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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 1826 of 2015

Shreyans Industries Ltd. Having its registered office at Village Bholapur, P.O. Sahabana Chandigarh Road, Ludhiana (Punjab) and Branch office at 5A-D, Gopala Towers, 25, Rajendra Place, New Delhi 11008

Through its Authorized Signatory Mr. Kanu Mehra, Age 33 years, Address Flat No. 1010, Charms Solitaire Apartments, New Delhi.

---- Petitioner

Versus

1. Chhattisgarh Textbook Corporation, Through its Managing Director, Having Registered Office at 2nd Floor, Haribhoomi Press Premises, Dhamtari Road Tikrapara, Raipur, Chhattisgarh 492001
2. State of Chhattisgarh Through Principal Secretary, Mahanadi Bhavan, Mantralaya, New Delhi, Raipur, Chhattisgarh.

---- Respondents

For Petitioner	: Shri Naman Nagrath, Senior Advocate with Shri Nitin Agrawal and Shri Sourabh Dangi, Advocates.
For Respondent No. 1	: Shri Narendra Kumar Vyas, Advocate.
For Respondent/State	: Shri UNS Deo, Government Advocate.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

C A V Order

Per Navin Sinha, Chief Justice

14/10/2015

1. The Respondent Corporation published notice inviting tenders (hereinafter referred to as the 'NIT') dated 31.8.2015 for supply of paper manufactured with virgin pulp made of wood in integrated pulping plant. The last date for submission of bids was 29.9.2015. The bids were to be submitted online and hard copies of uploaded documents were also required to be submitted. The Petitioner is aggrieved by denial to consider its bids on the ground that hard copies of the bid uploaded online had been submitted beyond the prescribed time.

2. Learned Senior Counsel for the Petitioner submitted that the last date for submissions of bids online was from 19:00 hours from 29.9.2015 to 17:00 hours on 1.10.2015. The hard copy of the online bid to be submitted included the commercial bid uploaded by the bidder with seal and signature of the authorised signatory. In the circumstances, the hard copies could only be submitted after 29.9.2015. The Petitioner with promptitude submitted the hard copies of its online bid on 30.9.2015, before opening of the technical bids on 1.10.2015 at 17:01 hours. The rejection of its bid for non submission of hard copies of the online bid was totally unjustified and arbitrary.

3. The tender document only mentioned submission of hard copies of the bid also. No time was stipulated for the purpose. In the adjoining State of Madhya Pradesh, in case of online bids, a separate date was fixed in the tender notice itself for submission of hard copies. The Respondent Corporation ought to have followed this good practice to prevent ambiguity in terms of the tender. The tender process was divided into 12 stages with key dates for each. None of them mentioned the stipulated date for submission of hard copies. It therefore necessarily follows that hard copies could be submitted at any time before opening of the technical bids on 1.10.2015. The Petitioner cannot be said to have acted contrary to the terms of the tender or violated the terms of the same by submission of hard copies on 30.9.2015. If filing of hard copies along with online submission of bids is made a mandatory requirement, it defeats the very purpose of e-tendering.

4. Submission of hard copies in accordance with key dates was not a mandatory condition. Invoking the theory of substantial compliance it was submitted that the bid of the Petitioner may be directed to be considered. Clause (8) of the N I T dealing with eligibility and qualifications of a bidder did not stipulate invalidity of a tender for non submission of hard copies. In absence of any consequence having been provided if the Petitioner is also permitted to participate it will only help the Respondent Corporation in obtaining better offers.

5. Reliance was placed on (1990) 2 SCC 488 (G.J.Fernandez v. State of Karnataka), (1991) 3 SCC 273 (Poddar Steel Corporation v. Ganesh Engineering Works) and (2002) 6 SCC 315 (Kanhaiya Lal Agrawal v. Union of India). Reliance was further placed on a Division Bench order of the Madhya Pradesh High Court in Writ Petition No. 3740 of 2015 (M/s. Maxima Traders Bhopal Pvt. Ltd. v. The State of Madhya Pradesh).

6. Learned Counsel appearing for the Respondent Corporation submitted that Clause (9) of the N.I.T provided that the bidder is expected to examine carefully all the instructions, conditions of tender, annexures, schedules to tender form. Failure to comply with the requirements of bid submission was to be at the risk of the bidder. Bids not substantially responsive to the requirements of the bid documents would be rejected.

7. The N.I.T was published on 31.8.2015 and could be downloaded till 29.9.2015 at 17:00 hours. The bids were to be submitted from 1.9.2015 to 29.9.2015 with online payment. Hash would then be generated as compliant. The bidding was to close at 19:00 hours on 29.9.2015. Super Hash would then be generated by the Respondents. Thereafter, at the stage of “submit bids online” under Clause (10) of the guidelines to bidders for implementation on e-procurement system the bidder had to decrypt the bid data with the digital certificate and re-encrypt the bid data within the specified time as stated in the tender time schedule-key dates. Encrypted bid data of only those bidders who have submitted their bid seals (hashes) within the stipulated time as per the key dates would be accepted by e-procurement system. The bidder who had not submitted bid seals (hashes) within the stipulated time would not be allowed to decrypt and encrypt his bid data. The Petitioner waited till the last moment to complete this process on 29.9.2015 at 5:00 pm. Clause (3) of the terms and conditions of the N I T provided that hard copies of the technical bid along with a printout of online commercial bid was required to be received by post before expiry of time or dropped in the respective tender boxes as per key dates and time. The bidder was to be solely responsible for any delay. The mere submission of bids online and generation of super-hashes would not render a bidder eligible for consideration unless he had also filed hard copies along with a printout of the commercial bid submitted online within the key date. The decryption or re-encryption of bid data permitted from 29.9.2015 to 1.10.2015 was not part of the process of bidding. It related to decryption or encryption of data already uploaded.

8. The terms of tender and the obligations of the bidder were clear. Persons in the commercial world acquainted with online bidding were under no confusion with regard to what a bidder was required to do. Out of nine bidders, three from Kolkata, two from New Delhi, one from Tamil Nadu and one from Andhra Pradesh have substantively complied the requirement by submission of hard copies within the key date on 29.9.2015. It is only the Petitioner and another bidder M/s. Sethiya Industries Limited, New Delhi, who did not deposit the hard copies within time. The Respondent Corporation has thus committed no irregularity in declining to consider their bids.

9. We have considered the submissions on behalf of the parties.

10. The tender documents could be downloaded from 1.9.2015 till 17:00 hours on 29.9.2015. Bid documents were to be uploaded on line with payment from 1.9.2015 till 17:00 hours on 29.9.2015 leading to generation of Hash. Super Hash with regard to the eligible would then be generated by the Respondents 17:00 hours to 19:00 hours on 29.9.2015. The decryption or re-encryption of bid data already submitted was to be done between 17:00 to

19:00 hours on 29.9.2015. The technical bid was to be opened on 1.10.2015 till 3.10.2015. Evaluation and short listing of technical bids was to be done from 3.10.2015 to 5.10.2015. The price bid was then to be opened on 15.10.2015 till 16.10.2015 and short listing done from 16.10.2015 to 18.10.2015. The writ petition has been filed on 8.10.2015 much after opening of the technical bid when the tender process is mid way.

11. The tender terms clearly stipulated that filing of bids online would not suffice unless hard copies were also submitted within the time schedule of key dates along with proof of payment duly authenticated in the manner provided. The procedure required in the notice inviting tender obviously was not ambiguous to those associated with the commercial world as out of nine bidders, seven have complied with the same. Patently, when soft copies were uploaded, hard copy was already available with the Petitioner. It is difficult to accept the submission that the question for submission of hard copy till 29.9.2015 did not arise. According to the tender documents the Petitioner was simultaneously required to send hard copies of uploaded documents by post well in advance so that it was received within key dates or drop it in the drop box kept in the office. Decryption or encryption of uploaded data from 29.9.2015 to 1.10.2015 cannot be construed as actual bidding online being open till the latter date.

12. The terms of a tender are not open to judicial scrutiny unless and until they are palpably arbitrary, illegal or incapable of performance. A person inviting the bids is the best judge of what was intended by him in the tender documents. Only if there is ambiguity, the occasion for judicial scrutiny or reassessment by interpretation may arise. In the present case, quite obviously there was no ambiguity as seven out of nine bidders have complied with the same. In (2009) 11 SCC 9 (Sorath Builders v. Shreejikrupa Buildcon Ltd) it was observed:-

> 21. In Puravankara Projects Ltd. v. Hotel Venus International, in which one of us, namely, Dr. Arijit Pasayat, J. was a party, it was held as follows:
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> "Tender terms are contractual and it is the privilege of the Government which invites its tenders and courts do not have jurisdiction to judge as to how the tender terms should be framed. By observing that there was an implied term which was not there in the tender, and postponing the time by which the bank guarantee had to be furnished, in essence the High Court directed modification of a vital term of the contract."
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> It further held that:
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> "The statutory parameters have to be kept in view and the High Court can never alter or amend a contract entered into between the parties."

13. The submission with regard to substantial compliance by submission of bids online does not appeal to us as it effectively renders that term of the tender notice requiring submission of hard copies redundant as a requirement for a valid tender as that would amount to re-writing the terms of the tender. In (2009) 6 SCC 171 (Meerut Development Authority v. Assn. of Management Studies) it was observed as follows :-

> "26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process."

Likewise in (2004) 4 SCC 19 (Directorate of Education v. Educomp Datamatics Ltd.) it was again observed as :-

> "12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary,

> discriminatory or mala fide.
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> 13…… Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice…..”

14. In (2006) 11 SCC 548 (B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.) it was inter alia observed:-

> 66.
> (*ii*) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
> (*vii*) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

15. Clause (6) of the guidelines to bidders clearly provides that the bidders are strictly advised to follow the tender time schedule (key dates) of the tender. To hold that submission of hard copies of the bid documents in accordance with the key dates was not an essential condition because no consequence had been provided in Clause 8 dealing with eligibility and qualification would substantively be destructive of the entire tender dates of which key dates for submission of online bids, hard copies and completion of other formalities are always an essential and integral part. The submission of hard copies of the online bid had a salutary purpose for cross verification and it cannot be described as a collateral or non essential condition.

16. In G.J. Fernandez (supra) relied upon by the Petitioner it was held that non compliance with a collateral or non-essential term could not result in rejection of the tender. Similarly in Poddar Steel Corpn. (supra) it was observed that technical irregularity of non essential and subsidiary conditions was of no significance and could be waived. The cheque was drawn on the Union Bank of India instead of a demand draft in the name of State Bank of

India. In Kanhaiya Lal Agrawal (supra) it was observed that whether a condition was essential or collateral would depend on the consequences that would follow if there was non-compliance. It was also observed that prudent businessmen are expected to be fully aware of the requirements of a tender and need for compliance with the same. The judgements relied upon by the Petitioner are distinguishable on its own facts in view of our conclusion that submission of hard copies of the online bid cannot be considered as a collateral term since it had a specific salutary purpose. The cited precedents are also factually distinguishable also as they were not cases relating to online submission of bids along with hard copies of the same. In M/s. Maxima Traders (supra) the issue related to only non-mentioning of the word “Satna” in the cheque which was otherwise complaint and was held to be a non-essential term and curable defect.

17. In conclusion and after consideration of issues writ application is dismissed as devoid of merit.

Sd/-	Sd/-
(Navin Sinha)	(P. Sam Koshy)
CHIEF JUSTICE	**JUDGE**

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