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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.3152 of 2016

M/s. D.D. Builders Limited, a Company incorporated under the Companies Act, 1956, having its Registered Office at PO Ladugaon, District Kalahandi (Orissa), Branch Office at Plot No. 36F, B J B Nagar, Bhubaneswar, Khurda (Orissa), Local Office at 22, South Avenue, Choubey Colony, Raipur (Chhattisgarh) Through its Authorized Signatory Ghasiram Agrawal, S/o Shri Dambrudhar Agrawal, aged 33 years.

---- Petitioner

Versus

1. State of Chhattisgarh, Through Secretary, Water Resource Department, Government of Chhattisgarh, Mantralaya, Mahanadi Bhawan, Naya Raipur (C.G.)
2. Chief Engineer, Mahanadi Godawari Basin, Water Resources Department, Government of Chhattisgarh, Raipur (C.G.)
3. Executive Engineer, Water Resources Division, Government of Chhattisgarh, Dhamtari (C.G.)

---- Respondents

For Petitioner: Mr. Ashish Shrivastava and Mr. Soumya Rai, Advocates.

For Respondents/State: -
Mr. Prafull Bharat, Addl. Advocate General.

Hon'ble the Acting Chief Justice and
Hon'ble Shri Justice Sanjay K. Agrawal

ORDER ON BOARD

Sanjay K. Agrawal, J

10/03/2017

1. M/s. D.D. Builders Limited, a company incorporated under the provisions of the Indian Companies Act, 1956, by way of this writ petition, petitioner herein, has called in question the

rejection of technical bid by the respondents herein (during techno commercial evaluation) submitted pursuant to issuance of e-tender notice inviting tender dated 3-11-2016 on the ground that the same is incomplete and not fulfilling to the NIT requirements.

2. The essential facts requisite to judge the correctness of the plea raised at the Bar are as under: -
3. Respondents No.2 and 3 invited notice inviting tender No.08/SAC/2016-17, Dhamtari for Earth Work and C.C. Lining of Pairi Left Bank Main Canal from RD 0 to 1250 M., Reconstruction of 18 No. Masonry Structures & Repair of 25 No. Masonry Structures, C.C. Lining of 33 No. Distributory & Minors and Reconstruction & Repair of 13 No. Masonry Structures and Construction of Culaba of Pairi Left Bank Canal System in Dhamtari District. The estimated amount of contract was ₹ 2456 lakhs and time allowed for completion was 24 months from the date of issuance of work order (including rainy season). The NIT was issued on 3-11-2016. The tenderers were required to submit their tender by 21-11-2016. The bids have to be submitted in three fold viz., EMD (Earnest Money Deposit), technical bid and price bid. Submission of tender should be in three separate sealed envelopes marked as Envelope "A", Envelope "B" and Envelope "C". The Prequalification

Document (Envelope - "B") is also annexed with the NIT as Part-II which also provides for Eligibility and Qualification Requirements. Clause 3.2 of the Prequalification Document states that the contractor has to submit on-line 'Pre Bid Qualification Certificate' issued from the office of the Engineer-in-Chief, Water Resources Department, Sihawa Bhavan, Civil Lines, Raipur in Annexure-II and details of balance works in hand in format given in Annexure-III. The date fixed for opening of tender is 24.11.2016 at 11.30 hours and all the bidders were allowed to remain present during the course of opening of tender. As per clause 3.4 of the tender documents, details of work in hand are required to be given in prescribed form in Annexure-III (at page 51 of the petition). Note appended to the said prescribed proforma states that certificate of work executed and work in hand submitted by the bidder shall be certified by the officer not below the rank of Executive Engineer.

4. Pursuant to the aforesaid NIT, the petitioner and other eligible bidders submitted their bids to the competent authority and the bids were opened in presence of the petitioner and other bidders and thereafter, prequalification documents were considered and examined in which the petitioner was not found qualified and accordingly, the petitioner's price bid was not opened and the price bids of

other tenderers who were fulfilling the prequalification criteria were opened and thereafter, the technical bid of one of the tenderers namely Shri Sunil Kumar Agrawal was found responsive and ultimately after opening the price bids, respondents No.2 and 3 have awarded the work to Shri Sunil Kumar Agrawal. The petitioner was communicated by memo dated 30-11-2016 (Annexure P-1) through e-mail that the offer submitted by the petitioner has been technically rejected and the petitioner will not be allowed to participate in the opening of price bid.

5. Questioning the order Annexure P-1 by which the technical bid of the petitioner has been rejected, the petitioner has filed this writ petition under Article 226 of the Constitution of India stating inter alia that the action on the part of the respondents in rejecting the petitioner's prequalification bid without any reason and not considering and opening the petitioner's technical bid / financial bid, is illegal and arbitrary and as such, the decision making process is not just, fair and reasonable and violative of Article 14 of the Constitution of India.
6. On being noticed, the State/respondents have filed return stating inter alia that the petitioner has failed to fulfill the prequalification requirements enumerated in the tender notice and therefore he was not prequalified fulfilling the

tender specifications, as such, his bid was finally not found responsive and the petitioner was declared ineligible to further participate in the opening of technical bid and the work has rightly been awarded to the eligible tenderer.

7. No rejoinder has been filed opposing the return filed by the State/respondents.
8. Learned counsel for the petitioner would vehemently submit that action of the respondents / State in declaring the petitioner that he is not fulfilling the prequalification requirements of the tender notice is most arbitrary, illegal and contrary to the well settled law in this regard. He would further submit that petitioner fulfilled the prequalification criteria issued by the respondents in their NIT and rejection of the petitioner's bid runs contrary to the decision of the Supreme Court in the matter of **R.D. Shetty v. International Airport Authority**¹.
9. On the other hand, learned State counsel would submit that as per clause 3.4 of the Information & Instructions to the Tenderers, the petitioner was required to submit a certificate relating to work executed and work in hand duly certified by the Executive Engineer which he failed to fulfill and the petitioner only submitted the certificate of work executed certified by the Executive Engineer, but failed to submit the

¹ (1979) 3 SCC 439

certificate of work in hand duly certified by the Executive Engineer, only the petitioner has filed copy of running bills of work in hand and therefore he has been held to be not qualified in the prequalification criteria as such, his technical bid was not opened, as he was not technically qualified to participate in the further proceeding i.e. the technical bid proceeding and he has rightly been excluded from the tender proceeding, as he was not qualified.

10. We have heard learned counsel for the parties and given thoughtful consideration to their rival submissions made herein and also gone through the record with utmost circumspection.
11. In order to consider the dispute raised herein, it would be appropriate to notice the prequalification requirements in the tender notice so floated by respondents No.1 and 2. Clause 3 of the Information & Instructions to the Tenderers i.e. Prequalification Document states about Capability of Tenderer Eligibility (Eligibility and Qualification Requirements). Clause 3.4 is pertinent which we are concerned with. It states that details of balance works in hand in format given in Annexure-III. Annexure-III is as below: -

ANNEXURE – III

(Refer para 3.4 of the Information & Instruction for Tender)

1. The above details should be supported by the relevant documents duly self attested as well as attested by the any Gazetted officer. Certificate of work executed and work in hand submitted by the bidder shall be certified by the officer not below the rank of Executive Engineer.
2. It is made clear that the amount of work in hand is acceptable up to the last running bill recorded in the measurement book and paid. The work executed after the last paid running bill which is though recorded in measurement book but not paid to the contractor will be consider in the category of work in hand.
3. Any agreedemented works which have not been started due to any reason shall be considered in the category of work in hand.

NOTE: All of these documents must be uploaded online & the same will be digitally signed with the bidder's digital certificate.

12.A focused glance of the note appended to Annexure – III would clearly show that the bidder is required to submit two kinds of certificates, firstly, a certificate of work executed and secondly, a certificate of work in hand submitted by the bidder. Further requirement is that it must be certified by an officer not below the rank of Executive Engineer of the Department of Water Resources.

13.So far as the petitioner is concerned, he has submitted the certificate of work executed by it duly certified by the Executive Engineer which is annexed along with the return submitted by the State as Annexure R-1 running into three pages. Work completed has already been certified by the Executive Engineer of the Department on 1-10-2016 filed along with the return from pages 15 to 17. Thus, the petitioner has fulfilled the first requirement by producing the certificate of work executed by it duly certified by the Executive Engineer.

14.The petitioner has submitted that on the date of submitting tender, it had already undertaken 19 works and those were in his hand, but submitted certificate of only 8 works in hand certified by the Executive Engineer and did not submit the

certificate of Executive Engineer for remaining 11 works in hand, and only submitted running bills attested to be under his own signature and said to be notarised. From the aforesaid facts, it is quite vivid that the petitioner has not complied with clause 3.4 of the Eligibility and Qualification Requirements. Annexure – III is a part of sub-clause (iii) – Bid Capacity of clause 3.1 of the Eligibility and Qualification Requirements.

15. The object and purpose of seeking these documents by the Department, particularly, the certificates of work executed and work in hand is to evaluate the bid capacity of the bidder and thus, it has a particular purpose for which it was sought by the tendering authority and with the said purpose, such a document was required to be submitted to the Department. It is not the case that certificate has been asked for mere formality. If a document has been asked for by the tendering authority especially and particularly with a view to assess and evaluate the bid capacity by the petitioner, it must have been furnished by the bidder. It is an essential condition of notice inviting tender and its non-compliance is fatal.

16. Before proceeding further, it would be appropriate to consider the scope of judicial review in contractual matters. The scope of judicial review in contractual matters that too

in tender matters is very well delineated by the Supreme Court in umpteen number of cases right from **Tata Cellular v. Union of India**² in which Their Lordships of the Supreme Court have held that State should be given some more play in the joints and held as under: - (SCC pp. 675-78, paras 70, 74 & 77)

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. 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.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

(1) Whether a decision-making authority exceeded its powers?

(2) committed an error of law,

2 (1994) 6 SCC 651

(3) committed a breach of the rules of natural justice,

(4) reached a decision which no reasonable tribunal would have reached, or

(5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-maker power and must give effect to it.

(ii) Irrationality, namely *Wednesbury*³ unreasonableness.

(iii) Procedural impropriety.”

17. In a decision in the matter of **Heinz India Private Limited**

and another v. State of Uttar Pradesh and others⁴, Their

Lordships of the Supreme Court have held that the power of

judicial review is neither unqualified nor unlimited. It has its

own limitations and observed as under:

“60. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of “judicial review” one is

3 Associated Provincial Picture Houses Ltd. v Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)

4 (2012) 5 SCC 443

instantly reminded of the classic and oft-quoted passage from *Council of Civil Service Unions v. Minister for the Civil Service*⁵, where Lord Diplock summed up the permissible grounds of judicial review thus: (AC pp. 410 D, F-H and 411 A-B)

"... Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. ...

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. ...

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by

5 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)

the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

18. In a recently pronounced judgment in the matter of **Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others**⁶, Their Lordships of the Supreme Court have reiterated the law laid down in **Tata Cellular** (supra) and also followed the judgment rendered in **Tejas Constructions and Infrastructure (P) Ltd. v. Municipal Council, Sendhwa**⁷ in which **Raunaq International Ltd. v. I.V.R. Construction Ltd.**⁸ was relied upon and it was held as under: -

"In Tejas Constructions and Infrastructure (P) Ltd. v. Municipal Council, Sendhwa, the Court was dealing with the case of challenge to the awarding of contract to the second respondent in the writ petition on the ground that he had not complied with eligibility requirements in NIT. Para 17 of that case reads as follows: (SCC p. 470)

"17. **In Raunaq International Ltd. v. I.V.R. Construction Ltd.** this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the

6 (2015) 13 SCC 233

7 (2012) 6 SCC 464

8 (1999) 1 SCC 492

transaction is mala fide.”

19. In the matter of **G.J. Fernandez v. State of Karnataka and others**⁹, Their Lordships of the Supreme Court have pointed out the distinction between essential and non-essential conditions of eligibility as under: -

“15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general.”

20. Similarly, in the matter of **Poddar Steel Corporation v. Ganesh Engineering Works and others**¹⁰, the Supreme Court following the law laid down in **G.J. Fernandez** (supra) again pointed out the distinction between essential conditions of eligibility and non-essential conditions of eligibility. Relevant paragraph states as under: -

“6. As a matter of general proposition it

9 (1990) 2 SCC 488

10 (1991) 3 SCC 273

cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. 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 complaints of the condition in appropriate cases. This aspect was examined by this Court in *G.J. Fernandez v. State of Karnataka*¹ a case dealing with tenders.”

21. Thereafter, in the matter of **West Bengal State Electricity**

Board v. Patel Engineering Co. Ltd. and others¹¹, the

Supreme Court has held as under: -

“The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State

¹¹ (2001) 2 SCC 451

agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.”

