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HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 2343 of 2016**

- NF Forgings Pvt. Ltd. Havind Registered Office And Works At Sankrail Industrial Park, N H 6 (Bombay Road) Dhulagarh, Howrah - 711302, West Bengal, Through Its Authorized Signatory, Shri Shantanu Bhattacharjee S/o Lt. Gobinda Das Bhattacharjee, Aged About 50 Years, Working As Deputy General Manager Of The Petitioner - Company, Resident Of 158/1, Kali Charan Ghosh Road, Kolkata - 700050, West Bengal,

---- Petitioner**Versus**

1. Senior Divisional Mechanical Engineer (C&W) South East Central Railway, Raipur Chhattisgarh Pin Code 492001
2. Chief Mechanical Engineer, South East Central Railway, Bilaspur Chhattisgarh Pin Code 495001
3. Chief Rolling Stock Engineer South East Central Railway, Bilaspur Chhattisgarh Pin Code 495001
4. M/s. O S C O R P Industries Pvt. Ltd., Balitikuri, Surkimill, Howrah 711113 West Bengal

---- Respondent

For Petitioner	Mr. Prafull Bharat and Mr. AK Prasad, Advocates
For Respondent/Railways	Mr. Abhishek Sinha, Advocate
For Respondent No.4	Mr. Arvind Shrivastava, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice**Hon'ble Shri Justice Prashant Kumar Mishra****Per, Ajay Kumar Tripathi, Chief Justice****2/8/2018**

1. Heard.
2. Petitioner was one of the tenderers, who participated in the

Tender issued by the respondent -Railway authorities for upgradation and rehabilitation of BOXN Wagons. Since his technical bid had been rejected by the Railways, therefore, he rushed to the Court by filing this writ petition seeking quashment of Annexure P/1 dated 2.9.2016. This was a communication to the petitioner that their technical bid has not been found fit and therefore, the price bid made by them should be collected. The writ petition was filed on 13.9.2016. While the writ petition was under consideration, one M/s. OSCORP Industries Private Limited, whose tender was found to be in order in every respect, was awarded LOA on 19.9.2016. This information was given to the Court by the Counsel for the Railways on 29.11.2016 and a direction was given to the petitioner to implead M/s. OSCORP Industries Private Limited as a respondent and the Court passed an order not to proceed with the tender in favour of M/s. OSCORP Industries Private Limited. The writ petition, thereafter, had been adjourned on many grounds but finally it is taken up for final disposal as agreed between the parties.

3. A brief background behind the present dispute is that earlier on 22.8.2013, a Notice Inviting Tender for upgradation and rehabilitation of 350 BOXN Wagons were issued. It is the case of the present petitioner that in the said tender, he was a participant and his technical bid was accepted. However, since he was found to be L-2, the contract was awarded to M/s. Commercial Engineering & Body Building Co. Ltd. That award of tender was an utter failure because only 16 Wagons could be upgraded and rehabilitated by the said firm despite extension of time. In this background, the Railways were compelled to issue a new NIT on 2.5.2016 after the previous contract was terminated. This time the upgradation and rehabilitation of

wagons was limited to 334 only. The technical bid of the various bidders was opened by the Tender Committee and a comparative evaluation was done with regard to the nature of work as well as the value of work of all the parties. The exercise so done by the Tender Committee has been brought on record by the Railways in their return and the relevant document is Annexure R/2. The minutes of the Tender Committee Meeting on the technical bid, which was held on 30th of August 2016 is at page 19 of the return of the Railways.

4. The Court is tempted to reproduce herein the relevant portion of the Minutes because they will have relevance to the issue raised in the writ petition, as much arguments have also been made on the comments and evaluation and the grounds, which have been provided by the Tender Committee :

“Minutes of Tender Committee meeting (Technical Bid) held on 30.08.2016 for the Tender of “Upgradation and Rehabilitation of BOXN wagons.”

