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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 2184 of 2015

M/s Urmila Construction Through: Its Partner namely Vikash Dixit, S/o Vishwamitra Dixit, Aged About 30 Years, Having Its Head Office Ambikapur And Is A Class B Registered Contractor, R/o Mission Chowk, Ambikapur, Police Station & Post Ambikapur, Civil And Revenue District Surguja, (Chhattisgarh)

---- Petitioner

Versus

1. State Of Chhattisgarh Through: Secretary, Urban Administration & Development Department, Mahanadi Bhawan, Mantralaya, Capital Complex, New Raipur, District Raipur, (Chhattisgarh)
2. Municipal Corporation, Ambikapur, Surguja, District Surguja, (Chhattisgarh), Through Its Commissioner, Municipal Corporation, Ambikapur, District Surguja, (Chhattisgarh)
3. Secretary, Municipal Corporation, Ambikapur, Surguja, District Surguja, (Chhattisgarh)
4. Commissioner, Municipal Corporation, Ambikapur, Surguja, District Surguja, (Chhattisgarh)
5. Mayor In Council, Municipal Corporation, Ambikapur, Throuth Its Mayor, Municipal Corporation Ambikapur, District Surguja, (Chhattisgarh)

------Respondents

For Petitioner:	Shri Manoj Paranjpe, Advocate.
For Respondent No.1/State:	Shri Prafull N Bharat, Additional Advocate General.
For Respondents No.2 to 5:	Shri Apoorva Tripathi, Advocate.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per **Navin Sinha, Chief Justice**

12/1/2016

1. The Respondents published a Notice Inviting Tender dated 20.11.2015 for providing, laying and jointing of pipes of specified dimensions at the designated locations for water supply. The Petitioner inter alia was one of the

bidders and claims to have been the lowest L-1. The Respondents took a decision on 7.7.2015 not to award works to the Petitioner in view of its past poor performance in execution of similar works leading to annulment of the tender on 19.3.2010 and also declaring it ineligible for future participation. A fresh notice inviting tender was then published on 20.11.2015.

2. Learned Counsel for the Petitioner submitted that the impugned order dated 7.7.2015 with reference to order dated 19.3.2010 related to M/s. Urmila Construction Company and not the Petitioner which is styled M/s. Urmila Construction. The two are different entities being registered partnership firms. The blacklisting of M/s. Urmila Construction Company was made ineffective by the Respondents themselves on 18.2.2011 and it was permitted to participate in future bids. The government registration of eligibility to participate in tenders of M/s. Urmila Construction Company came to an end on 14.9.2014. The registration of the Petitioner M/s. Urmila Construction is valid with effect from 7.8.2014. It was lastly submitted that if the Petitioner M/s. Urmila Construction was a separate entity from M/s. Urmila Construction Company and the former was an L-1, the Respondent could not have arbitrarily denied award of works on non est grounds. The Petitioner genuinely apprehends that the same ground may be used to disqualify the Petitioner in future tender also. While the impugned order mentions one ground for denying award of works the counter affidavit urges another ground which is impermissible.

3. Learned Counsel for the Respondents submitted that foundational facts are missing in the pleadings with regard to the submission of M/s. Urmila Construction Company and M/s. Urmila Construction being different

entities though it is acknowledged that both of them are registered partnership firms. There is no pleading with regard to the constitution of M/s. Urmila Construction Company. It was next submitted that even if the Petitioner was L-1 but the rates quoted by it was still 22.11% above the schedule of the rates mentioned in the tender document, the Corporation had a duty to protect public funds and therefore committed no wrong in deciding for retender. In commercial matters where public money is involved, the Court may not test the order strictly in terms of the language used in the order if from materials in the counter affidavit the Respondents are able to support the order on other grounds in public interest. There are no allegations made in the Writ Petition of deliberate mala fides to keep the Petitioner out of consideration or to favour any particular bidder.

4. We have considered the submissions on behalf of the parties and do not consider it necessary to decide the issue with regard to whether M/s. Urmila Construction Company and M/s. Urmila Construction are one and the same or separate entities in absence of necessary pleadings and leave it open for consideration in another appropriate case. Likewise, we are of the considered opinion that the grounds mentioned in the impugned order with regard to alleged non-performance on an earlier occasion cannot be made a recurring ground for all times to come.

5. The only question of law arising for our consideration is if a bidder is the lowest tenderer and qualifies as L-1, does he acquire an indefeasible right to demand that works must necessarily be allotted to him and the failure to do so would automatically render it arbitrary. The law stands settled that merely because a bidder may be L-1, he has no indefeasible right to insist that the

works must be allotted to him alone. A host of considerations can arise with regard to efficiency and quality which may be at a premium to quote the lowest rates also. We do not mean to suggest that such is the case presently. Equally, if the present Petitioner is L-1, the Respondents cannot arbitrarily deny the award of works to it. If there is denial of award of works to L-1, and it is challenged in a Court of law, in judicial review under Article 226 of the Constitution, the Court will only examine if there are valid grounds or not. If the decision making process is flawed either by taking into consideration irrelevant materials or shutting out relevant materials from consideration, the decision has been taken for mala fide reasons, then only the Court may interfere and not otherwise. In (2005) 6 SCC 138 (Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.) it was observed :-

> "11…….Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

6. The Respondents in their counter affidavit have clearly stated that the rates quoted by the Petitioner as L-1 were still 22.11% above the schedule of rates quoted in the tender documents. The Respondents had therefore decided to go in for re-tender. The Corporation deals with public money in such developmental works. It has a bounden duty to protect public interest by ensuring that public money is not wasted or squandered by circumstances which are clearly avoidable. Therefore, in the facts of the present case, we

are of the considered opinion that the ground mentioned for annulling the tender notice declining to award works to the Petitioner because he was L-1 meet the standards of judicial scrutiny and does not call for any interference.

7. That leaves the question of variance between the grounds taken in the impugned order and in the counter affidavit which was strenuously urged on behalf of the Petitioner as not sustainable. Normally speaking, the order of the Government will be tested on grounds mentioned in the order and it is not open for it to supplement the grounds in a counter affidavit. But this is not a universal rule to be applied mechanically devoid of all other considerations. So long as the Respondents are able to put forth valid, genuine and cogent reasons in their counter affidavit in support of the impugned order and the grounds cannot be said to be arbitrary or fanciful or irrelevant, the Court will not interfere merely because it may appear to be proper to do so at the cost of public interest and public money. In any event the fact that the rates quoted by the Petitioner as L-1 was 22.11% above the schedule of rates quoted in the tender documents is an undisputed fact. Financial implications are an important and relevant consideration while testing a government order.

8. We therefore find no reason to interfere.

9. The Writ Petition is dismissed.

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

Priya