

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (C) NO. 2995 OF 2016

R.K. Transport & Constructions Pvt. Ltd., Reg. No. 015609, through its Director Mr. Amar Agrawal, S/o Satyanarayan Singhal, aged about 48 years, having its Head Office at 65-A, Transport Nagar, Korba – 495677 (C.G.)

... Petitioner

Versus

1. State of Chhattisgarh, Water Resources Department, through the Engineer-in-Chief, Sihawa Bhawan, Civil Lines, Raipur.
2. Chief Engineer, Hasdeo Basin, Water Resources Department, Bilaspur (C.G.)
3. Executive Engineer, Water Resources Division, Raigarh (C.G.)
4. Superintending Engineer, Water Resources, Circle Raigarh (C.G.)
5. Sunil Kumar Agrawal, Chandni Chowk, Raigarh (C.G.)

... Respondents

For Petitioner	:	Mr. B.P. Sharma, Advocate, assisted by Mr. Rishabh Garg, Advocate.
For Respondents 1 to 4	:	Mr. Praful Bharat, Addl. Advocate General.
For Respondents 5	:	Mr. R.R. Sinha, Advocate.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order on Board

Per **Thottathil B. Radhakrishnan, C.J.**

15/05/2017

1. We have heard learned Counsel for the Petitioner and learned Additional Advocate General as well as learned Counsel for the contesting Respondent 5 in this writ petition whereby the exclusion of the Petitioner from competition in the award of a Government contract is questioned fundamentally on the premise that a particular clause prescribing qualification is palpable, perverse and therefore arbitrary.

2. Learned Counsel for the Petitioner made reference to Annexure-I to the information and instructions for tenderers. Clause 1.3 thereof deals with bid capacity. It provides a formula under which the bid capacity is assessed by multiplying $1.5 \times A \times B - C$ and if that resultant quantum is greater than or equal to the bid amount, the bidder is treated as having a bid capacity. For the purpose of this formula, A, B and C are defined in that

clause. We are concerned only with the interpretation of the prescriptions of B and C. Clause 1.3 to the extent it is relevant reads as follows :

- “B - Prescribed completion period in years.
- C - Amount of balance works in hand with tenderer at the time of receipt of tender.”

'B' prescribes completion period in years. 'C' prescribes the amount of balance works in hand with tenderer at the time of receipt of tender.

3. The arguments advanced on behalf of the Petitioner is that the authorities have evaluated the amount of balance works on the premise that works which have been done, measured, quantified, bill prepared; but not paid; would stand excluded from works which are completed as well as works which are in hand of the tenderer. Such exclusion is treated as resulting in hostile discrimination and therefore arbitrary; inasmuch as such prescription, according to the Petitioner, is wholly unreasonable when the other works on the basis of which the quantifications have to be made are done for the Government. To buttress the stand of the Petitioner, along with the aforesaid submission, learned Counsel for the Petitioner drew our attention also to a document which is a part of Annexure P-9 which tends to show that cases where work is completed, measured and measurement accepted by the contractor will be treated as works which are completed though payment has not been made by the Government and such non-payment is not attributable to the contractor.

4. Learned Additional Advocate General relying on the material documents argued that in any view of the matter the Petitioner is not qualified and therefore the exclusion or inclusion on the basis of the formula by which the bid capacity is to be assessed may not be decisive with the case in hand. He pointed out Part-2 of the pre-qualification document (Envelope-B)- information and instructions, to show that in Clause 3.1(i) thereof the tenderer ought to have done the Gate Work for 80.54 metric tonne. Reverting to the certificate issued from the office of the Engineer-in-Chief, dated 1.10.2016, learned Additional Advocate General

points out that the Petitioner has no case that any quantity towards the Gate Work was ever done by him. Reference is also made to different certificates regarding work in hand and other details which would show that there is no material on record to evidence that the Petitioner had done Gate Work.

5. Faced with aforesaid argument of the learned Additional Advocate General, the learned Counsel for the Petitioner made reference to a certificate which is at Page 55 of the Paper-book as part of Annexure P-3. He pleaded that Gate Work is essentially in Column 7 of that certificate and there is an error in the said certificate to the extent that, according to him, a single row of column has been sliced into 3 by two unnecessary horizontal lines. Learned Counsel for the Petitioner, to corroborate this submission, referred to what is produced along with covering memo dated 15.5.2017 as the corrected version of that certificate.

6. We made a competitive evaluation of what is available at Page 55 of the Paper-book and the so called corrected version of that certificate. While column 7 of the certificate at Page 55 shows that the Petitioner had done, among other things, the work of design and drawing to the extent of 154.16 Lakh and had also procurement of supply of material with fabrication and erection to the gross tune of 1871.94 metric tonne for an amount of Rs. 3115.29 Lakh, there is foot-note to the document at Page 55. It reads that entry as Item 7 was got executed by the Petitioner by CSIDC rate contract agency Ms. Jain Engineering Works, Indore, as per the agreement clause 4.1 of agreement and as per the certificate referred to in that note. Adverting immediately to the certificate produced along with covering memo dated 15.5.2017 it can be seen that there is no such note at the foot of the said document. However, it is shown that Executive Engineer, Water Resources Department, Janjgir-Champa, who is shown to have signed the said document produced along with covering memo dated

15.5.2017 had gone to the extent of saying that the contractor (Petitioner) had executed the said work satisfactorily and its financial capacity is very sound. We do not want to say much about the 'very sound' financial capacity of the Petitioner as expounded by Department Engineer, having regard to the inexcusable inferences that we would have drawn had we be dealing with the trial or appellate jurisdiction relating to different other matters in the realm of contracts including issuance of documents by officers in authority. We make this very cautious statement in this Writ Petition because we find that the document produced along with the covering memo dated 15.5.2017 is made as an unnumbered, undated printout and it is given a particular reference number by entering a number in ink using a pen and thereafter it is dated 6.10.2016, the date on which the document at Page 55 of the Paper-book is also issued. While the document at Page 55 is also dated in ink and not in the print version, the place of issuance of that document is shown as Champa in print whereas even the place of issue of the document produced along with the covering memo dated 15.5.2017 has been entered in pen. Common course of human conduct read along with the presumption available to regularity or propriety of official acts taken together in this land ridden with corruption of inexcusable nature at least at times, prompt us to infer that this is a case where writ jurisdiction should dissuade itself from acting upon the documents which are produced by the Petitioner along with covering memo dated 15.5.2017 or to make any conclusive decision based on document produced at Page 55 of the Paper-book. We leave that matter here.

7. Adverting to the factors which can be seen on the basis of the materials, as rightly pointed out by the learned Additional Advocate General, there is no material to hold that the Petitioner had done any work in the Gate Work category which appears to have been a major condition

requiring an offeror to be one who had done a minimum performance of 80.54 metric tonne turnover in Gate Work. On this short issue, we are of the view that the Petitioner is not entitled to challenge his exclusion from the financial bid.

8. The aforesaid position notwithstanding, the case in hand clearly shows that the Petitioner had submitted his tender fully knowing the conditions of the invitation and had also filed this Writ Petition only after the financial bid was opened. It is a case of participating in the competitive tender process and thereafter turning round to levy a challenge only when he found his offer to be unacceptable to the Government. For this ground as well, this Writ Petition is patently misplaced.

9. For the aforesaid reasons, this Writ Petition fails.

10. In the result, this Writ Petition is dismissed.

Sd/-
(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge