one (1) number Induced Draught/Force Draught/Natural Draught RCC Cooling Tower having film/splash type fill, of capacity not less than 13000 M3/hr and associates/collaborates with a party fully meeting the requirements of Clause 6.1.1 above.

In such a case, the bidder shall furnish an undertaking jointly executed by him and his associate/collaborator as per the format enclosed in the bid document for the satisfactory performance of the Cooling towers. This joint deed of undertaking shall be submitted along with the bid, failing which the bidder shall be disqualified and his bid shall be rejected. Further, in case of an award, the Bidder's associate/collaborator will be required to furnish demand bank

guarantee for 1% (one percent) of the total contract price in addition to the contract performance security to be provided by the bidder.

4. The question thus before us is that: whether Respondent No. 3 does not meet the qualifying requirements as per Clause 6.0.

5. It is the say of Respondents before us that case of Respondent No. 3 falls in Clause 6.1.2 and it is that clause which will determine the eligibility of Respondent No. 3.

6. If we analyze the aforesaid clauses, we find that as per Clause 6.1.1, the bidder is required to have designed, constructed and commissioned at least one IDCT in RCC Construction with splash type fill, of capacity not less than 13000 M³/hr (cubic metres per hour). We may note that the cooling tower required by Respondent No. 1 is a draught cooling tower with a splash type fill. Thus, the alternative criteria which is deemed sufficient to make a bidder eligible is that he may have designed, constructed and commissioned a draught cooling tower of a splash type fill or may have designed, constructed and commissioned a "forced draught" or "natural draught" cooling tower either of film or splash type. In terms of the affidavits filed by Respondent No. 1 and Respondent No. 3, Respondent No. 3 fulfils this requirement.

7. Learned Counsel for the Petitioner has contended before us that it was incumbent upon the bidder to have designed, constructed and commissioned the cooling tower and it is his say (which has also been set out in the writ petition) that the reliance placed on the cooling tower stated to have been designed, constructed and commissioned by Respondent No. 3 was actually never designed by Respondent No. 3. Respondent No. 3 based its experience (which also a condition of eligibility) on, the setting up of the Kondapalli-I (in short, K-1) Project. With regard to K-1 project, it is not disputed that the original order qua the project vis-?-vis the cooling tower(s) was placed on M/s Lanco Power Limited, which in turn, placed an EPC on M/s Korea Heavy Industries and Construction Co. Ltd (Hanjung). Hanjung thereupon awarded the contract to Encon Services Ltd (ESL). ESL was subsequently amalgamated with Lanco Infratech Ltd.

8. It is thus the say of the Petitioner that Respondent No. 3 has effectively purchased the alleged qualification requirements.

9. Learned Counsel for the Respondents on the other hand stated that the bid of Respondent No. 3 as submitted is, in collaboration and/or association of Ms/ Hammon Thermal Europe, being part of route-II, which regularly undertakes execution of cooling tower projects. A joint undertaking has been submitted both by Respondent No. 3 and M/s Hammon Thermal Europe that they are jointly and severally responsible to Respondent No. 1 for the satisfactory performance of the cooling tower, which includes obligations qua technical guarantees.

10. Learned Counsel for the Petitioner submitted that the design part of the work

of K-1 Project was carried out by Shriram Tower Tech Limited, as would be apparent as per the work order issued by ESL to Shriram Tower Tech Limited dated 28.12.1998. In this behalf, learned Counsel invited our attention to Clause 2.1.0 under the heading "scope of work" to emphasize that the complete designing work in respect of the cooling tower was to be carried out by Shriram Tower Tech Limited. The said clause reads as under:

2.0.0 SCOPE OF WORK

2.1.0 Design, engineering, manufacture, procurement, stage inspection during manufacture, assembly, inspection at works, performance testing at manufacturers works, dispatching all material required for 1 No. RCC Counter flow Cooling Tower of capacity 26000 m³/hr in 13 cells (12 working + 1 standby), including cold water basin and channel as per the Tender specification and subsequent changes agreed by. The scope shall include Mechanical, Electrical, C&I and Miscellaneous items, consumables, hardware, materials, commissioning spares, and any other items related to the above defined scope and all applicable taxes and duties. The scope of work shall also include and be guided by specifications, drawings, BOQ, amendment/s as applicable."

11. It is the say of the learned Counsel for the Petitioner that merely because the legal liability remained with ESL, does not imply that ESL can be stated to have carried out designing work by implication. Thus, the plea that ESL was involved at each stage of the project and thus ESL was part of the designing process is sought to be negated.

12. Learned Counsel also sought to draw our attention amongst others to the Minutes of Meeting (in short, M.O.M) dated 10.04.1999. It is stated that Shriram Tower Tech Limited was not even a party to this M.O.M. A common document referred to by learned Counsel for the Petitioner and Respondents is a letter issued by Respondent No. 1 to Respondent No. 3 dated 16.12.2009. This arose out of the bid submitted by Respondent No. 3 and the clarification sought by Respondent No. 1. We consider it appropriate to reproduce the letter as it is:

Ref No. 01/CS-0270-135-2-PRA

M/s Lanco Infratech Limited

Plot No.6, Software Units Layout,

Hyderabad ? 500081

India

Attn: Mr.B.Manohar, Director (Operations)

Sub: Induced Draft Cooling Tower Package for Nabinagar

Thermal Power Project (4x250 MW). Bidding Doc. No.CS-

0270-135-2.

Ref: 1. Your bid proposal dated 27.10.2009.

2. NTPC letter ref No. 01/CS-0270-135-2-PRA dated 12.11.2009 & 09.12.2009

3. Your letter ref LITL/11453x10/2009-10 dated 21.11.2009 & 11.12.2009

Dear Sir,

This has reference to the documents/details furnished vide your letters dated 21.11.2009 & 11.12.2009 on the Qualifying Requirements. On review of these documents, it is observed that there is still need for further details/documents pertaining to the distribution of work between M/s Encon Services Pvt. Ltd (Encon) and M/s Sriram Tower Tech Limited (Sriram) as indicated below:

Sl. Area Clarifications Required

1. Design The extent of involvement of Encon in the design work for the execution of the reference work (i.e. Induced Draft Cooling Towers (IDCT) for Kondapalli Thermal Power Project).

2. Civil Construction From the documents furnished by you, it is not clear who has actually carried out the civil construction works of the reference work.

3. Commissioning Who actually has carried out the Commissioning of the reference works of IDCT.

You are required to furnish the necessary information in terms of each of clarifications sought above duly supported by the documentary evidence so as to reach this office latest by 18.12.2009.

Thanking you

Yours faithfully

Saha)

DGM (CS-II)

13. Insofar as the issue of designing is concerned, Respondent No. 1 sought from Respondent No. 3 a clarification about the extent of involvement of Respondent No. 3 in the design work for execution of the K-1 Project, and as to who had carried out the design work. Respondent No. 3 responded to this letter vide communication dated 17.12.2009. It would suffice to re-produce the relevant portion of this letter dealing with the issue of design; the same is extracted hereinafter:

No. Area Clarification required by NTPC Ref. No. Clarifications by LITL Remarks

1) Design Extend of involvement of Encon in the design of IDCT for Kondapalli Power Plant 1 Involvement of ENCON SERVICES LTD in design of IDCT for Kondapalli Power Plant is total. Ref. to the scope of work in the Agreement b/w ESL & Hanjung already submitted to NTPC.

Who actually carried out the design of IDCT i.e. Thermal design, Civil, Structural design Basic design in respect of Thermal & Civil was carried out by ESL and Detailed Engineering scope was off loaded to the sub contractor M/s Shriram Tower Tech Limited who in turn taken the help of sub vendors (approved by ENCON/client) like M/s ABB, M/s GREAVES, M/s

PARAG, M/s P & M Construction Co. Pvt. Ltd. M/s DANCAL, M/s PETHE Brake Motors Pvt. Ltd., M/s Safe track ,M/s Speed-O-Controls Pvt. Ltd., M/s KGEN/ KGEN, M/s Crompton Greaves, M/s SRCAST, M/s VANKOS, M/s BRITTOOL etc.

14. It was clarified vide this letter that the basic design in respect of thermal and civil work was carried out by ESL while detailed engineering out of the scope of work envisaged under the said project was, off loaded to the sub contractor i.e., Shriram Tower Tech Limited, which in turn, took the help of various sub vendors.

15. The aforesaid position is naturally sought to be disputed by the Petitioner by relying upon the document dealing with division of responsibility between Hanjung and ESL qua the project of Respondent No. 1 with Bihar State Electricity Board, which is also incidentally conceived at Nabinagar through latter in point of time.

