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HIGH COURT OF CHHATTISGARH, BILASPUR
Writ Petition (C) No. 718 of 2015

M/S Raipur Construction Private Limited a company duly registered under the provisions of the Indian Companies Act, 1956 having its registered office at Babla Complex, G.E. Road, Raipur, Tahsil & District Raipur, (Chhattisgarh), (Builders & Promoters Of Class A-5) through its Managing Director Shri Mohammed Asgar, S/o Late Mohammed Rasheed, aged about 55 Years, R/o K.K. Road, Maudhapara, Police Station Maudhapara, Raipur, (Chhattisgarh) Civil & Revenue District Raipur, (Chhattisgarh)

---- Petitioner

Versus

1. State of Chhattisgarh through the Secretary, Ministry of Public Health Engineering Capital Complex, Mahanadi Bhawan, Secretariat, Naya Raipur, Tahsil & District Raipur, (Chhattisgarh)
2. Superintending Engineer, Public Health Engineering Department, Raipur Division, Raipur, Tahsil & District Raipur, (Chhattisgarh)
3. Executive Engineer, Public Health Engineering Department, Project Division, Raipur, Tahsil & District Raipur, (Chhattisgarh)

---- Respondents

Writ Petition (C) No. 719 of 2015

M/S Raipur Construction Private Limited a company duly registered under the provisions of the Indian Companies Act, 1956 having its registered office at Babla Complex, G.E. Road, Raipur, Tahsil & District Raipur, (Chhattisgarh), (Builders & Promoters of Class A-5) through its Managing Director Shri Mohammed Asgar, S/o Late Mohammed Rasheed, aged about 55 Years, R/o K.K. Road, Maudhapara, Police Station Maudhapara, Raipur, (Chhattisgarh) Civil & Revenue District Raipur, (Chhattisgarh)

---- Petitioner

Versus

1. State of Chhattisgarh through the Secretary, Ministry of Public Health Engineering Capital Complex, Mahanadi Bhawan, Secretariat, Naya Raipur, Tahsil & District Raipur, (Chhattisgarh)
2. Superintending Engineer, Public Health Engineering Department, Raipur Division, Raipur, Tahsil & District Raipur, (Chhattisgarh)
3. Executive Engineer, Public Health Engineering Department, Project Division, Raipur, Tahsil & District Raipur, (Chhattisgarh)

---- Respondents

For Petitioner	:	Shri Sumesh Bajaj, Advocate.
For Respondents/State	:	Shri Prafull N Bharat, Additional Advocate General

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri P. Sam Koshy, J.

C A V Order

Per Navin Sinha, Chief Justice

6/07/2015

1. Heard Learned Counsel for the Petitioner and Additional Advocate General for the Respondents.
2. The two writ petitions filed by one Company against the same Respondents raises identical questions of law arising from common facts, the only difference being that they pertain to different contracts published by the Respondents. They have therefore been heard together and are being disposed by a common order.
3. The Respondents published a Notice Inviting Tender ("NIT") on 20.2.2015 inter alia for Works No.1153 and 1154 with regard to laying of water pipelines in the designated areas. The technical bid of the Petitioner for both the works has been rejected separately on 6.4.2015, for the ostensible reason that it did not possess work experience during the last five years as stipulated in Clause 1.a of the NIT.
4. Learned Counsel for the Petitioner submitted that the Clause 1.a required the bidder to submit experience certificate for successful completion of D.I./C.I./other pipelines in contractor's/firm's/company's own name indicating inter alia stipulated period of completion, actual period of completion during the last five years i.e. 2009 – 2010 to 2013 – 2014. The certificate was to be issued by an officer not below the rank of Executive Engineer. The Petitioner submitted an experience certificate dated 26.7.2013 issued by Respondent No.3 in support

of its having executed the required nature of works for distribution network of Daldal Seoni Zone under the Raipur Augmentation Water Supply Project awarded to it under the agreement No. 24/DL/2008-09 and Work Order No. 2100 dated 16.7.2008 certifying that it had been duly inspected and works completed on 31.10.2011 which fell within the five year period. The technical bid of the Petitioner for both works was therefore compliant with the NIT. The rejection of its technical bid for both the works on the ground that the certificate issued related to a work order issued prior to the five year period in 2008 was erroneous and also extraneous to the NIT. The rejection of its technical bid as non compliant is therefore arbitrary.

