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Calcutta High Court

Case No: A.S.T. Nos. 17, 20, 28, 29, 32 and 33 of 2014

Classic Builders and Traders	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: April 8, 2014

Acts Referred:

- Constitution of India, 1950 - Article 166

Citation: (2014) 3 CHN 167 : (2014) 3 WBLR 906

Hon'ble Judges: S. Chatterjee, J; P.K. Chattopadhyay, J

Bench: Division Bench

Advocate: Amitava Ghosh, Navojit Mukherjee, Sourav Chatterjee, Saktinath Mukherjee, Kishore Dutta, Indranil Roy and Sabyasachi Sen, Advocate for the Appellant; Saktinath Mukherjee, Kishore Dutta, Indranil Roy, Sabyasachi Sen, Amitava Ghosh, Navojit Mukherjee, Sourav Chatterjee, Ashok Kumar Banerjee, Govt. Pleader and Susovan Sengupta, Advocate for the Respondent

Judgement

Pranab Kumar Chattopadhyay, J.
All the appeals arise out of a common judgment and order passed by the learned Single Judge. Therefore, we have heard all the appeals and the connected applications analogously and the same are being disposed of by this common order. From the records, we find that the Superintending Engineer and Member (Execution), North Bengal Flood Control Commission issued a notice inviting tender being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-2014 (hereinafter referred to as NIT first call) in respect of the work for "extension of segregating embankment of river Teesta and Karala" in the district of Jalpaiguri (Phase-I).

2. It was a two bid system, i.e., technical bid, which should be kept in one sealed cover and the financial bid, which should also be kept in a separate sealed cover. Altogether 8 (eight) tenderers responded to the aforesaid tender notice. Undisputedly, Mackintosh

Burn Limited (hereinafter referred to as MBL) was found to be only qualified bidder.

3. Since MBL was found as the only qualified bidder, the respondent authorities decided to proceed for a second call and therefore, issued a fresh notice inviting tender being No. IW/SE/M(EX)/NBFCC/NIT-3(e)/2013-14 (hereinafter referred to as NIT second call). In response to the aforesaid notice inviting tenderer, Neo Built Corporation (hereinafter referred to as NBC), the proprietorship firm of Usha Ranjan Sarkar (hereinafter referred to as Usha) and the Classic Builders & Traders (hereinafter referred to as Classic) along with two others submitted tenders.

4. On examination of the technical bids, Neo Built Corporation of Usha and Classic were found qualified for the purpose of opening the financial bids. The aforesaid decision was uploaded on December 18, 2013. MBL, however, did not respond to the second call since MBL was already declared as eligible bidder upon considering the bids submitted by the said MBL in response to the first NIT being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-14.

5. On 24th December, 2013, financial bid of MBL, the eligible bidder in the NIT first call and the financial bids of Neo Built Corporation of Usha and Classic, eligible bidders in the NIT second call, were opened when Classic was found as the lowest bidder namely, L-1 and the Neo Built Corporation emerged as second lowest bidder (L-2) and MBL became 3rd lowest bidder namely, L-3.

6. The position of the respective bidders on the basis of the quoted rates are mentioned hereunder:-

7. On 27th December, 2013, a representation was submitted to the Superintending Engineer and Member (Execution, North Bengal Flood Control Commission on behalf of the Neo Built Corporation of Usha), wherein the defects, discrepancies and/or irregularities in respect of the bid of Classic were specifically mentioned. In the said representation, learned Advocate on behalf of the Neo Built Corporation requested the Superintending Engineer to cancel the bid of Classic and to declare the Neo Built Corporation as the lowest bidder and award the contract.

8. The tender evaluation committee held a review meeting on 31st December, 2013 and on verification of the documents rejected the bid of Classic on the ground that Forms No. (i) and (iv) did not tally with the work for which tender was invited and further recorded that the/decision of the tender evaluation committee dated 18th December, 2013 in respect of the Neo Built Corporation of Usha would remain unchanged. The respondent authorities, even after rejecting the bid of Classic did not declare the Neo Built Corporation as the lowest bidder. Therefore, apprehending cancellation of the entire tender process and invitation of a fresh tender in order to enable Classic to rectify the defects, Usha Ranjan Sarkar being the proprietor of Neo Built Corporation filed a writ petition before this court being W.P. No. 752(W) of 2014 for restraining the respondent authorities from cancelling the tender being notice inviting tender No.

IW/SE/M(EX)/NBFCC/NIT-3(e)/2013-2014.

9. The Superintending Engineer and Member (Execution), North Bengal Flood Control Commission issued short notice inviting e-tender on 16th January, 2014 being No. WBIW/SE/M(EX)/NBFCC/NIT-7(e)/2013-14.

10. On 21st January, 2013, Classic also filed a writ petition being W.P. No. 2277 (W) of 2014, praying for issuance of letter of acceptance and work order in connection with NIT second call after cancelling the report of the Review Committee.

11. Both the writ petitions being W.P. No. 752(W) of 2014 filed by Usha and W.P. No. 2277 (W) of 2014 filed by Classic were disposed of by the learned Single Judge by a common judgment and order whereby the respondent authorities were directed to conclude the tender process initiated pursuant to the tender notice dated 16th January, 2014 in accordance with law.

12. Assailing the aforesaid judgment and order passed by the learned Single Judge, both Classic and Usha preferred appeals and also filed applications in connection with the said appeals.

13. From the records, it appears that the tender evaluation committee on verification of the documents rejected the bid of Classic on the ground that Form Nos. (i) and (iv) did not tally with the work for which the tender was invited.

14. The learned Single Judge, however, held that the completion certificate furnished by Usha in respect of NBC was not countersigned by the Executive Engineer of the Irrigation and Waterways, as required under Paragraph 7.4.1 of the tender conditions.

15. Mr. Saktinath Mukherjee, learned senior Counsel representing Usha submitted that the specimen completion certificate (Form 3) did not provide for counter signature by the Executive Engineer of Irrigation and Waterways Department as required by paragraph 7.4.1(ii) of the tender conditions. According to Mr. Mukherjee, Paragraph 7.4.1 of the tender conditions is an ancillary and non essential condition.

16. Mr. Mukherjee further submitted that there is no dispute regarding completion of job by the NBC as stated in the completion certificate and the requirement of counter signature by the Executive Engineer, Irrigation and Waterways Department in terms of Clause 7.4.1(ii) of the tender conditions is an ancillary condition along with the main object to be achieved.

17. Mr. Mukherjee submitted that the tender evaluation committee is entitled in law to deviate from Clause 7.4.1(ii) of the tender conditions and not to insist upon strict literal compliance thereof.

18. According to Mr. Mukherjee, the tender evaluation committee did not cancel the technical bid of the NBC till date even on the ground that requirement of Clause 7.4.1(ii) of the tender conditions has not been complied with and thus waived the deficiency of the NBC in this regard.

19. Mr. Mukherjee, the learned senior Advocate of Usha submitted that the learned Single Judge could not have come to the conclusion that the bid of the Neo Built Corporation was required to be cancelled and that Form 3 cannot be read de hors Clause 7.4.1 of the tender conditions.

20. Mr. Mukherjee specifically urged before this Court that the learned Single Judge entertained oral arguments unsupported by records and arrived at the conclusion that the tender evaluation committee was remiss in not rejecting the bid of Neo Built Corporation.

21. Mr. Mukherjee submitted that the respondent authorities have issued NIT (second call) in terms of Clause 8.7 of the NIT and the said clause read with the Memorandum of the Finance Department bearing No. 9754-F(Y) dated 3rd December, 2012, specifically provides that if response is less than three, the tender may be accepted without reference to the Finance Department. Therefore, according to Mr. Mukherjee, the decision of the respondents to go for a fresh tender process is contrary to Clause 8.7 of NIT, as well as the Memorandum dated 3rd December, 2012.

22. Mr. Mukherjee further submitted that when the authorities have invited tenders, then it must abide by the result of the tender and cannot arbitrarily and capriciously cancel the tender process.

23. Mr. Mukherjee urged before this Court that the Neo Built Corporation of Usha became the lowest bidder due to cancellation of the bid of Classic, and therefore the contract should be awarded in favour of Neo Built Corporation.

24. Mr. Mukherjee relied on a decision of the Supreme Court in the case of Harminder Singh Arora Vs. Union of India (UOI) and Others, in this regard.

25. It has also been argued on behalf of the Neo Built Corporation that Classic in its writ petition did not challenge the bid of Neo Built Corporation on the ground of infringement of Clause 7.4.1(ii) of NIT. Learned senior Counsel of NBC submitted that no ground has been taken in the writ petition to the aforesaid effect. It has also been submitted on behalf of NBC that Classic cannot throw a challenge now and allege that the Neo Built Corporation is ineligible and that the bid of the Neo Built Corporation should be rejected.

26. The learned Counsel of the State has relied upon Rule 47 of the West Bengal Financial Rules, Volume 1, more particularly the amendments made to Rule 47(8) thereof on 25th June, 2012 and contended that fresh tender should be invited as the bidders qualified in the technical bid in response to the NIT were less than three.

27. Mr. Mukherjee submitted that the West Bengal Financial Rules are framed under Article 166 of the Constitution of India for guidance of the officers of the State. They are general rules and are subject to the special rules framed for a particular tender.

28. It has been submitted that the tender conditions were stipulated and/or framed after 25th June, 2012. The NIT (first call) was invited on 16.8.2013 and the NIT (second call) was invited on 30.11.2013. Clause 8.7 of both NITs lays down the special procedure for the said purpose.

29. Mr. Mukherjee, learned senior Counsel of the Neo Built Corporation submitted that a special condition of a tender shall prevail over the general rules and therefore, in the present case respondent authorities have no other option but to follow the special conditions and contract should be awarded in favour of the Neo Built Corporation who became the lowest bidder after rejection of the Classic.

30. The learned Advocate representing Classic Builders and Traders submitted that after opening of the financial bid in the present case, there is no provision for accepting the offer of the second lowest bidder. Mr. Ghosh, learned Advocate of the Classic Builders and Traders submitted that the respondent authorities are not bound to accept the offer of the lowest bidder and a tenderer cannot claim for issuance of letter of acceptance as a matter of right.

31. Mr. Ghosh further submitted that the erroneous recording in the tender documents could not be taken seriously in the present case since such error was committed due to wrong handling of the computer system. Mr. Ghosh specifically submitted that Classic Builders and Traders duly fulfilled conditions of tender and did not suppress anything in the tender document. Mr. Ghosh submitted that there is no provision in the tender for accepting the offer of the second lowest bidder ignoring the offer of the lowest bidder.

32. Mr. Ghosh specifically submitted that minor mistakes of the lowest tenderer should have been waived as per Works Manual and the tendered job should be awarded to the Classic Builders and Traders.

33. Undoubtedly, Classic Builders and Traders as well as Neo Built Corporation were declared technically qualified by the respondent authorities and no appeal was preferred by the Neo Built Corporation within the prescribed time limit before the prescribed Appellate Authority, challenging the aforesaid decision of the respondent authorities for declaring the said Classic Builders and Traders as technically qualified.

34. Mr. Ghosh further submitted that the respondent authorities had no scope and/or authority to review its earlier decision when there was no legal challenge to the technical bid of the Classic Builders and Traders in accordance with law as per prescribed procedure. Mr. Ghosh submitted that the respondent authorities herein should not have reviewed its earlier decision at all when such decision had attained finality.

35. The learned Government Pleader submitted that there was no other option in the facts of the present case but to proceed for a re-tender since there was only one qualified bidder namely, Neo Built Corporation as Mackintosh Burn Ltd. withdrew itself from the tendering process and has already withdrawn the earnest money deposited earlier.

36. The learned Advocate representing the State respondents submitted that the learned Single Judge has considered and decided all the issues raised by the parties in accordance with law.

37. Considering the submissions of the learned Counsel of the respective parties and going through the records, we find that Mackintosh Bum Ltd. (MBL) was only technically qualified bidder in respect of NIT being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-14. Therefore, the respondent authorities issued NIT (second call) in terms of Clause 8.7 of the tender condition. In the second call Classic Builders and Traders and Neo Built Corporation of Usha were initially found technically qualified by the tender evaluation committee. Subsequently, the learned Advocate of Neo Built Corporation submitted a representation alleging serious defects, discrepancies and irregularities committed by Classic Builders and Traders in the tender documents. The members of the technical evaluation committee held a meeting and on verification of documents submitted by Classic Builders and Traders, found the existence of serious illegalities and discrepancies in the tender documents of the Classic Builders and Traders. Therefore, unanimously decided that Classic Builders and Traders has failed to submit the requisite Form No. I and IV and accordingly, the tenders submitted by the said Classic Builders and Traders were summarily rejected. The said technical evaluation committee however, specifically recorded in the minutes of the said meeting that the status of Neo Built Corporation of Usha would remain unchanged.

38. Learned Counsel of the respondent authorities as well as Classic Builders and Traders made certain allegations challenging the eligibility of Neo Built Corporation before the learned Single Judge and considering the said allegations, learned Single Judge also observed that tender evaluation committee was remiss in not rejecting the bid of Neo Built Corporation.

39. It was submitted on behalf of the respondent authorities that the completion certificate furnished by Neo Built Corporation was not countersigned by the concerned Executive Engineer of the Irrigation and Waterways Department as per Clause 7.4.1 of the NIT although the aforesaid counter signature was necessary since the completion certificate submitted by the Neo Built Corporation was not issued by the authorities connected with the department.

40. The completion certificate submitted by the respondent Neo Built Corporation was signed by Chief Engineer and Managing Director of W.B.F.C. Ltd. which is not a private organisation and such completion certificate altogether cannot be ignored since it was signed by Chief Engineer and Managing Director of W.B.F.C. Ltd.

41. Furthermore, it has already been settled by the Hon"ble Supreme Court in the M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, that the requirements in a tender process are classified into two categories namely, one which lays down the essential conditions of eligibility and the others are ancillary and subsidiary conditions. In the first case the authority issuing the tender should enforce the essential conditions rigidly while in implementing the ancillary conditions authority concerned may not insist upon the strict literal compliance of the condition in appropriate cases. The relevant extracts from the aforesaid decision of the Hon"ble Supreme Court are set out hereunder:-

"The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

42. Regarding the defects of Classic Builders and Traders, we find that the essential conditions of eligibility have not been complied with and therefore, the authorities had no other option but to reject the tender of the Classic Builders and Traders. The Neo Built Corporation, however, did not violate any essential conditions. The Neo Built Corporation submitted a valid completion certificate issued by a competent authority. Objection was raised since the said completion certificate was not countersigned by the Executive Engineer of the Irrigation and Waterways Department in terms of Clause 7.4.1.

43. The learned senior Counsel representing the NBC has rightly submitted that the specimen completion certificate did not provide for countersignature by the Executive Engineer of Irrigation and Waterways Department, as required by Paragraph 7.4.1 Clause-ii. The Neo Built Corporation may reasonably commit a mistake on a perusal of the specimen completion certificate (Form 3). In any event, the requirement of counter signature by the Executive Engineer, Irrigation and Waterways Department in terms of Clause 7.4.1(ii) of tender conditions cannot be regarded as an essential condition and therefore, the members of the tender evaluation committee did not commit any error in the eye of law for not insisting upon strict literal compliance of Clause 7.4.1(ii) of tender conditions.

44. In the aforesaid circumstances, the tender submitted by Neo Built Corporation cannot be rejected and as a matter of fact, the respondent authorities also did not take any such decision in respect of Neo Built Corporation. As a matter of fact, technical evaluation committee in its meeting held on 31st December, 2013, while summarily rejecting the tender submitted by Classic also made it clear that the status of Neo Built Corporation would remain unchanged. Therefore, the tender submitted by Neo Built Corporation cannot be held to be invalid and/or illegal under any circumstances.

45. One other important aspect, we cannot overlook in this case. It is not in dispute that on 28.11.2013 when technical bids were opened in respect of NIT being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-14 (first call) only MBL was found technically qualified bidder. Therefore, relying on Clause 8.7 second call was invited and NIT being No. IW/SE/M(EX)/NBFCC/NIT-3(e)/2013-14 was issued for the same job on 13th November, 2013.

46. It has been categorically mentioned in Note-I of Rule 47(8) of the West Bengal Financial Rules that in case of invitation of tender under two bid system, if the number of tenderers/bidders qualified in the technical bid is less than three then the tender should be invited afresh. The relevant extracts from the notification No. 5400-F(Y) dated 25th June, 2012 issued by the Govt. of West Bengal Finance Department, Audit Branch are set out hereunder:-

"GOVERNMENT OF WEST BENGAL

Finance Department

Audit Branch

Writers Building

No. 5400-F(Y)

Date, Kolkata, the 25th June, 2012

NOTIFICATION

In exercise of the power conferred by Clause (3) of Article 166 of the Constitution of India, the Governor is pleased hereby to make the following amendments in the West Bengal Financial Rules, Volume-I, and in partial modification of Notification No. 10500-F dated 19th November, 2004, (hereinafter referred to as the said Rules), namely:-

AMENDMENTS

In the said Rules,-

(I) for sub-rules 8. 9 and 10 of Rule 47 substitute the following sub-rules:-

Rule 47(8) "Subject to Notes-1 to 5 below, orders should be placed only after open tenders or quotations have been invited and in the cases where the lowest tender or quotation is not accepted, reasons should be recorded under signature of the officer in charge of purchase.

Note-1.- Subject to the special rules or order or procedure that may be prescribed by the Government in respect of a particular department, open tender shall invariably be invited

for the supply of articles or stores or for execution of works and services worth Rs. 1,00,000=00 or more.....If the number of tenders received is less than three, tender should be invited afresh. In case of invitation of tender under two-bid system, if the number of tenderers/bidders qualified in the technical bid is less than three, tender should be invited afresh.""

47. In the present case, it is not in dispute that the respondent authorities invited the tender under two bid system and the number of tenderers/bidders qualified in the technical bid in relation to NIT being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-14 was less than three, since MBL was found to be the only technically qualified bidder. Therefore, in terms of Note-I of Rule 47(8), respondent authorities should have invited fresh tender instead of inviting second call as per Clause 8.7 of NIT being No. IW/SE/M(EX)/NBFCC/NIT-1 (e)/2013-14.

48. Mr. Mukherjee, learned senior Counsel of the Neo Built Corporation of Usha argued before this Court that the special procedure mentioned in Clause 8.7(b) regarding invitation of second call shall prevail over the general rules as mentioned in Rule 47(8). Mr. Mukherjee also invited our attention to a subsequent memorandum dated 3rd December, 2012 issued by the Finance Department, Audit Branch, Govt. of West and submitted that even after taking appropriate steps, if the response to the re-tender is less than three, then the tender may be accepted without reference to the Finance Department.

49. We fail to understand how the aforesaid memorandum dated 3rd December, 2012 can be of any help to Neo Built Corporation. It has been mentioned in the aforesaid memorandum dated 3rd December, 2012 that if the response to the tender is less than three then the tender should be invited afresh in terms of Note-I below Rule 47(8). After re-tendering if response is found less than three then only tender may be accepted without reference to the Finance Department. So, there is no escape from inviting a fresh tender in case response to the tender at the first instance is less than three which had happened in the present case. In response to NIT being No. IW/SE/M(EX)/NBFCC/NIT-1(e)/2013-14 MBL was found to be the only qualified bidder. Therefore, the respondent authorities should have invited fresh tender in terms of Note-I of Rule 47(8) of West Bengal Financial Rules as mentioned in Notification dated 25th June, 2012 and also in terms of the Memorandum dated 3rd December, 2012. The Memorandum dated 3rd December, 2012 is also set out hereunder:-

"GOVERNMENT OF WEST BENGAL

Finance Department

Audit Branch

No. 9754-F(Y)

Kolkata, 3rd December, 2012

MEMORANDUM

Laying down the procedure of re-tender has been engaging attention of the Government for some time passed since the existing Tender rule of the State Government does not stipulate any such procedure. Various Government Departments and offices are frequently enquiring about the same. In these circumstances, it is felt necessary to prescribe the re-tender procedure and number of times it may be resorted to in case of the number of qualified bidders falling below three. Now, therefore, the Governor is pleased to prescribe the following procedure of re-tender:

1. If the response to Tender (including e-Tender) is less than three, then Tender should be invited afresh in terms of note 1 below rule 47(8) of West Bengal Finance Rules as amended by this department notification No. 5400-F(Y) dt. 25.6.2012. Such Re-Tender notice shall be published in widely circulated dailies for conventional Notice Inviting Tender, (NIT) and also through e-Tender portal incase of e-Tender. Prior to invitation of Re-Tender or fresh Tender the eligibility criteria and other terms & conditions as contained in the first "Notice Inviting Tender, shall have to be reviewed by the Tender Inviting Authority to ascertain whether (I) it was too much restrictive, say, specifications and qualifications were fixed at higher standard than required, (ii) advertisements in the widely circulated Newspapers were properly published and (iii) other related procedural matters were observed in its entirety. Even if, after taking appropriate steps, the response to the Re-Tender is less than three, that tender may be accepted without reference to the Finance Department, provided the rates do not exceed the estimated or the schedule rates beyond 5% in case of works estimate and reasonable prevailing market price for goods and service in other cases. Otherwise, such cases should be referred to the Finance Department for decision.

2. The Tender Inviting Authority shall maintain a Tender Register, in the proforma as enclosed in Annexure-I. This order shall take immediate effect.

West Bengal Financial Rules will be amended to incorporate the above provisions in due course.

Sd/- H.K. Dwivedi

Secretary to the

Government of West Bengal."

50. Mr. Mukherjee referred to the principles of statutory interpretation by Justice G.P. Singh which, in our opinion, is not at all applicable in the facts of the present case.

51. In the present case, the department concerned did not frame any special rule and in relation to a particular tender, authority concerned cannot prescribe any special rule or condition in violation of a specific rule framed by the Government. The West Bengal Financial rules are framed under Article 166 of the Constitution of India and the same cannot be avoided and/or violated by any officer in respect of a particular tender.

52. In view of clear provisions of Rule 47(8) Note-I as mentioned in the notification dated 21st June, 2012 and also in terms of Para-I of the subsequent memorandum dated 3rd December, 2012, respondent authorities herein should have invited a fresh tender instead of inviting second call since only one bidder namely, MBL was found qualified in the technical bid in NIT first call. The procedure for inviting second call mentioned in Clause 8.7 of the NITs is violative of Rule 47(8) and therefore the invitation of second call by the respondent authorities as per Clause 8.7(b) of the NITs cannot be held to be valid and legal.

53. Furthermore, it is not in dispute that the respondent authorities rejected the tenders of Classic Builders and Traders and MBL has also withdrawn its offer. As a matter of fact, the MBL has also withdrawn the earnest money deposited in relation to the tender. In the aforesaid circumstances, the respondent authorities cannot be asked to accept the sole bid of the Neo Built Corporation.

54. The respondent authorities committed an error by not inviting a fresh tender even after receiving only one technically qualified bid i.e. the bid of MBL. Subsequently, the respondent authorities sought to rectify its error by inviting a fresh tender when it found that Neo Built Corporation is only qualified bidder. The respondent authorities however, invited a fresh tender for the work in question during the pendency of the writ petition before the learned Single Judge. The Neo Built Corporation did not participate in the said tender process.

55. For the aforementioned reasons, the tender process already initiated by the respondent authorities stands cancelled. The respondent authorities are directed to issue a fresh tender notice for the job in question and such tender notice must be published in widely circulated news daily of the State. Since a considerable time has already passed, the respondent authorities are directed to take immediate steps for inviting a fresh tender in terms of this order and complete the tender process without any delay so that the work may not be withheld for an indefinite period.

56. With the aforesaid observations and directions, we modify the impugned order passed by the learned Single Judge and affirm the decision of the respondent authorities for proceeding with the re-tender subject to condition that such tender should be invited afresh in terms of this order by giving wide publicity in the widely circulated daily newspapers as mentioned hereinabove. Thus we dispose of all the appeals and the connected applications without awarding costs.

Chatterjee, J.

I agree.