22. Likewise, the Supreme Court following the judgment of **G.J.**

Fernandez (supra) in the matter of **Kanhaiya Lal Agrawal**

v. Union of India¹² held as under: -

“It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in **G.J. Fernandez v. State of Karnataka & Ors.**”

23. In a very recently pronounced judgment in the matter of **Om**

Prakash Sharma v. Ramesh Chand Prashar & Ors.¹³,

Their Lordships reiterated and followed the law laid down in

Poddar Steel Corporation (supra) with approval and

maintained the distinction between the essential conditions

of eligibility and those which are ancillary or subsidiary with

the main object to be achieved.

24. After considering the same, the Supreme Court held in **Om**

12 (2002) 6 SCC 315

13 AIR 2016 SC 2570

Prakash Sharma (supra) that the requirement of annual financial turnover was not an inevitable condition of the contract in the facts and circumstances of the case and was not a mandatory condition which would make the bid liable for rejection.

25. Recently, in the matter of **Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and others**¹⁴, the Supreme Court has held that essential conditions of NIT must be strictly complied with, conditions cannot be relaxed/deviated from and rejection of bid for non-compliance with essential conditions is valid and proper.
26. The principle of law laid down in **Bakshi Security and Personnel Services** (supra) has been followed with approval by the Supreme Court in the matter of **Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium) and others**¹⁵ in which the Supreme Court has considered the scope of judicial review and held that essential term(s) of the tender document should not be deviated from, and ancillary or subsidiary or non-essential terms should be respected and observed as under: -

“46. It is true that in *Poddar Steel*¹⁶ and in

14 (2016) 8 SCC 446

15 (2016) 8 SCC 622

16 *Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273

*Rashmi Metaliks*¹⁷ a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in *Bakshi Security and Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd.* (supra) through a reference made to *Poddar Steel* (supra). In that case, this Court held a particular term of NIT as essential (confirming the view of the employer) and also referred to the “admonition” given in *Jagdish Mandal*¹⁸ followed in *Michigan Rubber (India) Ltd. v. State of Karnataka*¹⁹. Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*²⁰. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.”

27. Thus, Their Lordships of the Supreme Court in afore-cited cases have clearly laid down that non-compliance of essential conditions of tender would make the tender liable for rejection, however, if the condition violated is non-

17 *Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority*, (2013) 10 SCC 95

18 *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517

19 (2012) 8 SCC 216

20 *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489

essential, but is collateral or ancillary, the tender shall be acceptable.

28. In the instant case, submission of documents relating to work in hand by the bidder duly certified by the officer not below the rank of Executive Engineer is an essential condition incorporated in the tender document in order to evaluate and assess the bid capacity of the bidder which the petitioner bidder has failed to fulfill and its non-fulfillment would result in rejection of technical bid.

29. Now, the question is whether the petitioner has suffered disqualification by not producing the requisite documents in terms of clause 3.1 (iii) read with clause 3.4 (Annexure-III) of the Prequalification Document (Envelope - "B"). Clause 6.0 of the said document provides for disqualification, sub-clause (i) of which reads thus,

"6.0 DISQUALIFICATION:

Even though the Tenderers satisfy the above, they are subject to be disqualified if :

i. Made misleading, incorrect, incomplete or false representation in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements."

30. The aforesaid clause clearly states that if incomplete, incorrect documents and attachments are submitted in proof of the qualification requirements, the tenderers will be subjected to disqualification.

31. In our considered opinion, the petitioner has failed to fulfill the requisite documents as required under clause 3.1 of the Prequalification Document (Envelope - "B") by not submitting the certificate of Executive Engineer of the work in hand with it at the time of submitting its bid which was an essential condition of the NIT as also the disqualification is attached for submitting the incomplete documents. Therefore, the respondent authorities are absolutely justified in holding that the petitioner has failed to fulfill the prequalification requirements in order to get itself qualified for participation in the price bid, as such, the respondents are fully justified in declaring the petitioner as technically disqualified. We do not find any infirmity or illegality in the decision-making process, on the other hand, the decision-making process adopted by the respondents is just, fair and consistent with the tender documents.

32. As a fall out and consequence of aforesaid discussion, the writ petition deserves to be and is accordingly dismissed.

Sd/-
(Pritinker Diwaker)
Acting Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge