

HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 2679 of 2016****Reserved on 19.01.2017**
Pronounced on 14.02.2017

1. Vyapak Enterprises S/o Late P.N. Shrivastava Aged About 49 Years A Partnership Firm Duly Registered Under Relevant Provisions Of The Partnership Act,1932, Having Its Registered Office 413, Offizo, Mangeto Mall, G.E. Road, Raipur, Reperesented Through Its Parnter Shri Mukesh Shrivastava, aged about 49 years, r/o B-37, Wallfort Enclave, Behind Ramkrishna Hospital, Pachpedi Naka, Raipur, Chhattisgarh
2. Mukesh Shrivastava S/o Late P.N. Shrivastava Aged About 49 Years Partner-M/s Vyapak Enteriprises, R/o B-37, Wall Fort Enclave, Behind Ramkrishna Hospital, Pachpedi Naka, Raipur, Chhattisgarh

---- Petitioners**Versus**

1. The Municipal Corporation Raipur Through Its Commissioner, New Administrative Building, Gandhi Maidaan, Byron Bazar, Raipur, Chhattisgarh
2. The Commissioner, Municipal Corporation, New Administrative Building, Gandhi Maidaan, Byron Bazar, Raipur, Chhattisgarh
3. M/s AS Advertisers, Gurunanak Chawk, Raipur, Chhattisgarh

---- Respondents

For Petitioners	:	Shri B.P.Sharma, Advocate.
For Respondents No.1 & 2	:	Shri H.B. Agrawal, Senior Advocate with Shri Pankaj Agrawal, Advocates
For Respondent No.3	:	Dr. NK Shukla, Senior Advocate with Ms. Priya Mishra, counsel for respondent No.3

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Sanjay Agrawal, J.**CAV Judgment/Order**

Per Sanjay Agrawal, J.

1. By way of the instant writ petition, the petitioners are questioning the gross illegality committed by the authorities of respondent Municipal Corporation, Raipur, for awarding the work contract to the respondent No.3, M/s. AS Advertisers despite of its failure in complying with the essential terms of the tender document at the time of filing of its submission.
2. Briefly stated the facts of the case are that the respondent Municipal Corporation, Raipur has invited tender in the shape of "Expression of Interest" (EOI) on 16.09.2016 from different advertising agencies/firms for construction of air-conditioned Bus stop at ten different places with A.T.M. facilities and grant of licence to advertise in the said premises. The said tender was issued under certain terms and conditions and one of its conditions, i.e., clause 2.6 stipulates for furnishing of "Bid Security and Performance Security".
3. The main contention of Shri B.P. Sharma, learned counsel appearing on behalf of the petitioner is that the respondent No.3 M/s AS Advertisers, while submitting its tender for the alleged work, has failed completely to comply with the aforesaid essential term for not submitting the 'Performance Security' in the prescribed format required mandatorily to be submitted at the time of filing the tender document and, yet the respondent Municipal Corporation, Raipur has not only opened its financial bid but declared it technically qualified and also declared as successful bidder. In support, Shri Sharma has relied heavily upon the decision of the Supreme Court rendered in the case of ***Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others***, reported in (2016) 8 SCC 622.

4. The respondents have contested the aforesaid contention of the petitioner. The respondent No.3, the successful bidder, while referring to clauses 2.6 and 2.12.2 has denied very specifically that the tenderer was required to furnish the “Performance Security” in addition to the “Bid Security” and, stated further that the said “Performance Security” is required to be furnished only when the tenderer is declared as a successful bidder and that too when it was required by the respondent Municipal Corporation within the prescribed period. Accordingly, it is submitted that the said condition is not the essential one and, thus no infirmity is committed by the respondent Municipal Corporation in awarding it the said work contract, therefore, the petition, as framed and instituted, deserves to be dismissed.
5. The only question which emerges, based upon the aforesaid rival submissions with regard to furnishing of “Performance Security”, which admittedly the respondent No.3 has not submitted at the time of submission of its tender document, is as to “whether furnishing of “Performance Security” as required to be made by way of Bank Guarantee as per formant enclosed as Appendix 'D' under clause 2.6, is a condition precedent by the bidder at the time of submission of the tender document?”
6. In order to ascertain the answer, it is necessary to examine relevant clauses of the tender document, i.e., clauses 2.6 & 2.12.2. They are, therefore, reproduced herein as under :-

“2.6 Bid Security and Performance Security

- 2.8.1 The Proposal needs to be accompanied by bid security. The Bid Security shall be kept valid throughout the Proposal Validity Period and would need to be extended, if so required by MUNICIPAL CORPORATION RAIPUR, (C.G.), for any extension in Proposal Validity period.