5. Learned Counsel next submitted that the additional ground urged in the counter affidavit that the works for which the experience certificate dated 26.7.2013 had been furnished, were required to be completed by 15.1.2010 but the actual date of completion was 31.10.2011 and therefore delayed completion of works was an additional reason for rejection of the technical bid under Clause 1.a, is completely arbitrary. It is not a ground mentioned in the impugned order. Relying on AIR 1978 SC 851 (Mohinder Singh Gill v. The Chief Election Commissioner), it was submitted that an order passed by a public authority will have to be tested on the grounds mentioned in the order and it cannot be supplemented or improved by additional grounds in the counter affidavit.

6. Without prejudice to the aforesaid, it was submitted that the Respondents cannot have two different standards under different contracts containing common conditions. A like condition as contained in Clause 1.a was stipulated in another Work No.1080 of similar nature. The Petitioner had furnished the same certificate 26.7.2013 issued by Respondent No.3. The certificate has been accepted as valid and acted upon by acceptance of the technical bid of the Petitioner. The Respondents have therefore acted arbitrarily in rejecting the technical bid for the two works in question.

7. Learned Additional Advocate General for the Respondents submitted that the technical bid of the Petitioner for Works No.1153 and 1154 has rightly been rejected since it was based on a work order issued in the year 2008 taking it beyond the period of five years as mentioned in Clause 1.a of the NIT. There has been no arbitrariness as the contract of another technically non-compliant bidder M/s B.K. Infrastructure, Raipur has also been rejected. It being a commercial contract, the Respondents were fully justified in taking into consideration the ability of the Petitioner to complete works in time. The scheduled period of completion and the actual date of completion was also relevant criteria under Clause 1.a of the NIT. Merely because the additional ground may not have been mentioned in the order rejecting the technical bid, the Court may not interfere in a contract matter involving public projects to done with public money. The order is based on discernable germane reasons demonstrating that their actions were neither arbitrary nor unjustified. If any mistake was committed in acceptance of the technical bid of the Petitioner under Work Order No.1080, it cannot be allowed to be perpetuated.

8. We have considered the submissions on behalf of the parties. The pleadings being complete we proceed to finally dispose the writ application at the stage of admission itself.

9. In matters of contracts, involving public projects, exercise of judicial restraint is called for. But this exercise of judicial discretion cannot be extended to the extent that even if arbitrariness is apparent, the Court may not interfere merely because the works may get delayed. That would be complete anathema to Article 14 of the Constitution rendering judicial remedy under Article 226 illusory. Therefore it will depend on the facts of each case whether the Court's interference is called for or not and there can be no straight jacket formula in the matter. If the Court finds the actions of the Respondents arbitrary, nothing prevents it from passing appropriate orders to set right the wrong done to a

bidder. Normally speaking, the terms of a tender and its interpretation are not to be judicially interpreted or rewritten. The terms have to be understood as the parties to the contract understood it. In the facts of the present case, the manner in which Clause 1.a was to read and understood is apparent from the conduct of the Respondents themselves. The Respondents obviously took a considered decision to accept the same certificate dated 26.7.2013 issued by Respondent no.3 as valid under another works of similar nature, work order 1080, containing like terms in the NIT. No explanation is forthcoming except a rather ambivalent stand that “the mistake, if any, cannot be perpetuated.” We are informed that even that contract is yet to achieve finality but no pleading has been made with regard to any corrective action proposed. The plea of an alleged “mistake, if any” in our opinion is completely an after thought and unacceptable.

10. Reference may be made to (1993) 1 SCC 71 (Food Corporation of India v. Kamdhenu Cattle Feed Industries) observing as follows :-

“7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.”

11. We are also in concurrence with the submission made on behalf of the Petitioner that an order passed by a public authority shall have to be tested on the basis of the grounds mentioned in the order itself and it cannot be

supplemented by additional grounds in the counter-affidavit.

12. The tender for the two works 1153 and 1154 as mentioned in the counter affidavit is yet to be finalized. The rejection of the technical bid of the Petitioner by order dated 6.4.2015 is therefore held to be bad and is set aside. The Respondents are directed to consider the technical bid of the Petitioner and then proceed in accordance with law.

13. The writ applications are allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE