

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 21<sup>st</sup> August, 2020.**

+ **W.P.(C) No.5283/2020 & CM APPL. 19050/2020 (for stay).**

**ISC PROJECTS PVT. LTD. & ANR.**

**..... Petitioners**

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Sameer Parekh, Mr. E.R. Kumar, Ms. Sonal Gupta, Ms. Rashi Gupta, Mr. Raghav Bansal, Mr. Prateek Khandelwal & Mr. Satjit Chhabra, Advocates and Mr. Jameer.

Versus

**IRCON INTERNATIONAL LIMITED**

**..... Respondent**

Through: Mr. Manoj Kumar Das & Mr. Deepak Kumar, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**HON'BLE MS. JUSTICE ASHA MENON**

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

1. The petition, (i) impugns the order/communication dated 10<sup>th</sup> August, 2020 of the respondent IRCON International Limited rejecting, during technical evaluation by the constituted Committee, the bid of the joint venture of the two petitioners, for the reason “technically disqualified”; and, (ii) seeks mandamus, directing the respondent to declare that the petitioners are eligible to participate in the bid process and to allow the petitioners to participate in the bid process.
2. The respondent, on behalf of West Central Railway, on 17<sup>th</sup> March, 2020 invited bids for construction of Down Line Railway Grade separator

running over New Katni Junction & Katni Murwara yards and comprising construction of Rail Viaducts on Pile foundation, composite steel girders and Deck Slabs, Open Web Girders, Retaining Walls, minor bridges, Earthwork & allied other civil engineering works in Katni District, Madhya Pradesh, for Katni grade Separator project of West Central Railway (Package-I), vide e-Tender document NIT No: IRCON/CO/KGS/Civil /DN/106.

3. The two petitioners namely (i) ISC Projects Pvt. Ltd.; and, (ii) Royal Infraconstru Ltd., on 8<sup>th</sup> June, 2020 formed a Joint Venture (JV) in the name and style of “ISC Projects – Royal JV” for submission of the technical and financial bid for the above mentioned tender, with the petitioner no.1 ISC Projects Pvt. Ltd. being the lead member of the JV for intents and purpose of representing the JV with the “Employers”, and so submitted the bid, claiming to be qualified therefor as per technical qualifications prescribed in the tender.

4. The grievance of the petitioners in this petition is, that neither any reason was assigned for holding the petitioners “technically disqualified” nor any hearing was accorded to the petitioners; the contention is that thus the action of the respondent of rejecting the bid of the petitioners is violative of the principles of natural justice, arbitrary and untenable in law. It is further the case of the petitioners that though the petitioners on 10<sup>th</sup> August, 2020 itself requested a clarification and reason for rejection of their bid but no reason was informed till the date of filing of the petition.

5. Having gone through the file, we did not find any of the terms and conditions of the tender, in response to which the petitioners had bid, to be

requiring the respondent to give reasons for the rejection or to give an opportunity of hearing to those whose bids were being rejected. Rather we found Clause 21 titled “Right to accept any tender or reject all tenders” in Part E titled “e-Bid Opening and Evaluation” of Section III titled “Instructions to Tenderers”, of the tender document to be expressly reserving unto the “employer/engineer”, the right to accept or reject any tender without incurring any liability to the affected tenderers or any obligation to inform affected tenderer, the grounds for such action. We thus, on 14<sup>th</sup> August, 2020 when the petition came up before us for admission, enquired from the counsel for the petitioners, the right under which the petitioners claim a right to be informed reasons and to be given opportunity of hearing, of rejection/before rejection of their tender.

6. The counsel for the petitioners drew our attention to Annexures P-9 and P-10 to the petition, being copies of Office Order No.33/7/03 dated 9<sup>th</sup> July, 2003 and Office Order No.15/3/05 dated 24<sup>th</sup> March, 2005 of the Central Vigilance Commission (CVC). The former requires pre-qualification, evaluation/exclusion criteria etc. which the organisation wants to adopt, to be made explicit at the time of inviting tenders, so that the basic concept of transparency and interest of equity and fairness are satisfied and provides that acceptance/rejection of any bid should not be arbitrary but on justified grounds as per the laid down specifications, evaluation/exclusion criteria, leaving no room for complaints. The latter provides that notwithstanding the clause incorporated in the tender document that the tender application could be rejected without assigning any reason, the tender accepting authority is bound to record on the file clear, logical reasons for any such action of rejection/recall of tenders.

7. The aforesaid two orders of the CVC only require the evaluation process to be explicit and reasons for rejection/acceptance to be recorded. The grievance of the petitioners here is not that the tender document did not provide the evaluation criteria. The grievance is that no reasons for rejection have been given and no hearing before/after rejection has been given. However the said Office Orders of the CVC also do not require so and only require reasons for rejection to be recorded on the file. We thus asked the counsel for the respondent, appearing on 14<sup>th</sup> August, 2020 on advance notice, to produce before us the record of evaluation of the tenders, to enable us to gauge, whether such reasons as prescribed by CVC to be recorded, exist on the record.

8. To satisfy our judicial conscience, that the technical bids of all except one of the bidders were not rejected, leaving only one in the fray for opening the financial bid, so as to make the award of contract a foregone conclusion, we also enquired from the counsels, how many bidders qualified technically.

9. We were informed that there were eight technically qualified bidders whose financial bids were opened.

10. The counsel for the petitioners then stated that though the technical bids were to be opened on 10<sup>th</sup> August, 2020 and the financial bids on 11<sup>th</sup> August, 2020 but the financial bids were not opened on 11<sup>th</sup> August, 2020 but opened on 13<sup>th</sup> August, 2020 and the award of contract should be stayed. The senior counsel for the petitioners stated that the financial bid of the petitioners was about Rs.12.5 crores below that of the successful bidder declared on 13<sup>th</sup> August, 2020.

11. The counsel for the respondent though appearing on advance notice, opposing any stay of award of contract, stated that he had taken instructions and also obtained copies of the documents and was in a position to share the same.

12. In view of the urgency, we, on 14<sup>th</sup> August, 2020 proceeded to hear the counsels at length, to gauge whether the petition deserves issuance of a notice and/or grant of any interim order, as sought by the petitioners and after hearing the counsels, reserved judgment.

13. The counsel for the respondent shared the minutes of the meetings held on 9<sup>th</sup> July, 2020, 15<sup>th</sup> July, 2020, 22<sup>nd</sup> July, 2020, 24<sup>th</sup> July, 2020 and 28<sup>th</sup> July, 2020 of the Tender Committee (TC), in connection with the tender finalisation of the aforesaid project, pertaining to the bid of the petitioners herein. It is recorded in the said minutes, that (a) the petitioners no.1&2 had submitted the bid in a JV; (b) as per the JV Agreement, the JV is in the ratio of petitioner no.1, 51% and the petitioner no.2, 49%; (c) the petitioner no.1 as the lead partner in the JV which had submitted the bid, did not fulfil the eligibility criteria as per EQC (Essential Qualification Criteria) clause 1(iii); (d) the petitioner no.2 also did not satisfy the eligibility criteria of EQC Para 1, EQC Para 2 table (iii); and, (e) thus the JV of the two petitioners did not qualify in technical bid, neither in similar work criteria nor in structural steel in bridge criteria and accordingly the TC did not recommend opening of their Financial Bid.

14. The senior counsel for the petitioners, perhaps aware of the reason for which the petitioners had been disqualified, had come fully briefed to argue on the aforesaid aspect. He drew our attention to Annexure-V titled

“Essential Qualification Criteria” of the tender document Clause 1 wherein is as under:-

**“1. Experience in similar nature of work (Technical Capacity);**

*As proof of possessing the Experience in similar nature of work for carrying out the proposed work, bidder should possess the experience of having successfully completed / substantially completed similar works during the last 7 years (ending last day of the month previous to the one in which tenders are invited), which should be anyone of the following :-*

- (i) One similar work costing not less than the amount equal to 60% of the advertised Cost of the work, or*
- (ii) Two similar works costing not less than the amount equal to 40% of the advertised Cost of the work, or*
- (iii) Three similar works costing not less than the amount equal to 30% of the advertised Cost of the work.*