1. General Information:

1	Members Present	1. Sri Jyotindra Digi : CRSE/SECR/BSP 2. Sri L. S. Meena : FA & CAO (F&B) SECR/BSP 3. Sri Vinod Kumar : CE/P& D/SECR/BSP
2	Tender Notice No.	M/R/Plg./RE/350 BOXNR/16-17/RTN/403 dated 02.05.2016 (F-151-155)
3	Name of the work	Upgradation and Rehabilitation of BOXN wagons (F-154)
4	Quantity	334 wagons (F-154)
5	Estimated Tender Value	Rs.30,26,21,368/ (Rupees Thirty Crore Twenty Six Lakh Twenty One Thousand Three Hundred Sixty

		Eight) (F-154)
6	Availability of Fund	Sanctioned Bulk RSP vide PB item No.842 (2016-17) and fund allotted Rs.153,39,54 thousands for 10000 Wagons (F-6)
7	Sanction of Detailed estimate	CME/SECR/BSP's sanction vide 2013/109/010/023/A/Rev D-Est/Rehab/BOX-BOXNR Date 01.07.2013 (F-36). This is a case of Retender, which was terminated by HQ vide letter No.Yantrik/Mukhyalay/010/023/A/BOXNR/R/350/CE BBCO/4175 Dated 12.08.2015 (F-1)
8	Earnest Money	Rs.16,63,110/- (Rupees sixteen lakh sixty three thousand one hundred ten only. (F-154)
9	Date of publication of tender notice in various newspapers	Copy of the newspaper cutting placed at F/159-168 1. Lokmat, Nagpur - 04.05.2016 (F-159) 2. Patrika, Bilaspur – 04.05.2016 (F-160) 3. Samvet Sikhar, Raipur – 04.05.2016 (F-161) 4. Haribhoomi, Raipur – 04.05.2016 (F-162) 5. Hitvada, Raipur – 04.05.2016 (F-163) 6. The Hindu, Chennai – 04.05.2016 (F-165) 7. ABP, Kolkata – 04.05.2016 (F-166) 8. Hindustan Times, New Delhi – 4.5.2016 (F-167) 9. Times of India, Mumbai – 04.05.2016 (F-168)
10	Tender Notice uploaded in SECR website	On 02.05.2016 (F-158)
11	Date of Tender opening	Sr.DME/R's office at 15:30 Hrs on 07.06.2016 & CME/SECR/BSP at 15:30 on 07.06.2016 (F-153).
12	Interval between date of publication of tender notice in News papers and date of tender opening	35 days (From 02.05.2016 to 07.06.2016)
13	No. of tender forms sold	Nil (F-223, 226)

14	No. of offers received in time	Four (04) (03 at Raipur and 01 at BSP) in time (F-222,225)
15	No. of delayed offers received	Nil
16	No. of late offers received	Nil
17	Validity of offer	90 days i.e. upto 06.09.2016 (F-206)

2. Details of offers received:

2.1 In response to the tender notification, three offers were received at Sr.DME office Raipur and one offer at CME office. The offers of the tenderers were opened on 07.06.2016 at 15:30 hrs at office of the Sr.DME/R and CME/SECR/BSP in presence of the nominated tender opening members. The detail of offers received is as under:

S.N.	Name of Tenderers	Officer received at
1	M/s NF Forgings Pvt. Ltd. Sankrail Industrial Part, NH-6, Bombay Road, Daulagari, Howrah	Office of the Sr. DME/Raipur
2	M/s Bhilai Iron & Steel Processing Company (P) Ltd. 94, Industrial Estate, Bhilai (C.G.)	Office of the Sr. DME/Raipur
3	M/s OSCORP Industries Pvt. Ltd. Balitikuri, Surkimill, Howrah 711113 (WB)	Office of the Sr. DME/Raipur
4	M/s Besco Ltd. (Wagon Division) 8, Anil Maitra Road, Ballygunge, Kolkata	Office of the CME/SECR/BSP

2.2 Vetted Comparative Statement and the Briefing Note for technical bid based on the documents/papers submitted by the tenderers are placed at F/857-863.