16. It is the submission of learned Counsel for the Petitioner that Clause 7.1 and 7.2 of this document is identical to Clause 6.1.1 and 6.1.2 of the tender in question. In respect of this other contract, a Sub Qualification requirement (in short, QR) was issued in the following terms:

Sub QR to be included in the Technical Specification

In case the reference cooling tower was designed by a party other than the bidder himself, the bidder shall employ a cooling tower designer/supplier who has independently designed an Induced Draught Cooling Tower of the same type as being offered of capacity not less than 13,000 cum/hr. In RCC Construction with splash type fill which is in successful operation for at least one (1) as on date of bid opening.

17. It is the contention of learned Counsel for the Petitioner that this Sub QR envisages a situation where the designing of the reference cooling tower was carried out by a party other than the bidder then, in that eventuality, the bidder is obligated to employ a cooling tower designer/supplier who has independently designed and IDCT of the same type.

18. It Is thus submitted that if the say of the Respondents was to be accepted that Respondent No. 3 could carry out the work of designing through the aegis of Shriram Tower Tech Limited, then the occasion to include the sub QR in subsequent tender would not have arisen. Therefore, the plea in substance is that because a sub QR has been issued, albeit in a subsequent tender, it ought to imply that the earlier tender (which is the tender in question) did not envisage that the job function of designing be sub contracted.

19. The other aspect emphasized by learned Counsel for the Petitioner is that the certificate submitted by Respondent No. 3, on a plain reading, did not refer to the fact designing work in K-1 project had been carried out by Respondent No. 3. There is no reference to the design contract obtaining between Respondent No. 3 and Shriram Tower Tech Limited; a reference to that design contract would show that it is Shriram Tower Tech Limited which had carried out complete designing work of the K-1 project even though the legal responsibility rested with ESL.

20. In a nutshell, learned Counsel for the Petitioner submits that the work of designing has to be carried out "of its own" resting with Respondent No. 3 and this work cannot be delegated to any third party including Shriram Tower Tech Limited, with mere supervision and legal responsibility resting with Respondent No. 3.

21. Learned Counsel submits that wherever Respondent No. 1 is of the view that such work could be carried out through another party, the phraseology used is "designed, constructed and commissioned or designed or got constructed or got commissioned" as was the case in WPC No. 296/2011 M/s Ansaldo Caldaie Boilers India Pvt. Ltd. v. Union of India and Anr.; decided on 01.03.2011; where the expression used was "designed, engineered, manufactured/got manufactured, erected or supervised erection, commission or supervised commission".

22. Learned Counsel for the Respondents has emphasized that the restrictive interpretation sought to be given to Clause 6.1.2 is not sustainable as in all such projects, no single entity carries out the complete work; but assistance is taken from other experts in the field. The ultimate responsibility rests with a party to which the tender is awarded and it cannot escape the liability or responsibility by putting the burden on such other party from whom it may have got some part of the work completed. Learned Counsel for Respondent No. 1 also emphasized that in the tender in question an important Clause 6.3 was inserted which reads as under:

Notwithstanding anything stated above, the Employer reserves the right to assess the capabilities and capacity of the Bidder/his collaborators/associates/subsidiaries/group companies to perform the contract, should the circumstances warrant such assessment in the overall interest of the Employer.

23. It has been thus submitted that Respondent No. 1 as an employer had reserved the right to assess the capabilities and capacity of the bidder/collaborators/associates/subsidiaries/group companies to perform the contract should the circumstances warrant such assessment in the overall interest of the employer.

24. In the present case, it has been emphasized that pursuant to the Petitioner casting a doubt on the eligibility of Respondent No. 3, a Tender Evaluation Committee (in short, TEC) having technical members actually went into all the aspects including the matter in issue and came to a conclusion in favour of

Respondent No. 3. It is thus submitted that an inspection has also been carried out to the satisfaction of Respondent No. 1 and Respondent No. 2 about the past experience and ability of Respondent No. 3 to carry out the task assigned to it; and thus, it is submitted that this Court while exercising the jurisdiction under Article 226 of the Constitution of India cannot be expected to sit as a court of appeal over the decision of TEC which, comprised of technical members as well.

25. Learned Counsel has also drawn our attention to Clause 8.3 (e) of the ITB under the heading "Attachment 5: Subcontractors Proposed by the Bidder" which deals with subcontractors proposed by the bidder, to emphasize that such an delegation of work is envisaged in the bid itself.

26. The last aspect emphasized by learned Counsel for Respondent No. 1 is that the Petitioner, in any case, is dis-entitled to any indulgence arising from the delay in approaching this Court for redressal of its grievances. In this behalf, it is stated that it was as far back as on 27.10.2009 that the technical commercial bids were opened as also the price bids when L-1 was found to be more competitive, Petitioner having quoted a price of Rs. 94,18,00,000/- and Respondent No. 3 having quoted a price of Rs. 90,74,35,000/-. Thus, the difference in price is about Rs. 3.5 crores i.e. about 4%. The Petitioner made a representation challenging the ability of Respondent No. 3 on 07.01.2010 followed up by a number of similar representations. Respondent No. 1 appointed TEC to look into the eligibility issue, which submitted its report on 02.03.2010. The Petitioner, it was contended, was obviously aware of the same as it made a further representation on 09.04.2010 seeking a reconsideration. The final approval was given by a higher management of Respondent No. 1 on 30.08.2008 treating the Respondent No. 3 as technically qualified, and thereafter, last representation was made by the Petitioner on 24.11.2010. The work was awarded on 25.01.2011 and the present writ petition was filed a couple of days thereafter.

27. It is thus submitted that the Petitioner should have approached this Court at least soon after April, 2010 rather than keep making representations for reconsideration, especially, bearing in mind the prayers made in the writ petition. Learned Counsel for Respondent No. 3 has argued more or less on the same basis as the submissions advanced on behalf of Respondent No. 1. Learned Counsel emphasized that the principle of ultimate responsibility and submitted that it is in view thereof that the sub-contracting of work was envisaged. Had Respondent No. 1 required the designing, construction and commissioning of working to be strictly carried out by the contracting entity itself, it would have possibly used the phraseologies like "by itself". In any case, it is submitted that the interpretation put forth by the party making the contract must be given due weightage. It was also pointed out that (as averred by the said Respondent, in para 19 of the counter affidavit) even the Petitioner has been sub contracting in the past different job functions of the works awarded to it including that part of the work which involves designing.

28. Learned Counsel referred to the judgment of the Supreme Court in Himachal Pradesh Housing and Urban Development Authority v. Universal Estates and Anr. JT 2010 (13) SC 57 to emphasize that the scope of judicial review in such matters is limited and the court would exercise its discretion only when it is satisfied that the action of the public authorities is detrimental to public interest. Furthermore, even if some defects are found in the decision making process, the court in exercise of powers under Article 226 of the Constitution of India would interfere only in furtherance of public interest and not merely to make out a legal point.

29. We have noticed and examined the aforesaid contentions though it is our view that the matter is in a very narrow compass. The short point is whether in terms of the Clause 6.1.2 the work of designing can be said to not have been carried out by Respondent No. 3 in K-1 Project so as to disqualify Respondent No. 3, as the substantive part of the design work was executed by Shriram Tower Tech Limited under the supervision and overall responsibility of Respondent No. 3

30. We may note at the threshold that this is a case where Respondent No. 3 is L-1. The difference in bid price between that submitted by the Petitioner and Respondent No. 3 is approximately Rs. 3.5 Crores, which in percentage terms is nearly 4 percent. The bid of Respondent No. 3 is thus undoubtedly commercially more competitive.

31. The Petitioner having lost out in the bid process now seeks to take recourse to the present proceedings so as to disqualify Respondent No. 3 on the aforesaid plea.

32. Learned Counsel for the Petitioner, inter alia, pleaded that the Petitioner was willing to execute the contract at the price quoted by Respondent No. 3, but that, in our considered view, would be no answer to the fact that the Petitioner in its wisdom decided to possibly keep an additional sum of Rs. 3.5 crores as profit at the time of making the bid even while Respondent No. 3 submitted a more competitive bid.

33. Insofar as the aspect of technical qualification is concerned, no doubt the terms of the tender must be adhered to, but where there is an element of ambiguity or even a grey area in ascertaining the intent of parties weightage will have to be given on how men of commerce operating in the same field of activity understand the terms used in a contract. The word "design" used in Clause 6.1.2 by itself, in our view does not exclude the possibility of a bidder employing a collaborator. The clarification issued by Respondent No. 3 vide its letter dated 17.12.2009 quoted by us above, would show that basic design of IDCT in K-1 project which involved civil and thermal work was with Respondent No. 3 while Shriram was off loaded a part of the job function comprising "detailed engineering"; though decidedly the overall supervision and responsibility was of Respondent No. 3. This vexed issue could perhaps be answered by employing the test of substantiality. Whether the off loaded portion of design work resulted in a

situation of disentitling Respondent No. 3 from bidding in respect of the instant tender is call which the experts had to take. The experts having decided otherwise. They have come to a view that Respondent No. 3 is substantially compliant. The court cannot supplant that view. It is then open for the Petitioner to contend that the collaboration route was per se a no-go area. In our view, it cannot be so contended. As long as the bidder and the collaborator, are operating broadly in the same line of business, such a submission is untenable. In today's fast moving era of technology and super specialization, it would be well nigh impossible for one entity to claim expertise in any one domain qua projects which are acutely capital intensive. Segmented parts of a project, such as design, construction and commissioning would often require involvement of multiple agencies and/or entities. It is precisely for this reason, in order to protect the interest of the employer, that legal instruments, such as, joint undertaking(s) have come into existence. In our view, the submission that because a part of the design work in K-1 project had been executed by Shriram Tower Tech Limited, Respondent No. 3 was ineligible to bid for the instant tender is misconceived. We thus emphatically reject this submission. This apart, what cannot be lost sight of is, assuming all things are equal that a court would be loathe to supplant its opinion with that of the experts in the field.

34. In the facts of the present case and the clauses referred to aforesaid, Respondent No. 1 and Respondent No. 2 were well within their rights to have scrutinized the capacity and capabilities of the bidders to satisfy themselves as per Clause 6.3. Such an endeavour possibly would have been made even otherwise in view of the terms of the contract, but especially taking into consideration the complaint of the Petitioner, a TEC comprising of technical members was constituted to examine the matter including inspection of the cooling towers manufactured, designed and installed by Respondent No. 3 at an earlier point in time, and to satisfy itself with regard to their due performance.

35. That the cooling towers have been working satisfactorily for a period of 11 years is not seriously disputed before us. The report of TEC comprising of technical members has also been shown to us. In Tec's report, the relevant aspects are discussed under the heading "Capacity and Capability" in para 3.0, para 3.1.5 and 3.1.6. We consider it appropriate to reproduce the same as under:

3.1.5 During the discussions with NTPC team, it was informed that Lanco Infratech Limited is an ISO 9001 - 2008 certified company and they are engaged in the field of Engineering, Procurement and Construction (EPC) contracts. The range of projects undertaken by LANCO construction are construction of BOP for thermal power projects, Hydel projects, Power Transmission and Distribution. It is also clarified that Encon Services Limited (ESL) who executed the BOP works including IDCT on sub-EPC basis from M/s. Hanjung for Kondapalli Power Corporation Limited Stage-1. It got amalgamated with Lanco Infratech Limited upon the order dated 08th Oct. 2002 of High Court of Andhra Pradesh in order to take up the construction of power plants and other projects on a large scale. It

was also clarified that ESL had engaged M/s. Shriram Tower Tech Limited as sub contractor for Design, Engineering, Procurement and Commissioning of IDCT as per the Technical Specifications issued by Owner Company M/s. Kondapalli Power Corporation Limited. LANCO also informed that they had given all the input design data to M/s. Shriram and ensured at various stages that the design was carried out as per TS and got the designing and drawings approved by the EPC contractors consultant M/s. FICHTNER. LANCO also stated that they constructed the civil work of substructure of Cooling Tower and helped M/s. Shriram by issuing the civil construction materials like concrete, reinforcement, shuttering materials etc. LANCO also clarified that they have taken the help of M/s. Shriram for Erection and Commissioning of IDCT and entire project management was done by ESL.

3.1.6 It has been observed that Lanco does not have full fledged engineering set up for carrying out IDCT Package. Lanco informed that, thermal design shall be done and guaranteed by their collaborator M/s Hamon Thermal Belgium and Detailed Design & Engineering shall be carried out by M/s. Hamon Thermal. However, they will employ Consultant for co-ordinating with Hammon and also with their site of this proposed Package of IDCT at Nabinagar.

LANCO further clarified that they will carry out all the civil construction, ordering and procurement of equipment, erection and commissioning since they have all the resources like skilled manpower and equipment for construction, material and equipment procurement, erection and commission of IDCT.

36. A reading of the aforesaid shows that TEC comprising of technical members fully analyzed the capability of Respondent No. 3, and while noticing that it did not have full-fledged engineering set up relied upon the work already carried out in the K-1 Project as also the experience of the collaborator, M/s Hammon Thermal Europe.

37. We have already noticed that both Respondent No. 3 and M/s. Hammon Thermal Europe have given undertakings for due performance of the contract and proper functioning of the equipment.

38. At this stage, we may notice with profit the principles enunciated by the Supreme Court in the case of Jagdish Mandal Vs. State of Orissa and Others, as under:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. 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 bona fide 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. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. 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. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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."

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

39. Having regard to the opinion of the Supreme Court in the aforesaid case and the court in several other discussions, we do not think that it is the function of this Court to sit in appeal over the view taken by an expert body especially called upon to look into the complaint of the Petitioner. This is more so where the body i.e., TEC comprised of technical experts who satisfied themselves as to whether Respondent No. 3 fit the bill or not. One cannot but overemphasize as indicated above that in a contract of this nature, assistance of experts in the field is often taken to do a part of the work while, the legal responsibility rests with the contracting party. So long as the appropriate experience and technology is available to a contracted party and the party awarding the contract is satisfied with the same, the third party cannot insist that the contract should be read in a particular manner so as to non-suit the party to whom the contract is to be awarded. This is exactly what, the Petitioner seeks to do by insisting that Respondent No. 3 does not have the experience as in the K-1 Project the designing work was carried out by Shriram Tower Tech Limited, while Respondent No. 3 had only the overall legal responsibility qua the work in issue.

40. We thus also find force in the contention of learned Counsel of Respondent No. 3 that the word "designing" used in the contract has to be understood in the context that this work must be got done satisfactorily by Respondent No. 3, and does not mean that Respondent No. 3 on a stand alone basis should execute the work. This, in fact, is the very view we have taken in the case of M/s Ansaldo Caldaie Boilers India Pvt. Ltd. v. Union of India and Anr.'s case (supra), quite contrary to the submission made by learned Counsel for the Petitioner herein. In this context, for the sake of convenience, the relevant paragraphs being paragraphs 15.4 to 15.9, are extracted hereinafter:

15.4 Therefore, the argument was that while as a whole the reference Steam Generator i.e., TNP plant had been designed, engineered and manufactured by a consortium of which ACS was the leader, the fact that certain parts of the evaporator had been manufactured by BHK/HPE would not make ACS ineligible as a QSGM.

15.5 As against this, Mr. Chandhiok argued to the contrary. He stressed upon the fact that the evaporator being a crucial part of the Steam Generator, it was quite apparent on a plain reading of the relevant clause of the bid documents that ACS would be eligible as a QSGM only if it had also designed, engineered and manufactured the evaporator.

15.6 We may only note at this stage that the writ Petitioner's filling up of the bid documents in particular the attachment 3A-4 was less than happy, but what cannot be lost sight of is that there was no attempt on the part of writ Petitioner to mislead NTPC as regards the fact that it was offering an evaporator manufactured by a third party in so far the current tender was concerned. From the extracts which are culled out by us hereinabove, it is quite clear that NTPC was quite aware of the fact that the Siemens AG was the technology owner/licensor of the evaporator which was offered by the writ Petitioner in its bid.

15.7 Therefore, this brings us to the question as to whether interpretation placed by the writ Petitioner ought to be accepted or not? In our view it is trite law that interpretation is required to be made; whether of contract, document or a statute, only if, there is an ambiguity as to the intent of the parties. Intent has to be construed from the words used in the contract. It is only when the language of a document is ambiguous, should the tools of interpretation be brought into play to gather the intent of the parties. In doing so one should read the document as a whole and not in fragmented parts.

15.8 The word "provide" used in Clause 7.1.1 of the IFB/closure I.I.I. of the BDS leaves us no wiser as to the intent of parties. In plain English, the word "provide" would mean supply or furnish (see Concise Oxford Dictionary 9th Edition page 1102). Would it then mean that ACS will stand disqualified as a QSGM if in the reference plant (i.e., the TNP plant), the evaporator was supplied by say BHK. In our view, this interpretation cannot be laid on the said clause, given the manner in which it is structured, especially when it is read in conjunction with other

similar Clauses (read routes) of the tender. To cite an example, under Route 5, a bidder can qualify as a QSGM if he had in the past had experience of manufacturing a Steam Generator of requisite specification with an evaporator of constant pressure provided it undertook to supply one with a variable pressure, and in addition furnished a joint deed of undertaking of the owner and/or licensor of such technology. Therefore, on a comparison of QRs for a QSGM (which are common to all five Routes) it appears that in so far as the NTPC was concerned, it was quite prepared to accept a bidder as a QSGM if the evaporator supplied had the backing of the technology owner and/or the licensor of the evaporator.

15.9 In the present case, a consortium appears to have designed and manufactured the TNP Plant of which ACS was the leader. The fact that certain parts of the evaporator (we will assume that they are crucial) were designed and manufactured by BHK would not, on this account alone, disentitle ACS from being categorized as a QSGM, because in our opinion, a reading of the document does not reflect that such was the intent of parties. If NTPC is prepared to accept a joint deed of undertaking of a technology licensor for a Steam Generator with a Variable Pressure evaporator when the referential plant was designed with an evaporator suitable for constant pressure - we see no reason why the word "provide" used in Clause 7.1.1 of IFB/clause 1.1.1 of BDS cannot be interpreted to mean that parties did not intend to exclude a person from being categorized as a QSGM only because the evaporator provided in the referential plant was supplied by a third party.

41. We are thus of the considered view that there is no merit in the challenge laid by the Petitioner to the qualification of Respondent No. 3.

42. The argument of the Petitioner that since in the subsequent tender (by insertion of a sub QR) Respondent No. 1 had provided for involvement of a cooling tower designer/supplier if the reference cooling tower had been designed by a third party and hence by implication excluded the possibility of parties intending that the eligibility condition would stand complied if a third party was involved in designing a referential plant (IDCT); is misconceived for the following reason. Firstly, it proceeds on the premise that Respondent No. 3 had no role to play in design work of K-1 project. Secondly, in our view, incorporation of a clause in a subsequent tender cannot be used as an interpretative tool to explain the intent of parties qua an earlier tender.

43. Now coming to the plea of delay on the part of the Petitioner in approaching the Court, we are unable to persuade ourselves to agree with the submission of learned Counsel for Respondent No. 1. The Petitioner showed promptness in making the complaint and this was followed up by different reminders. There was no communication to the Petitioner but the fact remains that on 09.04.2010 the Petitioner did seek a review of the decision. Respondent No. 1 and Respondent No. 2 in their wisdom apparently kept on examining the matter and withheld their hand till 30.08.2010 when Respondent No. 3 was found technically qualified. The Petitioner made the last representation on 24.11.2010 and

approached the Court in January, 2011 itself.

44. We are thus of the considered view that there cannot be said to be any fatal delay on the part of the Petitioner in approaching the Court.

45. We may note in the end that learned Counsel for Respondent No. 1 prays by relying upon the judgment in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, that the Petitioner having enjoyed an interim order, Respondent No. 1 and Respondent No. 2 are entitled to be compensated for the cost escalation arising from the delay in proceeding with the contract. We may notice that there are some delays in the contract which have arisen otherwise than on account of pendency of this petition. The extension of the bids was sought by Respondent No. 1 from time to time. Thus, the question arises whether the continuation of interim order for a period of couple of months in the present matter has caused any injury and if so, the extent of it. The observations in para 25 of Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors. Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors."s case (supra) are as under:

25. Therefore, when such a Stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counter-productive.

46. We are of the considered view that in case the Respondent No. 1 so desires, it is for Respondent No. 1 to establish in appropriate proceedings that there is financial implication of the delay occasioned on account of the interim orders operating for these couple of months in order to succeed in any monetary claim in this behalf against the Petitioner. The present dispute is really in the nature of a commercial dispute between the Petitioner and Respondent No. 3. We are of the considered view that in such a matter (even though Mr. Amit Prasad succinctly set out the controversy in issue while endeavouring to persuade us to his point of view), the succeeding party must get actual costs.

47. We had asked the parties to file their respective bills of costs and fees by today. The bill of costs filed by Respondent No. 3 for the hearings, senior counsel's fee and drafting expenses are quantified at Rs. 9,13,000/- and that of Respondent No. 1 at Rs. 12,26,375/-. There has been neither any appearance on behalf of Respondent No. 2 nor has any bill of costs been filed on behalf of the said Respondent. We thus allow the costs in favour of Respondent No. 1 and Respondent No. 3 and against the Petitioner in the aforesaid terms.

48. The writ petition is accordingly dismissed with costs of Rs. 12,26,375/- in favour of R-1 and Rs. 9,13,000/- in favour of R-3.

49. Interim orders dated 10.02.2011 stand vacated.