IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8342 of 2015

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Waterfront Constructions Private Limited having its registered office at C-3, Lake View Apartment, 1127, Model Colony, Shivaji Nagar, Pune represented through Vivek Vithalrao Gawai, son of Vithalrao D. Gawai, Resident of Flat No. 2, Varun Apartment, Peer Bazar, P.S. Usmanpura, District - Aurangabad, Maharashtra.

.... Petitioner/s

Versus

1. The Union of India through the General Manager, East Central Railway, Hajipur, District - Vaishali, Bihar.
2. The Chairman, Railway Board, Room No. 256-A, Rail Bhawan, Raisina Road, New Delhi - 110001.
3. Workshop Projects Organisation through the Chief Administrative Officer, Workshop Projects, Indian Railways, 6th Floor, Chamber Bhawan, J.C. Road, Gandhi Maidan, Patna - 800001.
4. Chief Engineer- I, Workshop Projects, Indian Railways, Workshop Projects Organisation, 6th Floor, Chamber Bhawan, J.C. Road, Gandhi Maidan, Patna - 800001.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kumar Kaushik
For the Respondent/s : Mr. S.D.Sanjay, Sr. Advocate (ASG) with
Mr. Anil Kumar Sinha
Mr. Ankit Katriar

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 07-09-2015

By this writ petition filed under Article 226 of the Constitution of India the petitioner prays for an appropriate direction in the nature of mandamus commanding the respondent authorities in the Workshop Project Organization to reconsider the tender papers of the petitioner submitted in response to the tender notice dated 13.11.2014 placed at Annexure-2 and permit his participation in the financial bid. The petitioner also prays for issuance of an appropriate writ to set aside the decision taken by the respondents by which they have rejected the technical bid of the petitioner without any notice or communication to him. The petitioner has also prayed for grant of ad-interim stay to the tender process.

Facts of the case as it reflects from the pleadings is that the petitioner is engaged in providing construction services. The respondent Workshop Project Organization (hereinafter referred to as 'the Organization') is stated to have been established in October, 2002 with a task to set up a modern coach Periodic Overhaul Workshop at Harnaut in Bihar. The headquarter of the respondent-Organization is at Delhi. The respondent-Organization functioning directly under the Railway Board invited tender vide notice dated 13.11.2014 for earth filling work, construction of road, boundary wall as well as minor bridges within the workshop area, a copy of which document is placed at Annexure-2 to the writ petition. Although initially the last date for filing tender was fixed on 26.12.2014 but was extended under a corrigendum to 16.01.2015 and the date for opening tender was fixed on 19.1.2015. The petitioner along with some others applied against the tender along with relevant documents. The technical bid was opened on 19.1.2015 and when the petitioner is stated to have been found ineligible for further participation although no notice nor any information as to the reasons for rejection was given to him rather it is only after the financial bid was opened in respect of other tenderers on 25.5.2015 that the petitioner gathered knowledge that his financial bid had not been opened. The petitioner represented before the authorities at Patna and not getting any answers that he filed the writ petition for the reliefs so set out hereinabove.

A counter affidavit has been filed in which it is stated that since the petitioner did not fulfill the eligibility criteria and the information supplied by him in the prescribed format gave conflicting informations which did not match the documents submitted hence suffering incongruity that the technical bid of the petitioner was rejected and which rejection warrants no interference.

This matter was heard on 22.6.2015 when a Bench of this Court while directing the respondents to file counter affidavit, issued restraint order from creation of any third party rights and as a result although the financial bids have taken place but they have not been acted upon.

Mr. Kumar Kaushik has appeared for the petitioner while the respondents are represented by Mr. S.D. Sanjay, learned senior counsel assisted by Mr. Anil Kumar Sinha.

Although extensive arguments have been advanced on behalf of both sides but in my opinion, the entire arguments revolves around the consideration of the eligibility criteria present at Clause-4 of the Special Conditions of Tender and Instructions to the Tenderer(s) under Chapter-III of the Tender document present at Annexure-2 to the writ petition. It is the stand of the petitioner that except for a typographical error occurring in the details of work completed by the petitioner in the last three financial years i.e. current year and three previous financial years as desired under clause 4.1 to 4.1.2 of Chapter-III, there was nothing to unsuit the petitioner and given a chance the error could have rectified for the supporting documents were already on record. According to Mr. Kaushik, the error was unintentional and the documents enclosed with the information presented in the prescribed format clarified all confusions whatsoever. Mr. Kaushik, learned counsel appearing for the petitioner with reference to the eligibility criteria placed at Clause-4 of Chapter-III of the tender document placed at Annexure-2 submitted that each of the willing tenderer had to furnish the details of the work completed in the last three financial years i.e. the current year and three previous financial years of which at least one similar work had to be of a minimum value of 35% of the advertised tender value which though was advertised at Rs.24.43 crores but was modified to 22.60 crores under a corrigendum. He submits that 35% of the modified value would be about Rs.6.7 crores and although the petitioner had completed one such project on 25.3.2012 but inadvertently the completion date was incorrectly mentioned as 15.3.2015 and which is confirmed by Annexure-R/3 read with its enclosure. Learned counsel with reference to the details of work of similar nature completed by the petitioner present at Annexures R/1 and R/3 to the counter affidavit(s) filed by the respondents submitted that whereas the works appearing at serial nos. 1, 2, 4, 5 and 6 were yet in progress the descriptive details of the work appearing at item no.3 was inadvertently mentioned as completed on 19.10.2014. He submits that this was a bonafide error on the part of the petitioner since the certificate so enclosed by him, a copy of which is placed at Annexure-R/2 itself clarified all confusions by mentioning that the scheduled date of completion of the work was 6.2.2017.

It was the submission of Mr. Kaushik that since the typographical errors stood clarified by the certificates enclosed by the petitioner placed at Annexure- R/2 to the counter affidavit and the enclosure to Annexure-R/3 of the supplementary counter affidavit of the respondents it sufficiently also explained the eligibility of the petitioner and the respondents ought to have given an opportunity to the petitioner to correct the typographical error occurring in the chart or treating it to be a bonafide error, should have allowed the participation of the petitioner in the financial bid.

With reference to Annexure-8 which is a copy of the circular issued by the Railway Board dated 23.9.2013 in implementation of an order passed by the Delhi High Court in

WP(C) No.2092 of 2012 it was submitted that even when an advisory has been issued by the Railway Board requiring the Tender Committee to inform the reasons for rejection of a tender document, it has not been carried out. It is next with reference to the decision of the Tender Committee which is placed on record through supplementary counter affidavit vide Annexure R/5, submitted that even when the Tender Committee proceeds to reject the claim of the petitioner on grounds that the information regarding completion of work on 19.10.2014 in reference to item no.3 of the chart present at Annexure R/1 was incorrect and stood falsified by the certificate present at Annexure-R/2, which confirmed that the work was yet in progress but the Tender Committee grossly erred in rejecting the candidature of the petitioner even while admitting in the same order at Annexure R/5 that one completion certificate was available in the file. He thus submits that in these admitted circumstances where it was within the knowledge of the Tender Committee that even though there were some typographical errors in the information furnished by the petitioner in prescribed format yet his eligibility was not in suspicion and his participation in the financial bid should not have been obstructed.

Learned counsel referred to a judgment of the Supreme Court reported in **(2013) 10 SCC 95, paragraphs 14 to 16**

(Rashmi Metaliks Limited vs. Kolkata Metropolitan Development Authority) to submit that the respondents cannot be permitted to supplement the reasons for rejection in their counter affidavit. Learned counsel further with reference to paragraph 18 of the same judgment has submitted that there are stipulations which are mandatory in character while there are others which are directory or ancillary in nature. It was submitted that in the case under reference, the non-filing of the latest income-tax return though was held fatal by the Single Bench and the Division Bench of the Kolkata High Court but the appeal was allowed by the Supreme Court on grounds that the filing of certificate was a salutary requirement indicative of the commercial standing and was not an essential condition. Mr. Kaushik next referred to a judgment of this Court reported in **2010(2) PLJR 153 (Ramsarup Industrial Corporation vs. State of Bihar)** and with reference to paragraphs 4, 7 and 8 submitted that the distinction in between the permissiveness at the stage of technical bid and the conclusiveness of the information at the stage of financial bid has been explained by the Court to hold that since it is not the competitiveness which is adjudged at the stage of technical bid rather it is only the eligibility which is tested hence any inadvertent errors or irregularity in the tender document can be permitted to be corrected. The Court has held that the elimination of the tenderers at the stage of technical bid hampers the competitiveness and is not in public interest. Mr. Kaushik also referred to a Bench decision of this Court arising from CWJC No.6614 of 2015 (S.K. Enterprises vs. State) and analogous cases to submit that a denial of opportunity to rectify any defect at the technical bid stage has been deprecated and in similar circumstances such rejection has been set aside.

The argument of Mr. Kaushik has been very strenuously contested by Mr. Sanjay with the able assistance of Mr. Sinha. Taking the Court through the eligibility criteria present in the tender document placed at Annexure-2 it was pointed out that Clause 12 of Chapter-I required the tenderers to submit their credential along with the tender papers failing which the tender document was liable to be rejected. With reference to Clause-5 of Chapter-II more particularly clause 5.1 and 6.6 thereof it was submitted that the eligibility criteria has been spelt out eloquently. Learned counsel next with reference to clause-4 of Chapter-III submitted that similar stipulations are present in the instructions given to the Tenderers and Clause 5(vi) provides that any incomplete statement or false declaration would render the tender invalid. Another stipulation referred to by learned counsel is the chart required to be submitted in the prescribed format containing the details of the work completed by the willing tenderers. Learned counsel next with reference to the descriptive details so submitted by the petitioner, a copy of which is placed at Annexure-R/1 to the counter affidavit and Annexure-R/3 to the supplementary counter affidavit submitted that since admittedly the petitioner had given incorrect details of the work as regarding the completion of work in so far as the work appearing at serial nos. 3 and 7 is concerned then there was no turning back for the petitioner and his admission to the error is itself sufficient to confirm the decision taken by the respondents. It was submitted that since at the stage of technical bid it is only a scrutiny of the eligibility of the tenderers on the basis of the information supplied by him and since the information so supplied by the petitioner present at Annexure R/1 as well as Annexure-R/3 apparently was incorrect inasmuch as the only work which entitled the petitioner to a participation was listed at serial no.3 and mentioned the date of completion as 19.10.2014 i.e. within the prescribed period but the certificate so enclosed by the petitioner upon examination reflected that the information was incorrect and the work was still in progress with the scheduled date of completion on 6.2.2017 i.e. beyond the prescribed period. It was thus contended that since the other informations showed that work was in progress hence there was no occasion for the respondents to examine the others and the candidature of the petitioner was rejected on eligibility and the decision of the Tender Committee present at Annexure R/5 to the supplementary counter affidavit suffers from no infirmity. In so far as the issue of work present at item no.7 of the prescribed format is concerned, it was argued that although a certificate was enclosed by the petitioner and a copy of which is enclosed with Annexure R/3 but since the petitioner has himself mentioned that the scheduled date of completion of the said work is 15.3.2015 hence there was no requirement to go further. It was thus submitted that since the error is apparent and has been admitted by the petitioner hence the grievance raised requires no indulgence.

Learned counsel in support of his submission has relied upon a Division Bench judgment of this Court arising from LPA No.316 of 2014 (M/s Petroleum v. State of Bihar) and analogous cases to submit that a conscious non-compliance of tender conditions has been held to be fatal and not capable of rectification. He submits that in the case under reference whereas the technical bid was to be submitted in Envelope 'A' the financial bid was to be submitted in Envelope 'B' and both the envelops were to be put in a third Envelope marked 'C'. The tenderers were required to place along with the technical bid a bank draft of 10% of the bid amount in Envelope 'A' but the tenderer instead of placing the bank draft in Envelope-'A' placed it with Envelope 'B' and as a consequence he was held disqualified in the technical bid. He moved this Court in the writ petition which was allowed on grounds of bonafide mistake by the tenderer but in appeal the Division Bench set aside the order of the learned Single Judge in reference to the tender conditions which debarred rectification of any error in the technical bid. The Division Bench held that submission of Bank draft in Envelope 'A' was an essential condition and the writ petitioner having failed to put the same in Envelope-'A' had to face the penal consequences. The Division Bench held that since it is at the stage of technical bid itself that the petitioner stood disqualified by not keeping the bank drafts in Envelope 'A', there was no occasion to cure such defect because the defect could not have been cured nor any direction could have been issued to the State-respondents to open Envelope-'B' to examine the statement of the writ petitioner. Mr. Sanjay also relied upon a judgment of the Supreme Court reported in **(2001) 2 SCC 451 (W.B. State Electricity Board vs. Patel Engineering Co. Ltd.)** paragraph 31 to submit that negligent mistakes by a willing tenderer in the bid documents cannot be permitted to be corrected.

I have heard learned counsel for the parties and I have perused the documents on record.

The issues that fall for consideration in the present case is:

(a) Whether it was an inadvertent typographical/clerical error committed by the petitioner while submitting the details of the works undertaken in the last three financial years, in so far as it related to item nos. 3 and 7?

(b) Whether the error so committed by the petitioner was bonafide and capable of rectification or was sufficient to call for his disqualification in the technical bid?

(c) Whether the Tender Committee even after noticing that the petitioner had enclosed a certificate confirming one such work which stood completed within the prescribed period, of the value so desired in the tender notice, yet could proceed to disqualify the petitioner?

(d) Whether the decision of the Tender Committee simply rests on the incorrect information supplied by the petitioner in relation to the work mentioned at item no.3 of the list of works?

There is no dispute on facts in so far as the error occurring in the tabulated sheet present at Annexure-R/1 as well as Annexure-R/3 of the counter affidavit is concerned and indisputably the information present at Annexure-R/1 reflecting completion of work at item no.3 on 19.10.2014 as well as the information relating to the work at item no.7 reflecting the date of completion as 15.3.2015 both are incorrect. I would also proceed to appreciate that the respondents have very fairly enclosed the certificate(s) in relation to the works listed at item no.3 and 7 at Annexure R/2 and enclosure to Annexure-R/3 respectively. Whereas the certificate present at Annexure-R/2 confirms that the work listed at item no.3 of Annexure-R/1 was in progress and the scheduled date of its completion was 6.2.2017, the certificate enclosed along with Annexure-R/3 which is in relation to the work appearing at item no.7 very clearly mentions at serial no.11 of the certificate that the work stood completed on 25.3.2012

It is rather queer that the Tender Committee's decision present at Annexure-R/5 though rightly rejects the claim of the petitioner in so far as it mentions completion of the work listed at item no.3 on 19.10.2014 in the backdrop of the certificate so attached at Annexure R/2 but surprisingly the Tender Committee even while noticing that there was a completion certificate available in relation to the work at item no.7 and a copy of which stands enclosed at Annexure-R/3, yet ignores its existence even when the document qualified the petitioner's participation in the technical bid. The certification enclosed with Annexure-R/3 though shows that the work has been sublet to the petitioner but neither there is any such constraints on the issue of subletting in the tender notice nor any such stand has been taken by the respondents in their counter affidavit and the supplementary counter affidavit to disentitle the petitioner. In fact, the respondents in their counter affidavit have simply relying upon the certificate present at Annexure-R/2 reflecting the incorrectness of information present against item no.3 of the details of work have proceeded to justify the impugned rejection.

In my opinion, arbitrariness is writ large in the decision of the Tender Committee and the reasons are not required to be searched upon rather it is present in the decision of the Tender Committee itself available at Annexure R/5. Whereas the Tender Committee has rightly rejected the information supplied by the petitioner in relation to the work at item no.3 in the backdrop of the certificate so supplied by him but there is no justification in the action of the Tender Committee in not permitting the petitioner's participation in the technical bid even while noticing that the work appearing at serial no.7 is a work completed within the prescribed period and which also stands supported by the certificate enclosed by the petitioner, a copy of which is enclosed with Annexure-R/3. The act of the respondents in disqualifying the petitioner on the basis of the certificate available in relation to the work at item no.3 but not giving him the benefit in relation to the work at item no.7 on the same account though the required certificate was available in the tender papers, is patently arbitrary, discriminatory and not capable of being upheld.

Learned counsel for the contesting parties have relied upon separate set of judgments but the opinion expressed in all the judgments is same and which is that whereas any error affecting an essential condition of the tender is not capable of rectification but an error which is subsidiary or ancillary in nature may be allowed to be rectified. This Court in the case of **Ramsarup Industrial Corporation** (supra) has discussed the issue of elimination at the stage of technical bid and at the stage of financial bid and has observed in paragraph 4 as follows:

> "…. …. …. …. …. …. …. …. …. … ….
> By nature, certain terms are mandatory or cannot be waived or altered. The others are procedural requirements which are not mandatory. A mistaken compliance of the latter would be mere irregularity for which opportunity to rectify has to be given. State, being controlled by the provisions of Article-14 of the Constitution of India even in matters of contract, has to act fairly and in a non-arbitrary manner and in public interest. This has to be kept in mind when we are judging the action of the State in declaring someone ineligible at the stage of technical bid. I say so because by permitting an irregularity or a mistake to be rectified at the stage what is the consequence as noted above at the stage of technical bid, there is no inter party competition. The inter party competition starts at the stage of financial bid alone. If people are eliminated at the technical bid's stage itself, the effect is that the inter party competition at the financial bid stage is reduced considerably. The whole concept

> of getting into competitive bid at the financial bid would stand defeated if not reduced in efficacy, if for technical reasons, technical bids are rejected. Such elimination of competition does not enure to the benefit of the State or the public. Such elimination termed to be in public interest. The action may not be mala fide but it can certainly be not bona fide.

In the said case the bank guarantee supplied by the petitioner was in an incorrect name and for the said mistake the petitioner in the said case had been disqualified at the stage of technical bid. The Court while being critical of the decision of the Tender Committee in disqualifying the writ petitioner on that count has relied upon a judgment of the Supreme Court rendered in the case of **M/s Poddar Steel Corporation vs. M/s Ganesh Engineering Works** reported in **AIR 1991 SC 1579** where the Supreme Court has held that although the authorities inviting tenders are bound to give effect to every term mentioned in the notice but the requirements in a tender notice can be classified into two categories in which while one lays down the essential conditions of eligibility which has to be enforced rigidly, the others are merely ancillary or subsidiary and which can be deviated upon without insisting for strict compliance.

The judgment of the Supreme Court relied upon by Mr. Kaushik rendered in the case of **Rashmi Metaliks Ltd**. (supra) not only takes into consideration the judgment rendered in the case of

M/s Poddar Steel Corporation (supra) but also refers to the judgment rendered in the case of **West Bengal State Electricity Board** (supra) so relied upon by Mr. Sanjay to contest the claim. In the case of **Rshmi Metaliks** (supra) the petitioner before the Supreme Court had been disqualified for failing to comprehensively correspond to the essential terms of tender which required filing of the latest income-tax return. A Single Bench of the Kolkata High Court upheld the disqualification for such failure and the Division Bench confirmed the same relying upon the decision of the Supreme Court rendered in the case of **West Bengal State Electricity Board** (supra) by holding that the requirement to submit income-tax return was essential and the defect had to be corrected before submission of tender papers. The Supreme Court after examining the judgments on the issue of mistakes capable of rectification has concluded in paragraphs 18 and 19 as follows:

> "18. We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different. It has been asserted on behalf of the appellant Company, and not denied by the learned counsel

> for the respondent Authority, that the financial bid of the appellant Company is substantially lower than that of the others, and, therefore, pecuniarily preferable.
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> 19. In this analysis, we find that the appeal is well founded and is allowed. The impugned judgment[1] is accordingly set aside. The disqualification of the appellant Company on the ground of it having failed to submit its latest income tax return along with its bid is not sufficient reason for disregarding its offer/bid. The respondents are directed, therefore, to proceed further in the matter on this predication. The parties shall bear their respective costs."

The judgments relied upon by Mr. Sanjay are entirely in different circumstances. Whereas in the case of **West Bengal State Electricity Board** (supra) the issue before the Supreme Court was whether the tenderers could be permitted to make correction of errors in their bid document which was negated by the Supreme Court, in the case of **M/s Petroleum** (supra) the tenderer had failed to deposit the earnest money through bank draft along with his technical bid and the Division Bench of this Court upheld the rejection on grounds that furnishing of the bank draft was an essential condition and its non-availability in the technical bid document had rendered the tenderer ineligible to participation. In each of the two situations the Courts have held that these were essential conditions and the error committed was not capable of rectification. The case in hand is entirely different for the required information which would qualify the petitioner for participation in the technical bid was available with the technical bid papers. In fact its availability has also been taken note of by the Tender Committee in the order of rejection present at Annexure-R/5 but merely on account that the certificate enclosed with Annexure-R/3 did not match the information present at item no.7 that they conveniently ignored to give the benefit thereof to the petitioner by permitting him to make appropriate correction in the details of work. It is neither a case that by giving an incorrect information relating to work at item no.3 the petitioner attempted to mislead the respondents since the certificate in relation thereto enclosed at Annexure R/2 clarifies this position nor is the position that the document confirming his eligibility to participate in the technical bid was wanting, as in the case of **M/s Petroleum** (supra) where the bank draft which made the tenderer eligible for consideration in the technical bid itself was missing. In the present case the paper supporting the eligibility of the petitioner as well as his claim of having completed one similar work in the previous three financial years stood confirmed albeit the information present in the tabulated form suffered from purely typographical infirmity and in all fairness the respondents should have allowed the petitioner to correct the same.

For the reasons discussed hereinabove the order disqualifying the petitioner from participating in the tender process passed by the Tender Committee present at Annexure-R/5 cannot be upheld and is set aside.

Since on the information present on record the petitioner qualifies for participating in the financial bid hence the Tender Committee of the respondent-Union of India in its Ministry of Railways are directed to re-evaluate the financial bids afresh and take a final decision in accordance with law, after taking into consideration the financial bid of the petitioner.

The writ petition is allowed.

(Jyoti Saran, J)

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