The Bid Security should be of Rs. 5 Lakh and shall be in form of FDR/D.D. in favour of **Commissioner Municipal Corporation Raipur** and Performance security of Rs. 20 Lakh by way of bank Guarantee as per formant enclosed as Appendix D

2.8.2 The Bid Security shall be returned to the unsuccessful Bidders within a period of two (2) weeks from the date of announcement of the Successful Bidder.

2.8.3 **The Bid Security shall stand forfeited in the following cases:**

- a. If any bidder withdraws his bid before the expiry of the validity period or before the issue of letter of acceptance, whichever is earlier, or makes any modification in the terms and conditions of the bid which are not acceptable to the department, then the MUNICIPAL CORPORATION RAIPUR, (C.G.) shall, without prejudice to any other right or remedy, be at liberty to forfeit 50% of the bid security absolutely. This provision would naturally apply only to the lowest bidder once the bid security of all the bidders except those of the lowest is refunded as per provisions :
- b. If bidder fails to furnish the prescribed performance security within the prescribed period the bid security is absolutely forfeited to the MUNICIPAL CORPORATION RAIPUR, (C.G) ***automatically without any notice.***
- c. In case the bidder fails to commence the work specified in the bid documents on the 15th day or such time period as mentioned in letter of award, after the date on which the Engineer-in-charge issued written orders to commence the work or from the date of handing over of the site, whichever is later, the MUNICIPAL CORPORATION RAIPUR (C.G) shall without prejudice to any other right or remedy, be at liberty to forfeit whole of the bid security absolutely.
- d. If only a part of the work as shown in the bid is awarded, and the bidder does not commence the work, the amount of the bid security to be forfeited to the MUNICIPAL CORPORATION RAIPUR (C.G) should be worked out with reference to the estimated cost of the work so awarded.
- e. In case of forfeiture of bid security as prescribed in a to d above, the bidder shall not be allowed to participate in the rebidding process of the work.”

2.12.2 Each envelope shall clearly bear the following identification

**“EOI for AIR-CONDITIONED Bus Queue Shelters WITH
ATM to be installed in lieu of Advertisement Rights”**

And shall contain:

Part I Submission: Technical Bid in separate envelope – in hard copy

- a. DESIGN AND DRAWING OF AIR CONDITIONED BUS SHELTER ALSO SHOWING DETAILS OF ADVERTISEMENT
- b. Bid security in the form of FDR/D.D. in favour of Commissioner Municipal Corporation Raipur
- c. Documents pertaining to the eligibility criteria
- d. All the documents as per EOI

Part II Submission: Financial Bid

- a. In a separate sealed envelope, Financial Bid as per the format enclosed as **Appendix F & F1.**

7. Since the “Performance Security” by way of Bank Guarantee is required to be furnished as per formant enclosed as “Appendix D”, therefore, the relevant portion of “Appendix D”, i.e., 'clause – B' of it is also reproduced herein as under :-

“B. In terms of Clause 2.10 of the EOI Document dated _____ issued in respect of the Project the Bidder is required to furnish to MUNICIPAL CORPORATION RAIPUR, (C.G.) an unconditional and irrevocable Bank Guarantee of Rs.20 Lacks as Bid Security for the Project.”

8. Now, if we examine the aforesaid terms and conditions strictly in its right perspective, then clause 2.8.1 would reveal that the “Bid Security” is required to be accompanied with a “Proposal” and that (“Bid Security”) has to be kept valid throughout the “Proposal Validity Period” and would be extended, if so required by the Municipal Corporation, Raipur for any extension in “Proposal Validity” period. It provides further that the “Bid Security” has to be paid in form of FDR/DD, while the “Performance Security”, which is introduced subsequent part of this clause, though not required to be accompanied with a “Proposal” like a “Bid Security”, has to be in the form of Bank Guarantee as per formant enclosed as “Appendix D”.

9. Clause 2.8.2 is not relevant for the purpose, therefore, we are skipping over the same. However, clause 2.8.3 provides for forfeiture of “Bid Security” which required mandatorily to be accompanied with a “Proposal”, as described and found earlier shall be forfeited in contingencies, if arises, as enumerated in sub-clauses 'a' to 'd' thereof.
- 9.1 Sub-clause (a) of clause 2.8.3 provides that 50% of the “Bid Security” shall be forfeited absolutely, if any bidder withdraws his bid before the expiry of the validity period or before the issuance of letter of acceptance, whichever is earlier. Pertinently to be observed here that the “validity period” would mean the 'validity period of the Proposal' as contained in clause 2.8.1 and which needs to be accompanied by the “Bid Security” only.
- 9.2 Sub-clause (b) of clause 2.8.3. provides that the “Bid Security” shall be forfeited absolutely by the Municipal Corporation Raipur automatically even without any notice being issued, if the bidder fails to furnish the prescribed “Performance Security” within the prescribed period as required by the Municipal Corporation, Raipur. Pertinently to be mentioned here that although no time period is prescribed for furnishing “Performance Security”, but a careful reading of this clause would, however, reveal that the requirement of furnishing “Performance Security”, would arise only after the acceptance of the bid, otherwise 50% forfeiture of “Bid Security” as provided in the aforesaid sub-clause (a) would not have been made. The only conclusion, as we gathered from combined reading of sub-clauses (a) and (b), would be that the requirement of furnishing “Performance Security” would come into play only as per the time period prescribed by the Municipal Corporation Raipur and, certainly that would be required only upon the acceptance of the Bid.

- 9.3 Like wise, as per sub-clause (c), and unlike to sub-clause (b), the entire “Bid Security” shall be forfeited absolutely in case the bidder fails to commence the work specified in the bid documents on the 15th day or such time period as mentioned in letter of award, after the date on which the Engineer-in-Chief, issued written orders to commence the work or from the date of handing over the site, whichever is later.
- 9.4 Similarly, as per condition provided in sub-clause (d), the amount of the “Bid Security” would require to be forfeited, if the bidder fails to commence the work.
10. Further examination of clause 2.12.2 and sub-clauses 'a' to 'd' of Part – 1 thereof would also reveal that the Technical Bid would require to be furnished in separate envelope (in hard copy) and that on its close scrutiny, particularly sub-clause (b) of it, provides that the requirement is only for the submission of the “Bid Security” in the form of FDR/DD in the name of Municipal Corporation, Raipur. It, however, nowhere provides for submission of the “Performance Security”.
11. A close scrutiny of the aforesaid terms and conditions as stipulated in clauses 2.8.1. and 2.8.3, coupled with clause 2.12.2., would lead to an irresistible conclusion that furnishing of the “Performance Security” as required to be made by way of Bank Guarantee as per format enclosed as Appendix 'D', is not the condition precedent to be made at the time of submission of tender document by any of the bidders.
12. The dictum laid down in **Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium) and others** (supra) is, however, based upon altogether on a different terms and conditions stipulated in the bid documents, and therefore, distinguishable from

the facts involved in the instant matter. That is the case where earnest money was not only required to be made by way of furnishing a Bank Guarantee in a specific format but was also required to be accompanied with a bid documents. Further examination of the facts of the said case-law would reveal very specifically that one of the bidders, namely, JVC had, although furnished the Bank Guarantee, but on a different mode of format prescribed in the bid documents and with that factual scenario, the question which was considered by the Supreme Court was whether furnishing of a Bank Guarantee in the specific format prescribed in the bid documents was an essential condition or not? Having considered this aspect of the matter, it was held that furnishing of a Bank Guarantee in a specific format was not only essentially required but was also required to be accompanied with a bid documents.

13. However, in the instant matter, what is significant as visualised from the close scrutiny of clause 2.8.1 of clause 2.6, vis-a-vis clause 2.12.2 is that the "Bid Security" alone is required to be accompanied with "Proposal" and not the "Performance Security". Therefore, furnishing of "Bid Security" with "Proposal" is only a condition precedent for submission of the tender document by the bidders and not the "Performance Security" as contended by the learned counsel for the petitioner. Therefore, the case-law (supra) cited by him is clearly distinguishable from the facts involved in the present matter.
14. Consequently, we hold that furnishing of the "Performance Security" as required to be made by way of Bank Guarantee as per format enclosed as Appendix 'D' is not the essential condition of the tender documents at the time of its filing by any of the bidders.

15. Resultantly, the petition, being devoid of merit, is accordingly dismissed. There shall be no order as to costs.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(Sanjay Agrawal)
JUDGE