(1993) 12 CAL CK 0024

In the Calcutta High Court

Case No : Matter No. 487 of 1993

Utpal Kumar Basu APPELLANT

Vs

Oil and Natural Gas Commission of India RESPONDENT

Date of Decision : 17-12-1993

Acts Referred:
Constitution of India, 1950 — Article 226
Sales of Goods Act, 1930 — Section 20

Citation : (1994) 1 ILR (Cal) 99

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : Some Nath Chatterjce, Anindya Milter, H.K. Mitter and Abharajit Mitter, for the Appellant;Dipankar P. Gupta, Solicitor General of India, Goutam Chakrabarty, Ajoy Gupta and Amit Basil, for the Respondent

Judgement

Shyamal K. Sen, J.—The main contention of the writ Petitioners in the instant writ petition is that the Petitioner No. 2, Nicco Corporation Ltd., although fulfilled the eligibility criteria and is eligible to participate in the price bid, has not been allowed to participate at the stage of price bid. The Petitioner, although eligible, has been wrongfully excluded by the Respondents from participating at the final stage, viz. consideration of the price bid, but the Petitioner'' price bid has been taken into consideration by the Respondents'' and found to be the lowest. The Respondent has utilised the price bid of the writ Petitioner to bring down the price bid of the next lowest tenderer.

2. The work under the tender is for setting up of a Kerosene Recovery Process Unit, being a part of an ONGC project at Hazira. Engineers India Ltd. (EIL) were appointed by ONGC as consultants. EIL had an independent status as advisers to ONGC. In ONGC, the preliminary considerations were entrusted to a Tender Committee. The final decision in ONGC was however taken by a Steering Committee presided over by the Chairman.

3. The newspaper publication inviting bids set out only two paragraphs from the

Bid Evaluation Criteria. The full BEC was available to all bidders as part of the tender documents which they purchased.

The original cl. 1.5.2 was follows:

1.5.2. Main bidder or leader of the joint venture/ consortium should have minimum experience in execution of at least one hydro-carbon processing plant in the field of petroleum or refinery or gas processing plant or petrochemicals or fertilized plant and should have completed at least a single contract of value not less than Rs. 8 crores during the last seven years and should accept total responsibility for the total scope of work including project management....

The BEC was amended on May 23, 1991, so as to increase scope for competition and a corrigendum was published in newspapers on June 4, 1991. The BEC as finally amended is set out as follows:

The first sentence starting from "Main bidder or leader of the joint venture" including project management shall be replaced by:

In case of Joint Venture/Consortium Bids, one of the participants should have experience in execution of at least one Hydrocarbon Processing Plant in the field of Petroleum or Refinery or Gas Processing Plant or Petrochemicals or Fertiliser Plant and Leader should have completed at least a single contract value not. less than Rs. 8 crores during the last 7 years and the Leader should accept total responsibility for the total scope of work including Project Management.

The above corrigendum was issued to all the agencies who purchased the tender document as on that date.

4. The bids were submitted on or before August 19, 1991. The price part of the bid were submitted separately on the same day. Bidders could be either single or joint venture/consortium NICCO submitted the bid claiming to be a joint venture/ consortium with Toyo Engineering India Ltd. (TEIL) of which NICCO claimed to be the leader.

NICCO in their bid stated as follows:

Please note that this subject tender being submitted by NICCO as prime bidder who is totally responsible for total scope of work including project management and fulfil BEC requirement of successful completion of at least one single contract value of not less than Rs. 8 crores. Moreover as per requirement of BEC criteria and addendum No. 1 of NIT, we have nominated M/s. Toyo Engineering India Ltd. as our sub-contractors who possess requisite experience in execution of Hydrocarbon Processing Plant.

(Vide Tender Committee review minutes dated 27.1.93).

5. A Memorandum of Understanding (heremath referred to as MOU) between NICCO and TEIL dated July 29/31, 1991, was submitted. The said MOU described TEIL as the nominated contractor of NICCO and TEIL. It has been submitted by

learned. Solicitor-General on behalf of ONGC that TEIL did not undertake responsibility of construction or of construction management activities. The responsibilities of TEIL in the alleged joint venture/consortium did not extend to the actual construction and construction management and other important activity for which they claimed they had the requisite experience. They were only involved in construction supervision. This MOU described TEIL as follows:

NICCO has approached TEIL to be its nominated contractor for bidding for the Kerosene Recovery Process Unit....

6. The first EIL short listing in October 1991 rejected NICCO on the ground that the Rs. 8 crore. contract executed by NICCO did not involve site work and was not comparable in responsibility as called for in the tender documents. The bid of one bidder, namely, M/s. Punj Lloyd was rejected outright as patently ineligible inasmuch as the value of the contract executed by them was less than even Rs. 8 crores. They were patently and obviously ineligible.

7. Thereafter the project was held in abeyance by the Government of India till May 1992 when the clearance to go ahead was again given.

8. The Tender Committee of ONGC 1992 recorded with regard to NICCO as follows:

From the above track record it is seen that the offer of M/s. NICCO meets the requirement of qualifying the experience criteria of BEC as the leader of consortium as regards the value of single contract executed and annual turnover subject to verification of the same with original. Hence the Tender Committee opines that a chance may be given to M/s. NICCO to establish the credentials of M/s. TEIL with supporting documents as regards the single work done in hydrocarbon processing plant, of value minimum Rs. 5 crores in the last 7 years.

9. EIL held clarificatory meetings with the tenderers including NICCO. The minutes of the clarificalory meeting with NICCO dated July 17, 1992, show that NICCO''s technical bid was under evaluation. (Vide Petn, paras 1.0 and 2.0 at p. 24). In particular the following in the clarificatory discussion may be noted:

(a) The technical bid was still under evaluation (vide petn. p. 24, paras. 1.0 and 2.0).

(b) The role and responsibility of TEIL reeded to be defined. NICCO agreed to review their offer and furnish the necessary information. The Memorandum of Understanding between NICCO and TEIL (the MOU) was to be modified. (Petn. p. 25, para.''4.0(b) & (h).

(c) In view of the long lapse of time and due to change in the scope of work NICCO (and indeed all other bidders) were allowed to submit revised price bids. (Pt. para.9, p. 27).

10. The second clarificatory meeting was held in August 1992 with other bidders including NICCO.

11. In the meantime NICCO submitted a MOU dated July 23/24, 1992, which now described TEIL as follows:

NICCO has approached TEIL to be its nominated contractor/back up consultant for bidding for the" Kerosene Recovery Process Unit....

12. There '' was no other change in the MOU. The division of responsibilities remained unchanged.

13. EIL, the export consultant engaged by ONGC, by its communication to ONGC in September 1992 reaffirmed its earlier view as to the unsuitability of NICCO.

14. The Tender Committee in October 1992 after summarising the past events noted as follows:

4.8.6. Tender Committee, after going through the documents, agreed that the recommendations of EIL that M/s. NICCO do not meet the experience criteria of BEC and hence is not recommended for short listing. (A/o. Pt. 63, para. 4.8.6 at p. 79)

15. The bidders were given an opportunity to submit revised price bids in view of the fact that the project had been held in abeyance and a long time had elapsed in the meantime. Since NICCO''s bid was not acceptable, the date for submission of revised price bid was not intimated to. NICCO.

16. Representations were received from NICCO. These representations were specifically considered by the Tender Committee on or about October 28, 1992. They were of the view that nothing new had been brought out to justify a change in their decision. The copy of the minutes signed on October 28, 1992, have been produced during hearing. The representations of NICCO were also considered again by EIL. They observed inter alia as follows:

But for another contract of Rs. 8 crores, it has been noted that this contract is only supply of an equipment. Hence M/s. NICCO''s claim of satisfyng Bid Document requirement in the light of their contract with a buyer in Moscow for selling an equipment like Plastic Injection Moulding Machine cannot be treated as satisfying the requirements as envisaged in the bid document. Moscow contract clearly identifies contract between the seller and the buyer for the delivery of an equipment on FOB basis. It may be noted that if the arguments put forward by M/s. NICCO were to be accepted on the basis of consideration of literal English language, any seller in India can work as turnkey contractor for a hydrocarbon processing plant with the help of back-up consultants.

In the light of above, we reject the submissions made by M/s. NICCG Corporation for the acceptance of their offer.

17. NICCO however suLmitted thir price bid on their own initiative on December 3, 1992.

18. On January 23, 1993, NICCO made a representation in which they again

described TEIL as their ''nominated subcontractor''. The Steering Committee, being the final authority to take the decision on behalf of ONGC, was to meet on January 27, 1993. This was known to NICCO and they addressed a representation to the Steering Committee dated January 27, 1993 (Petn. p. 68).

19. Even at the last minute, the representations of NICCO were considered by the Tender Committee on January 27, 1993, just prior to the meeting of the Steering Committee. At this stage the Tender Committee considered inter alia the letter of NICCO dated January 23, 1993, and further noted that the bid document of NICCO had stated as follows:

Moreover as per requirement of BEC criteria and Addendum No. 1 of NIT, we have nominated M/s. Toyo Engineering India Ltd. as our sub-contractors who possess requisite experience in execution of hydrocarbon processing plant.

The Tender Committee rejected the repesentations of NICCO.

20. The Steering Committee headed by the Chairman of ONGC met on January 27, 1993, and in the course of discussions brought out that:

(a) M/s. NICCO in their offer has stated that TEIL is their nominated sub-contractor and as such this was not a consortium bid.

(b) TEIL, the nominated sub-contractor by NICCO has got experience in the relevant area specified in the BEC, but they were sub-contractors and not consortium member.

(c) Mentioning M/s. NICCO''s offer as a consortium offer was an error and the correct status is that the offer of NICCO is not a consortium offer.

21. The Steering Committee then noted that NICCO in their representation dated January 27, 1993, claimed that their price was Rupees 100 lakhs lower than the lowest bidder. The Steering Committee was of the view that though NICCO on their own do not meet the experience criteria, their price could be considerd for establishing reasonability of price to be paid by ONGC against this contract.

22. The Steering Committee finally decided to award the contract to M/s. CIMMCO taking into account the price of NICCO in their revised price bid so that the evaluated price gets matched. As a result M/s. CIMMCO in fact lowered their price.

23. Mr. Mitra, learned Counsel for the Petitioner, submitted if the Petitioner fulfilled the eligibility criterion which was a question of law, then the same involved interpretation of eligibility criterion as laid down in the tender notice and as amended. The same is set out below:

In case of joint venture/consortium bids, one of the participants should hav experience in execution of at least one hydrocarbon processing plant in the field of petroleum or refinery or gas processing plant or petrochemicals or fertiliser plant and leader should have completed at least a single contract value not less than Rs. 8 crores during the last 7 (seven) years and the leader should accept total responsibility for the total scope of work including project managment. The nominated contractor(s)/consultant(s) or the consortium partner(s)/member(s), as the case may be, should possess experience in their respective fields of specialisation. Such offers should indicate clearly the scope of work of each agency and their relevant experience in the field for which they have been selected. ONGC/EIL reserves the right to evaluate the details furnished and reject unsuitable joint venture/consortium, if any. In case of joint venture/ consortium/its partner(s)/members selected should have participated in execution of a project of similar nature of value at least of Rs. 5 (five;) crores during the last 7 years.

24. It has also been submitted by Mr. Mitra that the amendment of criterion in case of the joint consortium bid was made at the recommendation of the consultant EIL. The reason for the amendment as stated in the EIL''s recommendation with dated May 17, 1991, was to widen the competition. The stipulation of execution of Rs. 8 crores single contract has been introduced to judge the financial and managerial capability of the leader of consortium.

25. Upon fair reading of the eligibility criterion No. 2 it is crystal clear that following are the criteria of eligibility in respect of consortium bid:

(a) One of the participants of joint venture/consortium should have experience in execution of at least one Hydro-carbon Processing Plant in the field of petroleum etc.

(b) The leader of the consortium should have completed at least one single contract of value not less than Rs. 8 crores during the last 7 years.

(c) The leader of the consortium should accept the total responsibility for the total scope of work including project management.

(d) The nominated contractor/consultant/partner/member, as the case may be, of the joint venture/consortium selected by leader should have participated in execution of a project of similar nature of value of Rs. 5 crores at least during the last 7 years.(e) The nominated contractor or consultant or consortium partner or member, as the case may be, should possess relevant experience in their respective field of specialisation.

26. The criterion of single contract of not less than Rs. 8 crores is not expressed to be of similar nature as is required in case of partner/member of joint venture/ consortium who is required to have executed a project of similar nature of price of Rs. 5 crores.

27. The criterion of single contract of not less than Rs. 8 crores is also not expressed to contain site work as is required in case of single bidder who is required to have experience in execution of at least one hydrocarbon plant of his own and should have completed on Turnkey Basis involving Detailed Engineering, Project Management, Procurement Services, Installation, Construction and

Commissioning a single contract of value not less than Rs. 10 crores. .

28. The expression ''of similar nature'' or ''work involving site work'' should not be added after the expression of ''single contract'', because this will amount to addition of. extra stipulations on the published eligibility requirements which is not permitted under the law of interpretation and, secondly, because in that event the second paragraph, of the criteria cl. 2.0, viz. ''project of similar nature'' with regard to consortium partner etc. would become redundant. Such interpretation, if given, would lead to an absurd and unintended result, viz., that in respect of a joint consortium bid the leader of the consortium must have executed a single contract of similar nature of the value of Rs. 8 crores or more arid in addition thereto other members of the consortium should also have executed contracts of similar nature of the value of Rs. 5 crores. This interpretation will also be repugnant to the first portion of cl. 2.0, viz., that in case of consortium bids one of the participants should have experience in execution of at least one Hydrocarbon Processing Plant. The cl. 2.0 clearly suggests that both (all) the members of the consortium bid need not have experience in the execution of Hydro-carbon Processing Plant which is a project of similar nature. Furthermore, the reason for amendment of BEC as will be apparent from the recommendation of EIL, is clear, viz., requirement of execution of single contract of Rs. 8 crores has been put in to test the financial and managerial capability of the leader. It is significant that only the leader of the consortium is required to complete a jingle contract for the value of not less than Rs. 8 crores and not the other members of the consortium. The other inember\ \of the consortium is required to have experience in execution of the project of similar nature of the value of Rs. 5 crores only.

29. It has, therefore, been submitted by Mr. Mitra that the interpretation as-suggested on behalf of ONGC in course of hearing is an after-thought and wholly unreasonable. No reasonable person on reading the eligibility clauses of BEC would interpret the same in that sense. Neither the Tender Committee nor the Steering Committee of ONGC read cj. 2.0 in the aforesaid sense as championed by ONGC in course of hearing obviously at the instructions of ONGC to some-how justify the exclusion of the writ Petitioner.

30. It has also been submitted on behall: of the Petitioner that only EIL gave the aforesaid unjust and unfair interpretation of the eligibility criteria. As held by Lord Denning, if the rules were interpreted wrongfully, it became a case of error of law. Such error is on the face of the record. Mis-interpretation, even if bona fide, is subject to prerogative writs and judicial review. The writ Court is entitled to correct the same and to direct the authorities to act within the correct meaning of the rules, (1980) 3 All E.R. 373 (378-379). In support of his contention Mr. Mitra relied upon the judgment and decision in the case of Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, where the Supreme Court has taken similar view. In this case the writ Petitioner was prematurely retired in exercise of powers under rules of service which is quoted in para. 3 of

the judgment. The writ Petitioner contended that her premature retirement was not in accordance with the service rules. High Court had dismissed the writ petition. Supreme Court allowed the writ petition by holding that when a public body is promoted by mistaken belief of existence or non-existence of facts or circumstances, there is an error. In the instant case, it has been submitted that ONGC has excluded the writ Petitioner from the tender process under mistaken belief the eligibility criteria is not fulfilled by the Petitioner and such belief is baseda on non-existent qualification of the eligibility criteria and, therefore, the order of exclusion of the Petitioner is vitiated.

31. In The Collector of Customs and Others Vs. Pednekar and Company (Private) Limited (In Liquidation) and Another, the Supreme Court has held that the High Court has jurisdiction to interfere under Article 226 of the Constitution of India when the authority has committed a manifest error of law apparent from the face of the order. In this case the authority had issued the order of confiscation by misreading of facts and law.

32. In the aforesaid decision it was held by the Supreme Court in para. 22 of the said report as follows:

We are dealing with an order of confiscation of certain goods imported under a licence granted to die Respondent. It was never disputed that it was a valid licence. It was also not an Actual Users licence. The Respondent, therefore, could sell these imported goods to others. The whole matter, cherefoje, turned on the legal issue as to whether property had passed at the time the Respondent had entered into the contract for the sale of the imported goods. Even the Customs Authority in its additional show cause notice made particular reference to Section 20 of the Sale of Goods Act and pointed out that "the ownership in the goods under consideration appears to have passed on to M/s. Bombay and Calcutta Cycle Co. right from the time the" sale contract was concluded.

33. When, therefore, on the terms of the contract along with other relevant facts and circumstances which had to be looked into by the adjudicator for application of Section 20 of the Sale of Goods Act, he committed a manifest error of law apparent on the face of the order, the High Court''s jurisdiction to interfere under Article 226 of the Constitution is clearly attracted. The submission of Mr. Sanghi is, therefore, without any force.

34. It, therefore, appears that while interpreting the terms of the contract if there is a manifest error of law apparent on the face of the order, the writ Court is entitled to interfere in exercise of jurisdiction.

35. It has further been submitted that the fact that the writ Petitioner fulfilled the eligibility test and tie consortium bid submitted by the writ Petitioner fulfills the criteria as laid down in cl. 2.0 cannot be disputed. Undisputed qualifications of the Petitioner and TEIL (consortium partner) are set out below:

(a) The Petitioner has in fact executed between 1988 and 1991 on turnkey basis a Hydro-carbon Processing Plant for Durgapur Steel Plant of the value of Rs. 4-27 crores. This Hydro-carbon Processing Plant is a contract of similar nature and the Turnkey job includes; site work and installation. Therefore, the Petitioner has got experience in site work as also the experience of engineering, fabrication, erection of a plant of a similar nature as required in BBC cl. 1.5 (page 10-14 of brief of documents).

(b) The other member of the consortium i.e. TEIL have executed on turnkey basis a Hydro-carbon Processing Plant of value of Rs. 19 crores. ONGC have confirmed that TEIL has experience in execution of Hydro-carbon Processing Plant. (Vide A/O ONGC affirmed by Ashoke Kumar Chattopadhyay at para. 12 of pages 9 and 10).

(c) The Petitioner has executed a single contract of the value of Rs. 8-13 crores with Sovelectro, Moscow, involving engineering fabrication and supply. (Vide cl. 5. 9.5.0, Page 54 of brief of documents as confirmed by ONGC in their Tender Committee)

(d) The Petitioner in its tender has accepted the total responsibility of the .total scope of works including project management. TEIL has also taken the responsibility of supervision for erection at site. The actual site work is carried out by expert sub-contractors selected by NICCO after consultation and approval by ONGC and EIL. Work of such expert sub-contractors are supervised by TEIL.

(e) The tender submitted by: NICCO is as a consortium bid and the same was accepted by ONGC & EIL on several occasions. EIL recommendations, ONGC''s Tender Committee recommendations. Minutes of meeting signed and accepted by EIL & ONGC will corroborate the said fact.

When an eligible tender is excluded from participation in the tender proces and is not allowed to participate in the price bid the tender process is vitiated. Any eligible tenderer has right to be considered at the time of opening of the price bid, and if its right is denied the tender process is vitiated.

36. In the instant case, the writ Petitioner was excluded at the stage of opening of price bid. It has further been submitted that ONGC utilised the price bid of the Petitioner since they considered the bid as the lowest reasonable bid. ONGC would not have negotiated with the second lowest tenderer of the bid to come down to the bid of the Petitioner if the Petitioner was considered to be disqualified or incompetent.

37. It is the contention of the learned Advocate for the Petitioner that realising that the consortium bid of the Petitioner fulfilled the eligibility criteria. ONGC''s Tender Committee suddenly and" hurriedly contended that, the Steering Committee considered the bid of the Petitioner as a single bid and, accordingly, Petitioner''s bid was not qualified on the basis of single bid. It is quite interesting and significant to note that the new decision of i:he Tender Committee was made hurriedly on January 27, 1993, just before the Steering Committee which were

also held on January 27, 1993, and the same was made by the Tender Committee in total disregard to their own and EIL''s earlier recommendations/ decisions.

38. An advantage is sought to be taken by ONGC of a letter of representation written by the Petitioner on January 23, 1993, in which it inadvertently mentions that TEIL was their nominated sub-contractor and, therefore, ONGC construed that TEIL could not be considered to be a partner of the consortium even though they had the MOU between TEIL and NICCO with them along with the complete offer of NICCO and their own earlier recommen- dations which state otherwise, ONGC should not be allowed to take this stand.

39. It has been submitted that the tender of the Petitioner has been described and considered as consortium bid. In the tender TEIL has been described as nominated contractor/back up consultant. With full knowledge of this EIL accepted the Petitioner''s bid as a consortium bid.

40. The Tender Committee also at its meeting held on May 22, 1992, with full knowledge that TEIL has been described as nominated contractor/back up consultant unhesitatingly accepted the bid of the Petitioner as consortium bid and held the NICCO qualifies as the leader of consortium as per BEC.

41. It is not known what promoted the Tender Committee to review their own decision. The competency of Tender Committee rejecting its own decision has been very much disputed by the Petitioner.

42. From the documents disclosed by ONGC on their own it appeared that on January 27, 1993, the same Tender Committee considered the same tender of the Petitioner as a single bid and on the same day, i.e. January 27, 1993, the Steering Committee disqualified the Petitioner''s bid as a single bid and not as a joint bid. At no point of time the Tender Committee or Steering Committee had intimated the Petitioner that the Petitioner''s bid which was so far accepted as a consortium bid would now be considered as a single bid. This was done against natural justice. Even if it is assumed that Steering Committee or Tender Committee considered that-there was a mistake on their part to treat the bid of the Petitioner as a consortium bid, before correction of the assumed mistake, it was obligatory on their part to draw notice of the Petitioner to explain such point that it should be treated as single bid. This can also be noted from the tender document that there is no scope .and right given to ONGC to import or assume any specific clause in between clauses for their own benefit. Clause 2.7 confirms that any change in bid evaluation criteria (BEC) shall be informed to the bidder.

43. The Tender Committee or Steering Committee could however, correct the assumed mistake without giving notice to. the fact, viz. this was in violation of the natural justice. In this connection the learned Advocate for the Petitioner relied upon the judgment and decision in the case of Divisional Superintendent, Eastern Railway v. L.N. Kashri.

44. It has been submitted that in the decision of the Steering Committee the bid of the Petitioner as a single bidder unilaterally without giving any opportunity to the Petitioner violate the principles of natural justice. In support of his contention Mr. Mitra relied upon the judgment and decision in the case of Divisional Superintendent, Eastern Railway, Dinapur and Others Vs. Shri L.N. Keshri and Others, The said judgment is set out hereinbelow:

The judgment of the Court was delivered by Ray C.J. These two appeals are by certificate from judgment dated 14th December, 1967, of the High Court of Patna.

(2) The only question in these appeals is whether the order dated 16th August, 1966, is valid.

(3) By order dated 16th August, 1966, the Appellants fixed the pay of the Respondents at Rs. 135 per month in the scale of Rs. 105-135.

(4) The Respondents Contended that their pay had been fixed in the scale of Rs. 110-180 and the scale was arbitrarily and illegally reduced.

(5) The Appellants contended that because of some mistake the Respondents had been put in the grade of Rs. 110-180 and this mistake was rectified.

(6) The Respondents were confirmed in the scale of Rs. 110-180. The Appellants having fixed i:he scale and confirmed the Respondents could not reduce the scale without giving any opportunity to the Respondents to be heard. Furthermore, the Respondents on confirmation became entitled to rights to the post and to the scale of pay fixed by the Board.

(7) The High Court rightly set aside the order. The appeals therefore fail and are dismissed. The Appellants will pay costs to the Respondents.

45. It is the contention of the writ Petitioner that the Respondent ONGC had never considered the bid of the Petitioner as a single bid as would be clear from the following:

(a) At the meeting of the Tender Committee dated 19th May 1992 the Tender Committee considered the bid of the Petitioner as a consortium bid.

(b) At the meeting held on 17th July 1992 the Tender Committee described TEIL as a consortium partner and informed that the role and responsibilities of TEIL needs to be re-defined and MOU to be reviewed as discussed with NICCO and NICCO agreed to review (page 61 Clause 4(h)). EIL was also present in the meeting. Accordingly, NICCO, the Petitioner, got the MOU with TEIL amended by describing TEIL as a back up consultant also. The amended MOU was given to EIL/ONGC in July 1992. Thereafter, the Tender Committee did not ask for any further review of the MOU though the Tender Committee thereafter called NICCO for further meetings on 18th August 1992.

46. The MOU had been altered on the basis of the views of ONGC in presence of EIL so that MOU would conform to the requirement of consortium bid and ONGC

never contended or informed the Petitioner that the bid of NICCO was not a consortium bid. It was submitted that the NICCO''s bid was rightly rejected.

47. The reasons for rejection of the case of NICCO''s bill as submitted by the learned Solicitor-General is as follows: In the case of a single bid the total expertise must be possssed by the bidder himself. In the case of a joint venture/ consortium the total expertise is shared amongst the members and their respective expertise must be directly available to the project.

48. It goes without saying that in a joint venture the member having the expertise in an area must himself undertake the responsibilities for the work in that area.

49. He has further submitted that the experience for every sub-contractor, consultant, partner or member of a joint venture/consortium is to be tested with reference to the scope of work for each agency (vide cl. 1.5 of BEC). Quite obviously, the participant having the experience has to undertake that part of the work for which his experience is relevant.

50. The Solicitor-General further argues that the view that the bid of NICCO cannot be described as a consortium or joint venture is absolutely correct because, inter alia, (a) TEIL was a nominated sub-contractor/back up consultant only and (b) as per the agreement between TEIL and NICCO, TEIL did not accept the responsibilities either of construction or of construction management.

51. Nobody is expected to work without contractors or sub-contractors. A single bidder can have a sub-contractor and a joint venture can also have a sub-contractor. Paragraph 1.5 of the BEC makes it clear that a member of a consortium is different from a sub-contractor. It i;5 absurd to claim that an alleged leader (NICCO) can form a joint venture not with another member but with a sub-contractor. And even here, the sub-contractor is not to do the work of construction or construction management. Surely, such an arrangement is not a ''joint venture or consortium''.

52. It has further been submitted by the learned Solicitor-General that even if NICCO''s bid is treated as a consortium or joint bid, it would not qualify. In addition to the reasons indicated above which will apply here also, the following reasons may in rejection of NICCO''s case should also be considered according to learned Solicitor-General.

(a) The basis pre-requisite, namely, "one of the participants should have experience in execution." Clause 1.5.2 of BEC becomes meaningless when the party said to have the experience is not directly utilising it for the job. This becomes more acute when, as in the present case, the other member/leader (NICCO) does not have sufficient on site construction experience.

(b) Moreover, experience of execution of a contract of Rs. 8 crores on the part of the leader stipulated in Clause 1.5.2. must be read in the light of the general experience criteria required to be fulfilled under Clause 1.5. Any and every contract would not fulfil the requirement. The experience must have relation to the type of work involved in the present contract even though it may not be of the ''same nature''. The contract must involve site responsibilities. It must have some nexus with the responsibilities and experience involved in the present contract.

53. The requirement of executing a single contract of Rs. 8 crores is intended to test experience in execution of comparable responsibilities. Any contract unrelated to on site constructional activities would not satisfy the criterion. It is not merely a test of financial responsibility or resources for which a separate clause being Clause 1.5.3. is provided.

54. The learned Solicitor-General also submitted that tne minutes of the administrative authorities evaluating the tender need not be drawn up with precision of a judicial or quasi-judicial body. The Court does not sit in appeal over technical evaluation. The minutes/considerations of the authorities concerned are not to be scrutinised as a judgment under appeal or a statute. So long as Court is satisfied that the decision is not unreasonable in the circumstances nor whimsical, the Court will not interfere.

55. It has also been argued by learned Solicitor-General that there is nothing to prevent those concerned in the decision-making process even to change their view until the final decision is taken. As has been observed in Wade on Administrative Law (6th Ed. at p. 407):

As Lord Hailsham LC has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.

56. According to learned Solicitor-General, in any event ONGC has a right to evaluate the bids. Unsuitable bidders whether single or joint venture/consortium may be rejected. BEC. cl. 1.5.2 specifically provides as follows:

ONGC/EIL reserves the right to evaluate the details furnished and reject unsuitable joint venture/consortium if any.

57. A party is allowed to participate" in the price bid, the only consideration at that stage is to see whose price is the lowest and whether the lowest price is a genuine price bid or not. At that stage there cannot be a consideration of suitability or unsuitability for the job. The argument that even if NICCO had been allowed to participate in the price bid, even then it was open to ONGC to reject their bid on the ground of unsuitability is not a correct argument.

58. The petition alleges that the bid of NICCO was opened and M/s. CIMMCO was called upon to match the bid of NICCO. It has been explained that it was not necessary to consider the price bid of NICCO because they did not have the necessary and requisite experience. The Steering Committee accepted this position. Price negotiation was, however, carried out with the lowest finally short-listed bidder with a view to scaling down the project cost thereby benefitting

public funds. This is not only permissible but desirable.

59. It has been submitted by the learned Solicitor-General that there was nothing to prevent the Tender Committee from agreeing with the recommendation of the EIL and coming to its conclusion that "M/s. NICCO do not meet the experience criteria of BEC and hence it is not recommended for short listing"

60. It has further been submitted by the learned Solicitor-General that the earlier view of the Tender Committee was not at the stage of final svaluation. Evaluation was still going on and, as far as the Tender Committee is concerned, they took a final view only at this stage.

61. Learned Solicitor-General in support of his contention relied upon the following decisions: Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, Fasih Chaudhary v. Director-General, Doordarshan and Ors. AIR 1987 S.C 157 '' and M/s. G. J. Fernandez Vs. State of Karnataka and others,

62. It was submitted by the learned Solicitor-General since the Petitioner did not satisfy the eligibility criteria nor could not come within the purview of selection and as such there was nothing wrong in consideration of one case of the Petitioner. He also referred to judgment and decision in the case of Ramana Dayaram Shetty v. The International Airport Authority of India (Supra) '' wherein it was held that the tender notice stated in clear terms that sealed tenders in the prescribed form are hereby invited from registered I Ind Class Hoteliers having at least 5 years'' experience for putting up and running a IInd Class Restaurant and two Snack Bars at this Airport for a period of 3 years.

63. In the aforesaid decision it was held that on a proper construction what the notice required was that only a person running a registered IInd Class Hotel or Restaurant and having at least five years'' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years experience of running a IInd Class Hotel or Restaurant. The test of eligibility laid down was an objective test and not a subjective one.

64. In the aforesaid decision it is further held that the authority cannot accept tender of person who does not fulfil the requisite qualifications.

65. It has further been submitted by the learned Solicitor-General that the Respondent ONGC is entitled to negotiate with the different parties before concluding the contract to fix the price bid, and in the instant case the price bid originally made by CIMCO was reduced by such negotiations which is not unjust. In support of his contention the learned Solicitor-General relied upon the judgment and decision in the case of Mis. Kasturi Lal Lakshmi Reddy v. The State of Jammu & Kashmir (Supra) ''. It was held that where the State of Jammu and

Kashmir as a matter of policy to auction blazes for tapping only on wage contract basis -excluded about 11,85,414 blazes in the inaccessible areas from tapping through wage contract as it was found impracticable to give them for tapping on wage contract basis and they were kept out of the auctions held by the State but were allotted to a private party for tapping on certain terms and conditions the action of Government held could not be condemned as arbitrary or irrational.

66. Under the terms and conditions set out in the order the .party was under an obligation to set up a factory within the State and 3500 metric tonnes of resin which was permitted to be retained by the party out of the resin extracted by them was required to be utilised in the factory to be set up by them and it was provided that no part of the resin extracted should be allowed to be removed outside the State. The advantage to the State was that a new factory for manufacture of resin, turpentine oil and other derivatives would come up within its territories offering more job opportunities to the people of the State increasing their prosperity .and augmenting the State revenues and in addition the State would be aissured of a definite supply of at least 1500 metric tonnes of resin, for itself without any financial involvement or risk and with this additional quantity of ressin available to it, it would be able to set up another factory creating more employment opportunities. Moreover, the State would be able to secure extraction of resin from these inaccessible areas on the best possible terms instead of allowing them to remain unexploited or given over at'' rediculously low royalty. The impugned order, therefore, could not be said to be disadvantageous to the State or, in any way, favouring the second Respondents at the cost of the State.

67. It was also held by the Supreme Court that the State did not commit breach of any constitutional or legal" obligation if it negotiated with any party and agreed to provide resources and other facilities for the purpose of setting up the industry. The impugned order was, therefore, unquestionable and without doubt, in the interest of the State, and there was nothing in it which could possibly incur the reproach of being condemned as arbitrary or irrational .

68. It has been submitted by the learned Solicitor-General that all the offers might not be considered but what is required that offers are to be considered fairly, reasonably, objectively and without any malice or ill-will.

69. In the present case, the Petitioner was given repeated opportunity and the case of the Petitioner was considered time and again.

70. The Supreme Court in this context observed:

It is well-settled that there should be fair play in action in a situation-like the present one, as was observed by the Court- in Ram and Shyam Company Vs. State of Haryana and Others, . It is also well-settled that the authorities like the Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in Haji T.M. Hassan Rawther v. Kerala Financial Corpn., A.I.R.. 1980 S.C. 157 at page 161.

71. While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, Similarly, however, ''free-play in the joints'' is also a necessary concomitant for an administrative body functioning in an administrative body functioning in an administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.

72. In support of his contention the learned Solicitor-General relied upon the judgment and decision in the case of Mis. G.J. Fernandez v. State of Karnataka and Ors. (Supra (%7)) The Supreme Court in the aforesaid decision in para. 15 of-the said judgment, inter alia, observed as follows:

Secondly, whatever may be the interpretation that a Court may place on the NIT the way in which the tender documents issued by it has been understood and implemented by the K.P.C. is explained in its ''note'', which sets out the general procedure which the K.P.C. was following in regard to NIT''s issued by it from lime to time. Para. 2.00 of the ''not_e''. makes it cleajythal the K.P.C. took the view that para, I lone incorporated the ''minimum prequalifying/eligibility conditions'' and the data called for under para. v. was in the nature ''general requirements''. It further clarifies that while tenders will be issued only to those who comply with the prequali-fying conditions, any deficiency in the general requirements will not disqualify the Applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed tie applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the Appellant that para. v. should also be treated as part of the prequalifying conditions, that they would make it specific and clear in their future. NITs that only the fulfilment of prequalifying conditions would be mandatory. If a party has been consistently and bona fide interpreting the standards prescribed by it is in particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

73. It is the contention of the learned Solicitor-General that qualification standard mentioned have been repeatedly considered and the authority concerned bona fide made the interpretation on one pre-qualification considered and conclusion arrived at is not, therefore, open to challenge in the writ jurisdiction. In my view, the said principle laid down by the Supreme Court in the

aforesaid decision cannot have any application in the facts of the instant case. In the aforesaid decision of the Supreme Court the contract partained to the construction of a Main Station Building of a Power House. Tenders were invited from registered contractors of appropriate class. Paragraph I of the notification inviting tenders (NIT) listed three ''minimum qualifying requirements'', viz. that the intending tenderer (i) should have executed civil and architectural works including insulation in a power plant/industrial complex, preferably in power plant, (ii) should have executed at least 1000 cubic metres per month of concrete pouring and at least 300 cubic metres per month of brick work at one site, and (iii) should have had an annual turnover of at least one crore for each of the preceding three years. Paragraph v. of NIT required the intending tenderers to furnish the following information "along with the application for issue of blank tender books", namely, (a) Audited Balance Sheet/ Certificate from Chartered Accountant for preceding three years ; (b) Latest income tax Clearance Certificate; (c) Copy of the Registration Certificate ; (d) Annual output of the works of all the above nature at any site accompanied by a certificate from the organisation for whom the tenderer had carried out the works furnishing details, such as rate of pouring of concrete, manufacturing of hollow concrete blocks, precast concrete blocks....etc, and period of completion scheduled/ envisaged, equipment and their deployment, i.e. man months etc. The question was whether the requirement of furnish- ing documents/certificates as contained in para. v. of notifi- cation inviting tender (NIT) vas a pre-condition for supply of tender books or the documents should be furnished at any time.

74. It was held that the supply of documents as per sara. v. of NIT was also a pre-condition for supply of ender books along with requirements of para, I of NIT. An intending tenderer could be kept out of consideration if he documents/ certificates as required under para. v. of "JIT were not furnished. The Supreme Court observed: "A:ommon thread runs through paras, I and v. of N.I.T. and they are really meant to supplement each other. It is in order to satisfy itself that the requirements of para. I (1) and (2) are fulfillel that the authority issuing tenders had called for the certificates mentioned in para, v. and the fulfilment of the requirement in para, I (3) has obviously to be verified by reference to the audited balance-sheets called for under Clause (a) of para. V. The reference in Clause (d) of para. v. to the ''annual output of the works of the above nature'' is also obviously a reference to the works of the nature described in para. 1. It is clear that at least some, if not all of the documents referred to in para. V, are intended to verify the fulfilment of the three prequalifying requirements of para. I. Tfye stipulation of the time element within which the information asked for in para. v. should be supplied is also of so^me significance, it specifically requires the information,to be supplied along with the application for tender forms. It would, therefore, not be correct to read para. I in isolation and treat it as the only condition precedent for the supply of forms of tender. The more harmonious and practical way of construing the NIT is by saying that, before the tender books can be supplied, an intending tenderer should satisfy the authority issuing

the tenders by supplying such of the documents called for in para. v. as are material in assessing the fulfilment of the condition in para. I, that he fulfils the three conditions set out in para. I.

75. The main question involved in this writ petition appears to me to be one of scope and interpretation of the tender conditions which provide for eligibility criteria for participation in the bids and if the Petitioners fulfil such conditions of eligibility. The relevant clauses relating to such eligibility criteria are set out hereinbelow:

1.5. Experience Criteria

Single bidder, main bidder or the leader of joint venture/consortium and their nominated sub-contraclor(s). Bidder must have experience:

Engineering & Procurement,

(ii) Fabrication and erection

(iii) Site installation and hook up including interfering with related facilities and commissioning of process plant in Hydro-carbon Industries.

1.5.1. Experience in case of Single Bidder ;

Single Bidder should possess financial and organisational capabilities and experience in execution of at least one Hydro-carbon processing plant in the field of petroleum of refinery or gas processing or petrochemicals or fertilisers and should have completed of its own on turnkey basis involving detailed engineering project management, procurement services, installation construction and commissioning a single contract of value not less than Rs. 10 crores during the last 7 years.

1.5.2. Experience in case of Joint Venture/Consortium Bids:

In case of Joint Venture/Consortium Bids one of the participants should have experience in execution of at least one Hydro-carbon processing plant in the field of petroleum or refinery or gas processing plant or petrochemicals or fertilizer plant and leader should have completed at least a single contract value not less than Rs. 8 crores during the last 7 years and the leader should accept total responsibility for the total scope of work including Project Management.

The nominated contractor(s) consultants or the consortium partner(s)/ member(s), as the case may be, should possess experience in their respective fields or specialisation. Such offers should indicate clearly the scope of work of each agency and their relevant experience in the field for which they have been selected. ONGC/EIL reserves the right to evaluate the details furnished and reject unsuitable joint venture/ consortium if any. In case of joint venture/ consortium members selected should have participated in execution of project of similar nature of value at least of Rs. 5 crores, during the last 7 years.

76. By the amendment the scope for participation was wide and in so far as it

provides that in case of joint venture/consortium bids, one of the participants should have experience in execution of at least one Hydro-carbon processing plant in the field of petroleum or refinery or gas processing plant or petrochemicals or fertiliser plant and leader should have completed at least a single contract value not less than Rs. 8 crores during the last 7 years and the leader should accept total responsibility for the total scope of work including project management.

77. It appears on perusal of the aforesaid" clauses relating to the eligibility criteria following requirements will be necessary:

(a) One of the participants of joint venture/consortium should have experience in execution at least one Hydro-carbon Processing Plant in the field of Petroleum etc.

(b) The leader of the consortium should have completed at least one single contract of value not less than Rs. 8 crores during the last 7 years.

(c) The leader of the consortium should accept the total responsibility for the total scope of work including project management.

(d) The members elected by the leader should have participated in execution of a project of similar nature of value at least of Rs. 5 crores during the last 7 years.

(e) The nominated contractor or consultant or consortium partner or member, as the case may be, should possess relevant experience in their respective field of specialisation.

(f) The criterion of single contract of not less than Rs. 8 crores is not expressed to be of similar nature as is required in case of partner/member of joint venture/ consortium who is required to have executed a project of similar nature of price of Rs. 5 crores.

It has not been disputed that the Petitioner executed a single work not less than of Rs. 8 crores.

78. The clause noted above does not contain site work as is required in case of single bidder who is required to have experience in execution of at least one hydro-carbon plant of his own and should have completed on Turnkey Basis involving Detailed Engineering, Project Management, Procurement Services, Installation, Construction and Commissioning a single contract of value not less than Rs. 10 crores.

79. As appears the first EIL short listing in October 1991 rejected NICCO on the ground that the Rs. 8 crore contract executed by NICCO did not involve site work and was not comparable in responsibility as called for in the tender documents.

80. Learned Solicitor-General stressed on the point that NICCO did not fulfil eligibility criteria since the site work was not done by NICCO in respect of the contract.

81. It was submitted that EIL was right in holding that NICCO in eligible on the

basis that contract with the buyer in Moscow for selling an equipment like Plastic Injection Moulding Machine.

82. I am afraid that the conditions for bid evaluation criteria do not contemplate such a position.

82A. By letter dated May 16, 1991, Sr. Manager (Project) Engineers India Limited, i.e. EIL suggested to ONGC, Calcutta, that the changes incorporated in the NIT cl. No. 2 may please be adopted for wider participation.

82B. Changes incorporated in cl. 2.0 of the notice inviting tender was to the effect as follows:

2.0 Experience in case of Joint Venture/Consortium Bids.

In case of joint venture/consortium bids, one of the participants should have experience in execution of at least one hydro-carbon processing plant in the field of petroleum or refinery or gas processing plant or petrochemicals or fertilizer plant and leader should have completed at least a single contract of value not less than Rs. 8 (eight) crores during the last 7 years and should accept total responsibility for the total scope of work including project management. The nominated contractor(s) consultant(s) or the consortium partner(s)/ members, as the case may be, should possess experience in their respective fields of specialisation. Such offers should indicate clearly the scope of work of each agency and their relevant experience in the field for which they have been selected. ONGC/EIL reserves the right to evaluate the details furnished and reject unsuitable joint venture/consortium if any. In case of joint venture/ consortium/its partner(s)/members selected shall have participated in execution of a project of similar nature of value ai least of Rs. 5 crores during the last seven years.

83. The leader of the consortium should undertake full responsibility for complete scope of work.

Working Paper, Operation Business Group Hazira Project.

84. Such changes were ultimately recommended by the Tender Committee to modify cl. 1.5.2. of the approved BEC to the extend as suggested and recommended by EIL. It was also recorded therein that the proposed changes the competition will be improved. It was in fact intended to widen the competition.

85. In another Working Paper Operation Business Group, Hazira Project issued by Ratanlal, General Manager, on May 20, 1981. It has been clearly mentioned that-

With earlier approved clause as indicated in P/P-15(A) the leader of the joint venture/consortium must have experience of executing at least one hydro-carbon, processing plant in addition to his financial and managerial capability.

In the proposed changed clause P/P-15(B), the leader of the joint venture/

consortium with financial and managerial capability can also quote subject to any one of their consortium partners have experience; in execution of at least one hydro-carbon processing plant.

The above proposed modification, this will widen the competition. In view of above, it is requested that above T.C. recommendation may please be approved.

86. Thereafter Corrigendum to Notice inviting Tender For Kerosene Recovery Process Unit for ONGC, Hazira being Tender No. 2759/T-126/BM/02 was issued. The said notice is set out hereinbelow:

87. Ref. ADVT No. 2759 I 126/BM/02 inviting Tender for the Subject Works appearing in this newspaper on May 16, 1991, following corrections may be carried out in the said NIT-At Serial No. 2.0 of NIT the first five lines, that is, "Main bidder or Leader of the Joint Venture including Project Management" shall be replaced by the following:

88. In case of Joint Venture/Consortium Bids one of the participants should have experience in execution of at least one Hydro-carbon Processing Plant in the field .of Petroleum or Refinery or Gas Processing Plant or Petrochemicals or Fertiliser Plant and Leader should have completed at least a single contract value not less than Rs. 8 crores during the last 7 years and the Leader should accept total responsibility for the total scope of work including Project Management.

89. It, therefore, appears that the purpose of issuing corrigendum to Notice Inviting Tender was to incorporate the change in cl. 1.5.2. to the original notice thereby extending the scope of participation in bids and widen the competition which was also noted as already recorded in the Working Paper Operation Business Group, issued by General Manager (T) dated May 20, 1991.

90. On proper interpretation of the amended conditions it appears to me that in case of Joint Venture/Consortium Bids one of the participants should have experience in execution of at least one Hydro-carbon Processing Plant in the field of Petroleum or Refinery or Gas Processing Plant or Petro-chemicals or Fertilizer Plant and Leader should have completed at least a single contract value not less than Rs. 8 crores during the last 7 years and the Leader should accept total responsibility for the total scope of work including Project Management.

91. So far as the nominated contractor(s)/consultants or the consortium partner(s)/member(s), as the case may be, should possess experience in their respective fields of specialisation. Such offers should indicate clearly the scope of work of each agency and their relevant experience in the field for which they have been selected. ONGC/EIL reserves the right to evaluate the details furnished and reject unsuitable Joint Venture/Consortium if any. In case of Joint Venture/Consortium, members selected should have participated in execution of project of similar nature of value at least of Rs. 5 crores, during the last 7 years.

92. It appears from record that the Tender Committee found it fit and proper to recommend the case of NICCO while EIL short-listed the case of NICCO on the

ground that NICCO did not carry on the site work so far as the execution of work by NICCO is concerned which is on similar in nature.

93. In the recommendation for initial shortlisting the analysis of offer of M/s. NICCO as appears from cl. 3.5 is to the following effect.

3.5. The Analysis of offer of M/s. NICCO.

The following analysis have been carried out on the offer of M/s. NICCO based on the details furnished by th cm.

3.5.1. M/s. NICCO have formed a joint consortium with M/s. Toyo Engg. India Ltd. and the rule of the joint venture partner (M/s. Toyo Engg. India Ltd.) as per MOU submitted is to carry out Residual Engg. preparation of technical documents, B/O & MTO for entire plant wherever required, attending meeting with ONGC/EIL for technical support, Technical Back-up Procurement assistance for preparing enquiry document, Technical evaluation and inspection and expediting (for special items of equipments), construction supervision commissioning assistance and preparation of final document. M/s. Toyo Engg. Co. Ltd. have goi: experience in their respective field.

3.5.2. M/s. NICCO have executed works of Design, Supply, Erection and Commissioning of Napthalene Crystallisation Plant for M/s. Steel Authority of India Ltd., Durgapur, at a contract value of Rs. 427 lakhs in the year 1991 which is less than qualifying requirement of Rs. 8 crores. M/s. NICCO have also mentioned in their experience list that they have carried out job of assembly and supply of Plastic Injection Moulding Machine & Accessories at a contract value of Rs. 8.13 crores in the year 1990 for M/s. Sovelectro, Moscow (USSR). As per the work order for this job, it is observed that this job pertains to fabrication & assembly at manufacturers'' works as well as supply of Plastic Injection Moulding Machine only and, as such, no site work has been carried out in this job. Hence, this work is not comparable in responsibilities as called for in the tender document.

3.5.4. In view of what is stated in para. 3.5.2 M/s. NICCO do not meet qualifying criteria & hence not recommended for short-listing.

This above recommendation for initial shortlisting was made by EIL. The Tender Committee, however, scrutinised the said recommendation of EIL. So far as NICCO''s case is concerned the same was also taken up by the Tender-Committee as appears from cl. 5.9 on words which is set out hereinbelow:

5.9. M/s. Nicco Corporation Ltd. (NICCO)

5.9.1. Experience:

M/s. NICCO have submitted their offer as a leader of joint venture as M/s. Toyo Engg. India Ltd. TEJL as nominated sub-contractor.

5.9.1.1. As per the MOU between NICCO and TEJL submitted by the bidder, the scope of work of TEJL is as follows:

Residual engineering, attending meetings with ONGC/ EIL for technical support, technical back up, procurement assistance including technical evaluation, inspection and expediting of special items of equipments, construction supervision (jointly with NICCO), commissioning assistance (jointly with NICCO) and preparation of final document)

All other work under the scope of the tender shall be the responsibility of NICCO.

5.9.1.2. From the track record submitted by the bidder it is seen that M/s. NICCO has executed a work of fabrication, assembly, supply of plastic moulding machines and accessories for M/s. V/o Sovelectro, Moscow, USSR, for a contract value of Rs. 813 lakhs in June ''90

5.9.1.3. As per the track record submitted, M/s. TEIL have executed monoetheyleng glycole plant, with eithane as feed stock for M/s. India Glycoles Ltd. in the year 1989 for a value of Rs. 19.75 crores and the work involved detailed engineering, procurement, erection, construction and commissioning. The bidder has submitted a letter of intent copy of the same is placed at si. No. 37 opposite. However, they have not submitted completion certificate and detailed work order from where actual value of work and completion date could be ascertained.

5.9.1.4. From the copy of annual report submitted by NICCO, the annual turnover of NICCO is

Rs. 43.04 crores for 88-89

Rs. 63.52 crores for 89-90

5.9.1.5. From the above track record, it is seen that the offer of M/s. NICCO meets the requirement of qualifying the experience criteria of BEC as the leader of consortium as regards the value of single contract executed and annual turnover subject to verification of the same with original. Hence, Tender Committee opines that a chance may be given to M/s. NICCO to establish the credentials of M/s. TEIL with supporting documents as regards the single work done in hydrocarbon processing plant, oi value minimum Rs 5 crores in the last seven years.

Tender Committee consisting ot Shri Ratan Lai, GR(1) Shri K Ravandranathan, DGM (F & A) and Shri K B Kashyap AD (MM) met at ONGC, Hazira, to serutinise the officers for the subject work on 19th, 20th, 21st and 22nd May, 92.

94. Minutes of the said meeting is set out hereinbelow:

95. In fact differing with the views of the EIL Tender Committee took the decision so far as M/s. Nicco Corporation Ltd. is concerned, to the following effect as appears, from els. 6.49 to 7.2.0. of the minutes of Tender Committee meeting.

6.4.9. M/s. Nicco Corporation Ltd.

6.4.9.1. Basis of offer: Leader of joint venture, Public Limited Company.

Consortium partner: M/s. Toyo Engineering India Ltd.

6.4.9.2. EIL have not recommended for pre-quali-fication as M/s. NICCO is not meeting the experience criteria of execution of a job of Rs. 8 crores.

6.4.9.3. Tender Committee recommends for pre-quali-fication of the offer and to call the bidder for clarifi-catory discussions (for details refer N/P 29-32)

7.0.0. Conclusion of Tender Committee Proceedings & Recommendation

7.1.0. Even though none of the offers are responsive as per BEC Tender Committee recommends to evaluate the existing offers for Kerosene Recovery Process Unit, in order to avoid delay in accomplishing the project.

7.2.0. Tender Committee recommends to call the following bidder for clarificatory discussion in order to give them chance to withdraw all the unacceptable deviations taken by them and for furnishing supporting documents to establish their eligibility for participating in this tender

(i) M/s. L & T Ltd.

(ii) M/s. ICB Ltd.

(iii) M/s. SPIC - SMD

(iv) M/s. C1MMCO Ltd.

(v) M/s. BHPV

(vi) M/s. EPIL

(vii) M/s. LLOYD STEEL

(viii) M/s. NICCO.

Pursuant to the said decision M/s. NICCO participated at the meeting of bid clarificatory discussions held On 17th July, 1992 with ONGC, EIL. Details relating to work to be performed and clarification on the original clauses were made and discussed. No point was taken cither by ONGC and EIL on the question of NICCO not qualifying from the contract at all. Minutes of such meeting has been made annexure ''B! to the writ petition.

96. Bid Clarification discussion was held as will appear from the minutes of the meeting held on August 18, 1992, at ONGC Hazira amongst ONGC, EIL & M/s. NICCO. The minutes of the said meeting has been made, Annex. ''C to the writ petition.

97. On the September 28, 1992, Final shortlisting recommendation for Tender in question was made wherein on the same grounds EIL recommended that M/s. NICCO do not meet the experience criteria of NIT and hence not recommended for short-listing.

98. Tender Committee recommendations for "Final shortlisting of offers for Kerosene Recovery Process Unit" was made by -the Tender Committee as appears from the Working Paper Operation Business Group, Hazira Project, being Annex. ''D'' to the writ petition.

99. So far as M/s. NICCO Corporation Ltd. is concerned to the following effect as appears from cl. 4.8.

4.8. M/s. NICCO Corporation Ltd.

4.8.1. M/s. Nicco have submitted their offer for the subject work as a prime bidder with M/s. Toyo Engineering India Ltd. (M/s. TEIL) as nominated sub-contractor.

4.8.2. MOU between M/s. NICCO and M/s. TEIL has been furnished. As per MOU M/s, TEIL as nominated sub-contractor would provide technical back up. Residual Engg. Procurement assistance, inspection and expediting, constructions supervision and commissioning assistance. All other responsibility is with M/s. NICCO as leader.

4.8.3. Prima facie, the offer of M/s.NIC Cft was not recommended for initial shortlisting by EIL, vide their recommendation dt. 17.10.91 as M/s. NICCO do not meet the qualifying criteria of BEC M/s. EIL have mentioned.

M/s. NICCO have executed works of desigi, supply, erection and commissioning of Naphthalene. Crystallization Plant for M/s. Steel Authority of India Ltd. Durgapur at a contract value of Rs. 427 lakhs in the year 1991 which is less than qualifying requirement of Rs. 8 crores. M/s. NICCO have also mentioned in their experience list that they have carried om job of Fabrication Assembly and supply of Plastic Injection Moulding Machine and Accessories at a contract value of Rs. 8.13 crores in the year 1990 for M/s. Soveleetro, Moscow (USSR). As per the work order for this job, it is observed that this job partains to fabrication and assembly at manufacturers works as well as supply of Plastic Injection Moulding Machine only and, as such, no site work has been carried out in this job. Hence, this work is not comparable in responsibilities as called for in the Tender document.

