

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-COM No.3 of 2017 (O&M)

Date of Decision: 18.04.2017

M/s Girdhari Lal Constructions

....Petitioner

Vs.

Union of India and others

....Respondents

CORAM: HON'BLE MR.JUSTICE R.K. JAIN

Present: Mr.Akshay Bhan, Sr. Advocate, with
Mr.Amandeep Talwar, Advocate,
for the petitioner.

Mr.Chetan Mittal, Sr. Advocate, with
Mr.Parminder Singh Kanwar, Advocate,
for respondents No.1 to 3.

Mr.Anand Chibbar, Sr. Advocate, with
Mr.B.S. Patwalia, Advocate,
for respondent No.4.

RAKESH KUMAR JAIN, J. (ORAL)

The petitioner has challenged the validity of the letter dated 29.12.2016 by which the petitioner has been found ineligible and disqualified for opening of technical bids.

In short, respondent No.3 published a Notice Inviting Tender (NIT) along with its terms and conditions for the allotment of construction of various buildings under Phase 1-B for IIT Ropar. The petitioner also applied pursuant to the NIT and in that process uploaded various documents including Form 'C' appended with the NIT in which column No.11 required the information to be furnished by the petitioner as to whether it has ever worked on back to back basis? The petitioner instead of filling column

No.11 in the manner as prescribed, allegedly changed the format of column No.11 as 'remarks' and uploaded the information that *"work completed in time"*. This became the bone of contention and vide the impugned order dated 29.12.2016, the petitioner was found ineligible with the observation that *"M/s Girdhari Lal Construction Pvt. Ltd. is not found eligible as per provision of para 1.2 of Section-II at page 32 of NIT because the Form 'C' has been changed by modifying the column 11 to hide the factum of carrying out work on back to back basis and the paragraph 4 of letter of transmittal also provides disqualification because of incorrect information given in the forms."*

The case set up by the petitioner is that it had not concealed any information of having worked on back to back basis in the past as the petitioner has relied upon a certificate on behalf of DG MAP issued on 01.07.2014 in which it is mentioned that *"This is to certify that M/s Girdhari Lal Constructions Pvt. Ltd. (enlisted with E-in-C's Branch vide Index No.SS-9) has executed the work for CA No:DGMAP/Phase-II/Pkg-05/AF/01 of 2010-2011 for Construction of Dwelling Units Includeing AllitedServices For Offrs. WO's, Airmen at Delhi (AF), Gurgaon (AF) & Hindon (AF), costing Rs.299.24 Cores (aprox), subletted on back to back basis by M/s Unity Intra Projects Ltd. On the basis of successful satisfactory completing of the work, M/s Girdhari Lal Constructions Pvt. Ltd. have secured a work of Rs.361.83 crore for Army Delhi (west) with out department. The work has recently been commenced by the contractor with dates of commencement & competition as 27 May 2014 and 26 Aug 2016 respectively. This department does not have any objection if M/s Girdhari Lal Constructions Pvt. Ltd. do qualify in other departments on the basis of completion of above motioned work"*.

The case set up by the petitioner and argued before this Court is that though nothing has been concealed by the petitioner in the NIT about having worked on back to back basis but in any case if Column No.11 of Form 'C' has been wrongly filled in, it was only an inadvertent error and not a deliberate act of commission.

On the other hand, learned counsel for the UOI has submitted that in the information and instructions for eligibility criteria provided in the NIT in Clause 1.2, it was specifically mentioned that if tenderer would not give complete information called for in the application form or would not give it in clear terms or making any change in the prescribed form then the bid given by the said tenderer shall be summarily disqualified. Clause 1.2 of the NIT, relied upon by the counsel for UOI, is reproduced as under: -

“All information called for in the enclosed forms should be furnished against the relevant columns in the forms. If for any reason, information is furnished on a separate sheet, this fact should be mentioned against the relevant column. Even if no information is to be provided in a column, a “nil” or “no such case” entry should be made in that column. If any particulars / query is not applicable in case of the tenderer, it should be stated as “not applicable”. The tenderers are cautioned that not giving complete information called for in the application forms or not giving it in clear terms or making any change in the prescribed forms may result in the bid being summarily disqualified. Tenders made by telegram or telex and those received late will not be entertained.”

It is also submitted that Clause 10 of the NIT provides for ‘experience in works highlighting experience in similar works’ in which Clause 10.1 deals with Form ‘C’ which read as under: -

“10.1 Bidder should furnish the following: -

(a) List of eligible similar nature of works successful completed during the last seven years in (Form “C”).

(b) Performance report of works referred to in form “C” --- In form “D”. ”

He has drawn the attention of the Court to Form ‘C’ which is also required to be referred to herein for the ready reference and is reproduced as under: -

“Form ‘C’

Details of eligible similar nature of works completed during the last seven years ending previous day of last date of submission of tenders

<i>Sr. No.</i>	<i>Name of work/project and location</i>	<i>Owner or sponsoring organization</i>	<i>Cost of work in crores of rupees</i>	<i>Date of commencement as per contract</i>	<i>Stipulated date of completion</i>	<i>Actual date of completion</i>	<i>Whether EOT case decided – Yes/No, if yes with or without levy of compensation</i>	<i>Litigation/arbitration cases pending/in progress with details*</i>	<i>Name and address/telephone number of officer to whom reference may be made</i>	<i>Whether the work was done on back to back basis –Yes/No</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>	<i>9</i>	<i>10</i>	<i>11</i>

Indicate gross amount claimed and amount awarded by the Arbitrator.

Signature of Tenderer(s)”

He has also referred to Form ‘C’, which is submitted by the petitioner and is reproduced as under: -

Details of All Works of Similar Class Completed during the last five years										
Sr. No.	Name of work/ project and location	Owner or sponsoring organization	Cost of work in Crores of rupees	Configuration/ No. of storyes	Date of commen cement as per contract	Stipulated date of completio n	Actual date of completion	Litigation/ arbitration case pending/in progress with detail#	Name and address, Tel. No. of officer to whom reference may be made	Remarks
1	2	3	4	5	6	7	8	9	10	11
	Construction of Dwelling Units included Allied Services for Officers, WOs, Airmen at Delhi (AF), Gurgaon (AF) & Hindon (AF) (Part-I)	Unity/DG MAP	332.78	11 storeys	2-7-2010	30.4.2014	26.03.2014	No Arbitration	Die, Gen MD, Accn. Project E-in-C’ Br. Integrated HQ, of MOD (Army) Kashmir House Rajaji Marg New Delhi-11 Ph.011-23018459	Work Completed in time

According to the learned counsel for the respondents, the petitioner has changed the entire format of Form ‘C’ and has highlighted the following changes: -

- (i) The details were to be given by the tenderer for the work completed during the last seven years which has been changed by the petitioner to last five years.
- (ii) Column No.5 has been totally changed because in original Form ‘C’ the heading is “Date of commencement as per contract’ whereas in Form ‘C’ submitted by the petitioner the heading of column No.5 is “configuration/No. of storyes” which is not even a condition in the original Form ‘C’. Otherwise, the condition of Column No.5 of the Original Form ‘C’ has been mentioned by the petitioner in Column No.6 in the Form ‘C’ submitted by it.

- (iii) Column No.8 provides in the original Form 'C' was "whether EOT case decided - Yes/No, if yes with or without levy of compensation. This column has been totally omitted by the petitioner in the Form 'C' submitted by it rather Column No.8 has been changed to "actual date of completion".
- (iv) The last Column No.11 of the Original Form 'C' provides information to be submitted by the petitioner as to whether the work was done on back to back basis – yes/No, which has been changed by the petitioner to 'remarks'.

Learned counsel for the respondents has thus submitted that the petitioner has not committed an inadvertent mistake in filling Form 'C' rather it has changed on its own the entire format of Form 'C' which cannot be permitted and in this regard he has relied upon the judgments of the Supreme Court rendered in the case of ***"Bakshi Security and Personnel Services Pvt. Ltd. Vs. Devkishan Computed Pvt. and others"*** 2016(6) Recent Apex Judgments (RAJ) 67 and ***"W.B. Electricity Board Vs. Patel Engineering Co. Ltd. and others"*** 2001 AIR (SC) 682.

Learned counsel for the respondents has also submitted that in the letter dated 7.10.2016 the petitioner was asked to furnish the details of the work mentioned at 1a of the said letter, alleged to have been executed on back to back basis for M/s Unity Infra Projects Limited. The petitioner was also asked to submit the certified page of agreement between M/s Unity Infra Projects Limited and DG MAP containing provision of execution of work on back to back basis and the permission of DG MAP for subletting

the work to M/s Girdhari Lal Constructions Pvt. Ltd. along with the clarification. This was done on the basis of Clause 21 of the General Conditions of Contracts 2008 wherein it is mentioned that the Contract is liable to be cancelled if the contractor assigns, transfers, sub-lets or attempts to assign, transfer or sub-let, any portion of the works without the prior written approval of the Accepting Officer.

Learned counsel for the respondents has submitted that the petitioner was required to lead evidence by way of agreement between the company who had sublet the work of the petitioner on its behalf for the completion, which is called for work on back to back basis. The said permission has to be obtained prior in time by the company, who had sublet the work to the petitioner but nothing has been brought on record by the petitioner that there was an agreement between M/s Unity Intra Projects Ltd. for executing the work on back to back basis with the prior permission of the DG MAP.

Learned counsel for the petitioner, however, submits that the permission has been taken by the petitioner and in that regard his sole reference is on the letter dated 1.7.2014 purported to have been written on behalf of DG MAP in which it is mentioned that the “department does not have any objection if M/s Girdhari Lal Constructions Pvt. Ltd. do qualify in other departments on the basis of completion of above mentioned work”. It is also submitted by him that the respondents have now projected a new case before this Court about the change of format of Form ‘C’ otherwise the only objection raised by the respondents, while rejecting the eligibility of the petitioner, was of concealment of carrying out the work done on back to back basis with other firm which is stated to have been clarified by the

petitioner vide its letter dated 14.10.2016 in response to the letter dated 7.10.2016.

In this regard, learned counsel for the respondents has submitted that the letter dated 1.7.2014 could not have been issued on behalf of DG MAP specially when there was a ban imposed upon the petitioner by non other than DG MAP itself till 01.01.2015 for issuance of any tender. In this regard he has referred to the letter dated 3.7.2014 (Annexure R-4/4).

I have heard learned counsel for the parties and perused the record with their able assistance.

The issue involved in this case is as to whether the petitioner has been rightly held ineligible and disqualified for the opening of the technical bid on account of hiding the fact in Column No.11 of Form 'C'? The other issues which has also arisen, during the course of hearing, is as to whether the petitioner has rightly been disqualified and whether the petitioner had any jurisdiction or competence to change the format of Form 'C' appended with the NIT?

Both the questions are inter-linked, therefore, I would decide them together.

The controversy is in a narrow compass because the impugned order only talks of concealment of fact on the part of the petitioner in filling of Form 'C', which is the part of the NIT. It is specifically mentioned in Column No.11 that as to whether the tenderer has worked on back to back basis for which the tenderer has to say 'Yes' or 'No'. However, the petitioner did not say that it has worked on back to back basis for another company namely M/s Unity Infra Projects Limited rather it had changed Column No.11 from "*whether the work was done on back to back basis –*

time, which was not the requirement of Form 'C' that as to whether the petitioner worked in time or not rather the requirement was that whether the petitioner worked on back to back basis i.e. whether it had worked for other company for the completion of its work. Thus, the information supplied by the petitioner cannot be held to be innocent or inadvertent rather it was an act of deliberate concealment of fact from the respondents otherwise had it been an innocent or unintentional omission on its part it would not have changed the question of Column No.11 of Form 'C' posed to the petitioner. The petitioner apparently was not interested in disclosing to the respondents that it had ever worked on back to back basis for any other firm/company. In this regard, the Supreme Court in the case of **Bakshi Security and Personnel Services Pvt. Ltd. (Supra)** has held as under:

“13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is

not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.

14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddled the waters and rendered the price

quoted by the bidder as variable and not fixed.”

Similarly in the case of **W.B. Electricity Board (Supra)**, the Supreme Court has held as under: -

“24. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as a repetitive systematic computer typographical transmission failure. It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos.1 to 4 to correct the same before submission of the bid. Had they been vigil in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of Clauses 24.1, 24.3 and 29.1 of ITB.’

25. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. 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 fulfil 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 doubts 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 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.

26. For all these reason, in such a highly competitive bid of global tender, the

appellant was justified in not permitting respondent Nos. 1 to 4 to correct the errors of the nature and the magnitude which, if permitted, will give a different complexion to the bid. The High Court erred in directing the appellant to permit respondent Nos.1 to 4 to correct the errors in the bid documents.

29. In the instant case, we have also noted that the mistakes in the bid documents of respondent Nos.1 to 4 even though caused on account of faulty functioning of computer, could have been discovered and notified by the said respondents with exercise of ordinary care and diligence. Here, the mistakes remained in the documents due to gross negligence in not checking the same before the submission of bid. Further Clauses 24 and 27 of ITB permit modification or withdrawal of bids after bid submission but before the dead line for submissions of the bids and not thereafter. And equity follows the law. Having submitted the bid they did not promptly act in discovering the errors and informing the same to the appellant. Though letters were written on October 25, 1999, and December 17, 1999, yet the real nature of errors/mistakes and corrections sought were not pointed out till December 23, 1999 when representation was made after interim direction of the High Court was given on December 21, 1999. Indeed it appears to us that they improved their claim in the representation. In our view the said respondents are not entitled to rectification

of mistakes/error for being considered along with the other bidders.

35. For the reasons abovementioned, though the impugned order of the High Court insofar as it relates to quashing of letter of the appellant dated December 18, 1999, falls within the purview of judicial review, yet the direction to the appellant to permit correction of errors by respondents 1 to 4 in their bid documents and consider their bid along with other bid, goes far beyond the scope of judicial review, as elucidated by this Court in Tata Cellular (supra). In the result, we uphold the impugned order of the Division Bench insofar as it relates to quashing of communication and letter dated December 18, 1999 and set aside that part of the impugned order giving direction to the appellant to permit respondent Nos.1 to 4 to correct bid documents and to consider their bid after correction along with other bids. The appeal is thus allowed in part. On the facts and in the circumstances of this case we leave the parties to bear their own costs.”

Thus in view of the aforesaid facts and circumstances, I would hold that there was a deliberate attempt on the part of the petitioner in concealing the fact of having worked for another company on back to back basis in the past seven years.

Now, the question would be that if the petitioner has concealed this fact in Form ‘C’ at Column No.11 deliberately then what should be the consequences?

The consequences are not far fetched to reach as it is provided in the Clause 1.2 of Section II of the NIT that the tenderer would be disqualified in case it would not give complete information, called for in the application form or it would not give in clear term or make a change in the prescribe Form. The petitioner is not only guilty of not giving the information as called for but also guilty of changing the prescribed Form as has been observed herein above, therefore, the petitioner is guilty of *suppressio veri suggestio falsi*. Thus, the petitioner had no competence much less any right to have tampered with the Form appended with the NIT that too in the manner it has been done. The petitioner has changed the entire Form as it suited to it throwing the NIT to the winds which is the basis for the purpose of entering into an agreement between the parties. No other point has been raised.

In view of the aforesaid, I do not find any merit in the present petition and the same is hereby dismissed.

18.04.2017

Vivek

(RAKESH KUMAR JAIN)
JUDGE

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*