*Notes -*

- i) "Similar work" for this contract shall be "Construction of Bridge/Flyover/Viaduct in Railway/Metro/Highway/Expressway projects"*
- ii) The work should include Construction of Bridge/Flyover/Viaduct. In case of composite work, value of any other major component such as Approaches with RE wall/Retaining wall, Roads, Buildings etc. shall not be considered. Value of the component such as Bridge/ Flyover/ Viaduct in Railway/Metro/Highway/Expressway projects should be separately mentioned in Performance certificates.*
- iii) The contractor should submit performance certificates and Letter of Award in reference to Serial Number 1 (Minimum 3*

*nos., 2 nos. or 1 no. as the case may be) above issued by Government Organizations/ Semi Government Organizations/ Public Sector Undertakings/ Autonomous bodies/ Municipal bodies/ Public Limited Company / Concessionaire Company/ Private Company/JV Company for having successfully completed similar works in the last 7 years. Certificates issued by such Public Limited Company / Concessionaire Company/ Private Company/ JV Company must be supported by Tax Deducted at Source (TDS) Certificates (Form 16A/ 26AS) in evidence of the value of work executed.*

- iv) *All documents related to certification of completion of the "similar work" issued by above shall be submitted, duly Notarized by a Notary Officer.*
- v) *The value of similar work done shall be updated as per the Value Enhancement Factor (VEF) given below:*

<i>Financial Year</i>	<i>2018-19</i>	<i>2017-18</i>	<i>2016-17</i>	<i>2015-16</i>	<i>2014-15</i>	<i>2013-14</i>	<i>2012-13</i>
<i>VEF*</i>	<i>1.00</i>	<i>1.05</i>	<i>1.10</i>	<i>1.15</i>	<i>1.20</i>	<i>1.25</i>	<i>1.30</i>

*\*The VEF shall be applied for the respective year in which work under consideration has been completed.*

- vi) *Substantial completion means the value of the executed work should be 90 (Ninety) per cent or more of the OCV or RCV subject to the contract has not been terminated.*
- vii) *If the bidder is a JV, then the JV and its constituent members should fulfill the above requirement as below:*

<i>No</i>	<i>Requirement</i>	<i>Joint Venture</i>		
<i>1.</i>		<i>JV collectively</i>	<i>Lead Partner</i>	<i>Each Partner (Minimum)</i>

(i)	<i>One similar work costing not less than the amount equal to 60 % of the advertised Cost of the work, or</i>	<i>Must Meet Requirements</i>	<i>At least one work of 1.(i)</i>	<i>Each other member of JV shall have technical capacity of minimum 10% of the cost of work i.e., each JV member must have satisfactorily completed during the last 07 (seven) years, ending last day of month previous to the one in which tender is invited, one similar single work for a minimum of 10% of advertised value of the tender.</i>
(ii)	<i>Two similar works costing not less than the amount equal to 40% of the advertised Cost of the work, or</i>	<i>Must Meet Requirements</i>	<i>At least one works of 1.(ii)</i>	
(iii)	<i>Three similar works costing not less than the amount equal to 30% of the advertised Cost of the work</i>	<i>Must Meet Requirements</i>	<i>At least two works of 1.(iii)</i>	

”

15. The senior counsel for the petitioners contended that, (a) as per clause 1 supra, the bidder should have successfully completed/substantially completed during the last seven years, either one similar work of the value of not less than 60% of the advertised cost of the subject work or two similar works of the value of not less than 40% of the advertised cost of the subject work or three similar works of the value of not less than 30% of the advertised cost of the subject work; (b) the petitioners submitted the tender claiming qualification under clause 1(ii) supra i.e. of each of the two



petitioners having done works of the value of not less than 40% of the advertised cost of the subject works; (c) as per Note (iii) to clause 1, in proof of having completed two similar works costing not less than 40% of the advertised cost of the subject work, TDS certificates were required to be furnished; (d) the petitioner No. 1, on 13<sup>th</sup> April, 2020 (Annexure P-3 to the petition) informed the respondent that the petitioner No. 1 was seeking qualification under clause 1 supra claiming that it had satisfactorily completed a bridge work costing Rs.257.36 crores; though the said work was executed under a JV in which the share of the petitioner No.1 was 49% but the petitioner no.1 as one of the partners in the JV, had single handedly executed the entire work, without any assistance of the other JV partner who was having 51% share; the client also had issued a certificate that the entire work had been physically executed by the petitioner No.1; the petitioner no.1 thus sought clarification from the respondent, whether the entire cost of the works so completed will be acceptable to the petitioner no.1 as one of the two works under clause 1(ii), for qualification purpose; (e) that the petitioner along with the said communication dated 13<sup>th</sup> April, 2020 also enclosed a certificate dated 13<sup>th</sup> September, 2019 of Konkan Railway Corporation Ltd.(KRCL) for which the earlier work had been done by the petitioner no.1 in JV with GPT Infraprojects Ltd., showing the total value of the work done and certifying that the entire said work, physically had been executed by the petitioner no.1; (f) no reply was given by the respondent to the aforesaid clarification sought by the petitioners; (g) the petitioners sent a reminder dated 30<sup>th</sup> April, 2020 (Annexure P-4 to the petition) but still no response was received; (h) however the respondent on 15<sup>th</sup> May, 2020, while replying to all the queries/clarifications sought by

all the bidders (Annexure P-5 to the petition), with respect to the clarification aforesaid sought by the petitioners, merely referred to the tender document terms and conditions and stated that there was no change therein; (i) the entire payment for the work done by the petitioner no.1 in JV with GPT Infraprojects Ltd. for KRCL was made by KRCL to the petitioner no.1 only and entire TDS was deducted in the name of the petitioner no.1 only; (j) 40% of the total value of the work done by the petitioner no.1 in JV with GPT Infraprojects Ltd. for KRCL satisfied the bid criteria of the respondent; though the said work was awarded to the JV of the petitioner no.1 and GPT Infraprojects Ltd. but since the petitioner no.1 physically carried out the entire work as certified by KRCL also, the petitioner no.1 was entitled to take the entire value of the said work for justifying its eligibility for the subject project; (k) the logic in laying down the eligibility criteria is, that the bidder should have the actual experience of doing the subject work; (l) once the certificate issued by KRCL stated that the entire work was done by the petitioner No. 1 and the entire payment was made to the petitioner No. 1, the respondent erred in taking the share of the petitioner no.1 in the total cost/value of the work done for KRCL at 49% only and in attributing the remaining 51% to GPT Infraprojects Ltd. which had not done any work physically; and, (m) thus the rejection by the respondent, of the bid of the petitioners, is irrational. The senior counsel for the petitioners emphasised that KRCL would not have issued the certificate and would not have made the entire payment in the name of the petitioner no.1 only, had the petitioner no.1 not done the entire work and the petitioner no.1, while tendering for the subject work, is entitled to take the credit for the entire work done for KRCL and not merely for 49%

thereof.

16. We enquired from the senior counsel for the petitioners, whether not once the petitioner no.1 had bid for the works of KRCL in JV with GPT Infraprojects Ltd. and it was the said JV which was technically qualified and which was awarded the work by KRCL, the petitioner no.1 is estopped from claiming that the entire work was done by the petitioner no.1 and that the credit for entire work should be given to the petitioner no.1 only and not to its JV partner namely GPT Infraprojects Ltd. We further enquired, whether not the said claim of the petitioners was directly in the teeth of the qualification criteria reproduced hereinabove in the tender document and which expressly specifies that if the earlier qualifying work had been done in JV, the bidder shall be entitled to benefit thereof only to the extent of its share in the JV and not for the entire work. We further enquired from the senior counsel for the petitioners, whether not the works of such technical nature, besides the act of physical construction/installation, also entail the aspects of technical expertise, not only in preparing the drawings but also in execution of the work and whether not even if it was the petitioner no.1 which, to the exclusion of its JV partner GPT Infraprojects Ltd., had physically carried out the entire construction/installation work for KRCL, the contribution of the JV partner namely GPT Infraprojects Ltd. could be in preparing the drawing/design etc. and in technical supervision and guidance etc. and which cannot by any means be undermined; after all KRCL agreed to award the said work, not to the petitioner no.1 alone but to the JV of petitioner no.1 with GPT Infraprojects Ltd., with GPT Infraprojects Ltd. as the lead partner. We also mentioned to the senior counsel for the petitioners, that in fact the ultimate work of construction

and installation is always done by the hands of labourers/workers or technicians, but who alone are incompetent to take up work or to successfully execute/complete the same, without proper technical guidance, supervision and correction, by the contractors, on strength of whose experience, the work is awarded. We also enquired from the senior counsel for the petitioners, whether not the position of JV partners and others involved, in the matter of construction/installation of technical projects, is akin to legal work including Court work, done in collaboration of several advocates, paralegals, and for outcome whereof, the paralegals as the steno/typist who put the pleadings/opinion/proposition/agreement on paper or for that matter the advocate who has drafted under the guidance and supervision of a senior advocate, alone cannot claim credit; the same is the position with respect to arguments in Court-neither the Solicitor/briefing advocate nor the senior/arguing counsel, to the exclusion of the other, can alone claim credit for success or take the blame for failure.

17. The senior counsel for the petitioners, with his trademark smile answered, that “the legal work is very different”. However with respect to the claim of the petitioners being in the teeth of the qualifying criteria prescribed in the tender document and reproduced above, the senior counsel for the petitioners has drawn attention to *Patel Engineering Limited Vs. National Highways Authority of India* (2005) 118 DLT 623 (DB) to contend that the clause aforesaid has been interpreted, as contended by the petitioners. Attention is drawn to passages of the said judgment containing the qualifying clause therein to show that it was the same as in the present case. Attention is next invited to the following passages of the judgment:-

*“44. The document in question here is an invitation to tender; it is neither a contract, nor a statutory provision. Its intention is to define, as accurately as possible the requirements of NHAI, while eliciting responses from various bidders. The purpose of each clause is geared at ensuring that the best available options, having regard to the various technical criteria, enter the zone of consideration. The object of every tendering process is to ensure the availability of the best options, and the elimination of the ineligible or potentially inefficient parties, who might hold up, or worse, not be in a position to execute the contract.*

*45. If one keeps the considerations mentioned earlier, the spelling out of eligibility criteria, in terms of quantum of performance, for the previous 7 years, is relevant, and in tune with the overall objective of the tender process. The question is, whether in the case of a partner who participates in a previous Joint Venture, that eventually does not perform, or where one partner is left holding the responsibility, what would be the parameters for judging experience.*

*46. Clause 3.3.1(a) requires that the applicant-bidder should have "worked on" highway projects during the last 7 years. The first part of clause 3.3.1(b) spells out the eligibility criteria, in terms of the quantum of work, to have been "completed" or "substantially completed". Then comes the contentious part; weightage to tendering firms who have "participated" in joint ventures dealing with similar works would be given in "proportion to their participation in the Joint Venture".*

*48. The expressions used by clause 3.3.1 are "experience"; "substantially completed" "successfully completed"; "worked on" and "participated" all implying performance, execution or positive achievements/ attainments. These expressions, coupled with the objects of the tender documents, leave no manner of doubt that actual experience gathered by a bidder/ applicant has to be examined. The other interpretation, pressed into service, would result in highly anomalous*

*results; by an odd fiction, a non-existent joint venture would be deemed in existence, and its dead letter would bind an erstwhile partner to a pre-determined fixed share, though the actual, and otherwise satisfactory higher level of performance would be ignored. Such a construction, in our considered view, has no nexus with the object of the relevant condition or indeed the tendering process. Besides it leads to arbitrary results.”*

18. The senior counsel for the petitioners contended that according to the aforesaid judgment, what is relevant to be seen is, whether the bidder has actual experience to execute the works for which the tender is invited and once from the certificate and the TDS certificate issued by KRCL it is clear that the entire work was done by the petitioner no.1 and payment therefor from KRCL was received by petitioner no.1, the respondent has erred in technically disqualifying the petitioner no.1 by not giving credit for the entire work done for KRCL, to the petitioner no.1 alone and by giving credit to the petitioner no.1 for only 49% of the said work.