Earlier Tender Committee held from May 19 to 22, 1992, took the view from the track record available i:hat M/s. NICCO qualifies as the leader of consortium as per BEC and M/s. NICCO may be called for clarification discussion in order to give a chance for furnishing supporting documents to establish their eligibility for participating in this Tender. T.C. recommendations were approved by R.D. BRBC.

4.8.5. EIL again vide their recommendations for final shortlisting dated September 20, 1992, maintained their earlier view recorded in para. No. 4.8.3. and have not shortlisted the offer of M/s. NICCO. EIL have reproduced the recommendations given at the time of initial shortlisting which are as follows:

M/s. NICCO have executed works of design, supply, erection and commissioning of Naphthalene Crystallisation plant for M/s. Steel Authority of India Ltd., Durgapur, at a contract value of Rs. 427 lakhs in the year 1991 which is less than qualifying requirement of Rs. 8 crores. M/s. NICCO have also mentioned in their experience list that they have carried out job of fabrication, assembly and supply of Plastic Injection Moulding Machine & Accessories at a contract value of Rs. 8.13 crores in the year 1990 for M/s. Sovelectro, Moscow, (USSR). As per the work order for this job, it is observed that this job pertains to fabrication and assembly at manufacturers works as well as supply of Plastic Injection Moulding Machine only and, as such, no site work has been carried out in this job. Hence, this work is not comparable in responsibilities as called for in the tender document.

In view of what is stated above, M/s. NICCO do not meet the experience criteria of NIT and hence not recommended for shortlisting.

4.8.6. Tender Committee, after going through the documents, agreed with the recommendations of EIL that M/s. NICCO do not meet the experience criteria of BEC and hence is not recommended for shortlisting.

100. It appears that from the aforesaid Working Paper the Tender Committee agreed with the recommendation of the EIL which were earlier not accepted by the Tender Committee although EIL mere repeated the same view and no separate ground was disclosed. No reason has been assigned by the Tender Committee for rejection of NICCO''s case although on the same ground it earlier differed with EIC. The same grounds were found to be untenable to the Tender Committee although the Tender Committee recommended the case of the NICCO and NICCO participated in the clarificatory bid discussion on earlier occasion.

101. NICCO accordingly made a representation which was, however, rejected by the Tender Committee.

102. NICCO made further submission which was also considered as appears from letter of Engineers India Ltd. dated December 3, 1992, which has also been annexed to the writ petition.

103. The said finding noted pre-qualification criteria in notice inviting tender and thereafter took into account the details furnished by NICCO, and the following observations were made after noting the recommendation of the initial shortlisting of agencies on further review observed "as follows as appears from cl. 3 of the said finding.

3. On further review, it is observed from memorandum of understanding submitted that NICCO have associated M/s. Toyo Engg. India Ltd. as their nominated contractor/back up consultant for this job.

104. Hence, their inclusion in the joint venture has been considered as satisfying the experience criteria of second sentence in case of Joint Venture/Consortium Bids.. This leaves us to evaluate the offer of M/s. NICCO on the basis of their experience in the execution of similar magnitude of work in terms of financial

value. While we are evaluating an agency for a contract, it is expected that any reference to the word ''contract'' should be viewed as satisfying requirements of nature of job envisaged in the bid document issued. M/s. NICCO have carried out a job of Napthalene Crystallisation Plant for SAIL in the year 1991 on turnkey basis whose value is only Rs. 4.27 crores. But for another contract of Rs. 8 crores, it has been noted that this contract is only for supply of an equipment. Hence, M/s. NICCO''s claim of satisfying bid document requirement in the light of their contract with a buyer in Moscow for selling an equipment like Plastic Injection Moulding Machine cannot be treated as satisfying the requirements as envisaged in the bid document. Moscow contract clearly indentifies contract between the seller and the buyer for the delivery of an equipment of FOB basis. It may be noted that if the argument put forward by M/s. NICCO were to be accepted on the basis of consideration of Literal English Language, any seller in India can work as turnkey contractor for a Hydrocarbon processing plant with the help of back up consultant.

105. In the light of above, we reject the submission made by M/s. NICCO Corporation for the acceptance of their offer.

106. On December 3, 1992, the Petitioner No. 1 being Dy. Managing Director wrote to EIL and submitted their revised price bid by December 4, 1992. The said letter inter alia mentions, since we have not yet received any intimation from your end on the above we are taking the liberty of submitting our revised prices on December 4, 1992, by 11.00 a.m.

107. Accordingly, revised price bid was sent by NICCO, however, on the allegations that the NICCO did not fulfil the condition laid down in bid deviation;, criteria their price bid was not considered.

108. Various representations were thereafter made, but with no effect and review, however, was made of NICCO''s case by Tender Committee.

109. Again on January 27, 1993, in which following observations were made as noted hereinafter below:

A Representation of M/s. NICCO Corporation Ltd.

l.0 M/s. NICCO have stated vide para. 2 of their letter that they have quoted against this tender as a consortium bid with M/s. NICCO as the leader and M/s. Toyo Engineering India Ltd. (TEIL) as the nominated sub-contractor.

1.1. Examination

M/s. NICCO in their bid document have quoted as follows ;

Please note that this subject tender being submitted by NICCO as prime bidder who is totally responsible for total scope of work including project management and fulfil BEC requirement of successful completion of at, least one single contract value of not less than Rs. 8 crores.

Moreover, as per requirement of BEC criteria and addendum No. 1 of NIT we have nominated M/s. Toyo Engineering India Ltd. as our sub-contractors who possess requisite experience in the execution of Hydrocarbon processing plant.

110. In the aforesaid decision by the Tender Committee, NICCO was first time held to be a sinulc bidder with TEIL as nominated sub-contractor and not a consortium bid. In the MOU between M/s. NICCO and M/s. TEIL these are the nominated contractors/back up consultants to NICCO for bidding for KRU.

111. Accordingly, the requirement for single bidder was applied to NICCO''s case and the NICCO''s case was rejected. It appears that all on a sudden NICCO was treated as a single bidder which" provides for different requirements. On earlier occasion NICCO was treated as a Joint Venture/Consortium bidder. This finding by the Tender Committee is totally inconsistent with its own finding made earlier and appears to be wholly arbitrary.

112. It is also on record that such a finding has been made against the Petitioner changing and/or altering the entire position as a whole which has prejudicely affected the position of the Petitioner and such decision was taken without giving any opportunity of hearing to the Petitioner and as such the same violates the principle of natural justice.

113. It is well-settled that in the event a change or alteration in the condition is effected and the original position is altered and the party is put to prejudice, thereby such affected party should be given opportunity of hearing to explain the position.

114. In the instant case no opportunity of hearing has been given to the Petitioner. Moreover, on the finding itself it does,not appear that the Tender Committee was justified in treating the Petitioner as a single bidder.

115. In that view of the matter it appears to me that the Petitioner has been unjustifiedly debarred from participating in the contract and to make his bid.

116. The Respondent authorities cannot blow hot and cold at the same time. It appears that the Petitioner was considered as a Joint Venture Consortium Bidder and, thereafter, the Respondent authorities treated the Petitioner''s bid as a single bid which is totally inconsistent. The Respondent has changed its decision unilaterally to treat the Petitioner NICCO as single bidder while it is incumbent on the Respondent to give opportunity of hearing to the Petitioner NICCO which the Respondents failed to provide-. The said act of the Respondents accordingly violetes the principle of natural justice.

117. Considering the facts and circumstances of the case it appears to me that the Petitioner was wrongfully made to suffer and the Respondent authorities arbitrarily and without any valid reason did not consider the Petitioner''s bid although the same appears to be the lowest.

118. Accordingly, the Petitioner must succeed in this petition. There will be an

order directing the Respondents to consider the offer of the Petitioner along with the others and in the event the Petitioner''s offer is otherwise found to be valid and lowest and in the event the Petitioner otherwise complies with the formalities, Petitioner''s offer should be accepted by the Respondent authorities.

119. The writ petition is, accordingly, disposed of.

120. There will be no order as to costs.

121. All parties concerned are to act on the signed copy of the operative part of the judgment on the usual undertalking.