19. Per contra the counsel for the respondent argued that the petitioners have not filed the Indian Railways Standard General Conditions of Contract applicable to the subject tender and has drawn attention to Clause 17.15 and 17.15.1 thereof as under:-

*“17.15 Credentials & Qualifying Criteria: Technical, financial eligibility and Bid capacity of the JV shall be adjudged based on satisfactory fulfilment of the following criteria:*

*17.15.1 Technical Eligibility Criteria (‘a’ or ‘b’ mentioned hereunder):*

*(a) For Works without composite components*

*The technical eligibility for the work as per para 10.1 above, shall be satisfied by either the ‘JV in its own name*

*& style' or 'lead member of the JV'. Each other member of JV shall have technical capacity of minimum 10% of the cost of work i.e., each JV member must have satisfactorily completed during the last 07 (seven) years, ending last day of month previous to the one in which tender is invited, one similar single work for a minimum of 10% of advertised value of the tender.*

*(b) For works with composite components*

*(i) The technical eligibility for each component of work as per para 10.1 above, shall be satisfied by either the 'JV in its own name & style' or 'lead member of the JV'. Each other member of JV shall have technical capacity of minimum 10% of the cost of any component of work i.e., each JV member must have satisfactorily completed during the last 07 (seven) years, ending last day of month previous to the one in which tender is invited, one similar single work for a minimum of 10% of cost of any component of work.*

*OR*

*(ii) The technical eligibility for major component of work as per para 10.1 above, shall be satisfied by either the 'JV in its own name & style' or 'lead member of the JV' and technical eligibility for other components of work as per para 10.1 above, shall be satisfied by either the 'JV in its own name & style' or 'any member of the JV'. Each other member of JV shall have technical capacity of minimum 10% of the cost of any component of work. i.e., each JV member must have satisfactorily completed during the last 07 (seven) years, ending last day of month previous to the one in which tender is invited, one similar single work for a minimum of 10% of cost of any component of work.*

*Note for Clause 17.15.1:*

- (a) *The Major component of the work for this purpose shall be the component of work having highest value. In cases where value of two or more component of work is same, any one work can be classified as Major component of work.*
- (b) *Value of a completed work done by a Member in an earlier JV shall be reckoned only to the extent of the concerned member's share in that JV for the purpose of satisfying his/her compliance to the above mentioned technical eligibility criteria in the tender under consideration.”*

20. The counsel for the respondent has further contended that, (i) the aforesaid clause makes it clear that for the purposes of considering the eligibility of the bidder, when the qualifying work has been done by bidder in JV with another, the bidder could claim benefit thereof only to the extent of its share in the JV; (ii) the respondent is not concerned with the internal arrangement between the bidder and its JV partner in respect of the qualifying work; (iii) merely because the employer of the qualifying work has issued a certificate to the effect that the entire work physically had been done by the bidder and no part of the work had been done by the JV partner of the bidder or the fact that the entire payment of the qualifying work had been made in the name of the bidder, is of no avail; (iv) fully knowing that the petitioners did not meet the qualifying criteria as per the clauses of the tender document reproduced above, the petitioners sought clarification and were informed that the tender conditions shall prevail; the petitioners still bid for the project; (v) be that as it may, the respondent, vide its communication dated 17<sup>th</sup> July, 2020 sought clarification from KRCL and



which vide its response dated 18<sup>th</sup> July, 2020 informed that the qualifying work was executed by the JV of petitioner no.1 with GPT Infraprojects Ltd. and as per general terms and conditions of KRCL, irrespective of who has physically executed the work, the value of the completed work by a member of the JV is reckoned only to the extent of concerned member's share in that JV, for the purposes of satisfying their compliance to technical eligibility and that any internal agreement between the members of the JV, without approval of KRCL, was not a valid agreement and KRCL had not accorded any approval to the JV of petitioner no.1 and GPT Infraprojects Ltd., to allow the petitioner no.1 to do the entire work; (vi) the petitioners did not qualify on other aspects also; (vii) in *Patel Engineering Limited supra* there was no such condition as in Clause 17.15.1 of the general conditions of contract of the respondent herein; and, (viii) thus the bid of the petitioners has been technically disqualified in accordance with the tender conditions.

21. We have enquired from the senior counsel for the petitioners, whether the JV of the petitioner no.1 with GPT Infraprojects Ltd., for carrying out the works for KRCL, at any stage come to an end, with the petitioner no.1 alone taking over the entire work with the consent of KRCL.

22. The answer is in the negative.

23. We have further enquired from the senior counsel for the petitioners, whether not GPT Infraprojects Ltd., in seeking qualification for other works, would be entitled to use the work aforesaid done for KRCL.

24. The senior counsel for the petitioners responded, that it was up to to GPT Infraprojects Ltd. .

25. The aforesaid leads to a situation where for the same work, while the petitioner no.1 herein is claiming 100% credit instead of 49% credit, being its share in the JV, the other JV partner namely GPT Infraprojects Ltd. is also free to claim 51% credit, being its share in the JV, resulting in a total credit of 151% being claimed for the works for KRCL, and which certainly cannot be the intent of law.

26. We further enquired from the senior counsel for the petitioners, whether not the claim of the petitioners, if permitted, would result in a public work being permitted to be done by persons, who on their own strength did not have the expertise or experience therefor, but who secured the work order therefor by making a sham JV with another but which another never intended to contribute anything to the public work save for lending its name, to enable a person who was himself was not qualified to do the work, to secure the said work. We yet further enquired, whether not the same would also result in such contractors obtaining subsequent works also for which they again do not have the expertise or experience but by claiming 100% credit for the earlier work obtained by falsely representing that the same would be done by a JV having the requisite qualification, and whether not this would result, not only in encouraging “benami transactions” and colossal waste of public monies but also physical injuries to the citizens, from the faulty public works carried out by those inexperienced to carry out the same.

27. Being confident, that such an interpretation could not have been intended by the Division Bench of this Court in *Patel Engineering Limited* supra, we proceeded to examine the facts in which the observations relied

on were made and find that therein, (i) though the work was awarded to a JV of the Patel Engineering Limited and “LG” but LG did not measure up to the performance levels held out, leading to Patel Engineering Limited eventually taking over the execution of the project entirely; (ii) a supplementary JV agreement was executed between Patel Engineering Limited and LG, recording parting of ways between LG and Patel Engineering Limited, with Patel Engineering Limited taking over and executing and completing the remaining portion of 75% of the work and all additional works; (iii) the employer, namely National Highways Authority of India was intimated about the supplementary agreement by LG; (iv) it was not in dispute that prior to the date of supplementary agreement, only 25% of the work was completed and the balance 75% plus additional works had been carried out alone by Patel Engineering Limited; and, (v) the JV which had been awarded the work had failed and the employer had accepted Patel Engineering Limited to do the remaining 75% work. It was in these facts that Patel Engineering Limited was held entitled to take credit, in a bid for subsequent works, of the entire project cost for the earlier work, even though Patel Engineering Limited at the time of the award of that work were a minor JV partner. The law laid down in *Patel Engineering Limited* supra cannot thus be applied to the present case where, not only did the JV between the petitioner no.1 and GPT Infraprojects Ltd. continued till the completion of the work but KRCL also till now, is refusing to give credit for the entire work to the petitioner no.1. Mere physical act of carrying out the works does not qualify the petitioner No. 1 to the credit for the entire work, ignoring as aforesaid, the technical and other contributions of its JV partner. Once *Patel Engineering Limited*

relied upon is not applicable, it is not in dispute that as per the plain language of the qualifying criteria for the works, relevant clauses whereof are reproduced hereinabove, the petitioners do not qualify for the work and nothing wrong is thus found in the rejection by the respondent of the technical bid of the petitioners.

28. Mention may be made of *Pratap Technocrats Pvt. Ltd. Vs. Bharat Sanchar Nigam Limited* 2017 SCC OnLine Del 8747 (DB) where also though the unsuccessful bidder relied on *Patel Engineering Limited* supra, but the same was repelled, reasoning that the contextual setting therein was different. The same reasons as given above, *inter alia* were given. Interestingly, the author of both, *Patel Engineering Limited* supra and *Pratap Technocrats Pvt. Ltd.* supra is the same (Justice S. Ravindra Bhat), in the former as a puisne member of the Division Bench and in the latter as the presiding member of the Division Bench.

29. This Court in *Rohde and Schwarz Gmbh & Co. Kg Vs. Airport Authority of India* 207 (2014) DLT 1 (DB) held that it is not open for a bidder to claim experience of another entity as its own experience. It was further held that the vital test which has to be met is that the bidder must in fact have the requisite experience although for some reason it may not be available in his name. In the facts of the present case, the petitioners show only the certificate and the TDS certificate to claim the experience of the entire work done for KRCL but without showing that GPT Infraprojects Ltd., in JV with whom the said work was undertaken to be done, had abandoned the said work leaving it for the petitioners alone to execute or that the same was agreed to by KRCL. Moreover KRCL itself is refusing to

give credit for the entire work to the petitioner no.1, to the exclusion of GPT Infraprojects Ltd.

30. We may also notice that there is no challenge to the clauses aforesaid in the tender document and on a literal interpretation whereof the petitioners do not qualify. What the petitioners are wanting is, to be declared qualified, notwithstanding the same. It has been held in *Caretel Infotech Limited Vs. Hindustan Petroleum Corporation Limited* (2019) 14 SCC 81, that a bidder is not entitled to seek alteration of the terms imposed by the employer/buyer, even if a government or governmental authority. It was further held that an unnecessary close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by government and public sectors a cumbersome exercise, with long drawn up litigation at the threshold, working to a great disadvantage to the government and public sector. It cannot also be lost sight of that in the matter of finalising tenders for public works, no delay can be tolerated. There is no time to conduct a detailed factual investigation into, whether the petitioner no.1 alone is entitled to 100% credit for the works done for KRCL. The said adjudication cannot also be done in the absence of GPT Infraprojects Ltd. who was the lead partner of the JV and along with whom the petitioner no.1 had bid for and executed the said works. The documents furnished by the petitioners along with the petition were rightly not considered sufficient by the TC of the respondent and no error can be found therewith.

31. There is another aspect of the matter. In *Rohde and Schwarz GmbH & Co. Kg Vs. Airport Authority of India* (2016) 16 SCC 818 it has been

held that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with; interference is permissible only if the decision making process is *mala fide* or is intended to favour someone; decision should not be interfered with unless is so arbitrary or irrational that the Court could say, no responsible authority acting reasonably and in accordance with law could have reached; the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous; the constitutional court is expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority; a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional court to interfere; the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret documents; the constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions; merely because the owner or employer of a project gives an interpretation to the tender documents that is not acceptable to the constitutional courts, is not by itself a reason for interfering with the interpretation given.

32. A Division Bench of this Court in ***Consortium of Siemens Ltd. Vs. Dedicated Freight Corridor Corporation of India Ltd.*** 2019 SCC Online Del 11844 reiterated that under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issue of technical qualification of a bidder and that it is not open to the

Court to independently evaluate the technical bids as an appellate authority and that the Court is normally loath to interfere in contractual matters. It was further held that the Court should give way to the opinion of the experts and must realise that the authority floating the tender is the best judge of its requirements.

33. Recently in *L and T Hydrocarbon Engineering Ltd. Vs. Oil and Natural Gas Corporation Ltd.* (2019) 256 DLT 754 also, interpretation as given by the respondent herein to the clauses aforesaid, given to similar clauses in the tender document in that case, was found to be reasonable.

34. No other argument has been urged.

35. There is no merit in the petition.

36. Dismissed.

37. The petitioners to pay costs of Rs.1,00,000/- to the respondent IRCON International Limited, within four weeks of today.

**RAJIV SAHAI ENDLAW, J.**

**ASHA MENON, J.**

**AUGUST 21, 2020**

‘pp’