3.0 Finance observations on comparative statement/Briefing Note (F/864):

Compliance of finance observations by Sr. DME (C&W)/R is placed at F-889.

4.0 Analysis of documents and discussion on technical bid of the tenderer:

4.1 M/s NF Forgings Pvt. Ltd. Sankrail Industrial Part, NH-6, Bombay Road, Daulagari, Howrah):

Item	Description	Remarks	Folio No.
Tender Schedule	Tender document	Tender document has been downloaded from SECR's website.	F-340 to 387
Srl. No.8 of Tender Notice (F-154)	Cost of Tender form (Rs.10,000)	Submitted vide DD No.295500 dated 03.06.2016 issued by Bank of India Kolkata SME Branch, Kolkata	F-227
Sr. No.5 of Tender Notice (F-154)	Earnest Money (Rs.16,63,110/-)	Submitted vide DD No.295498 & 295499 dated 03.06.2016 issued by Bank of India Kolkata SME Branch, Kolkata	F-227

Eligibility Criteria

Para 1.21 A (i)/tender schedule (F-207)	The tenderer should have physically completed, in the last three financial years (i.e. current year and three previous financial years) at least one similar single work for a minimum value of 35% of advertised tender value.	35% of the tender value works out to Rs.10,59,17,478.80. M/s NF Forgings Pvt. Ltd. have submitted a list of completed works, out of which the work of "Preparation, fabrication and assembly of BOXNHL wagon, Qty 516 wagon" qualifies on grounds of value, period and type of wagon. <u>But the item of "Supply" is not a part of work. Hence, the firm does not meet the condition of similar work.</u>	F-335 and F-323 to 324
Para 1.21 A (ii) tender schedule (F-207)	The total contract amount received during the last three financial years plus the current financial year till the date of tender opening should be a minimum of 150% of advertised tender	150% of the tender value works out of Rs.45,39,32,052/- M/s NF Forgings Pvt. Ltd. have submitted copies of audited balance sheet for 2012-13, 2013-14, 2014-15 As per audited balance sheets, revenue from operations are as	F-231-268

	value.	under:- For 2012-13 (F-237) Total receipt from operations is Rs.222,36,78,246/- For 2013-14 (F-249) Total receipt from operations is Rs.113,63,31,746/- For 2014-15 (F-265) Total receipt from operations is Rs.114,19,93,000/- The total contractual payment received by the firm as verified from the concerned CA Surana Naveen Vikas & Co. during the year 2012-13, 2013-14, 2014-15 is Rs.3,66,23,10,478/- (F-880), The sum is more than 150% of advertised tender value, i.e. Rs.45,39,32052/-.	F-880
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Any special condition given by M/s NF Forgings Pvt. Ltd; NIL

Since M/s NF Forgings Pvt. Ltd. is not fulfilling the 35% eligibility criteria as mentioned above, the tenderer is **not considered technically eligible.**"

5. The recommendation of the Tender Committee was thereafter further placed before the Tender Accepting Authority, who gave their own observations and then, referred the matter back to the Tender Committee. Since the observation of the Tender Accepting Authority also has significance, the relevant portion in relation to the present petitioner is also reproduced herein-under:

“Item wise compliances of the observations are as under :-

Sl. No.	TAA observation	Compliance of TC
1	<u>To elaborate on the disqualification of M/s. NF Forging Pvt. Ltd. who have done the work of Preparation, Fabrication and Assembly of BOXN HL wagons</u>	i. As per the Eligibility Criteria of the tender documents, the tenderer should have physically completed in last three financial years (i.e. current year and three previous years) at least one similar single work for a minimum value of 35% of advertise tender value ii. Qualifying period defined is 2013-14 and onwards iii. 35% of the tender value works out to Rs.10,59,17,478/- iv. M/s. N.F. Forging Pvt. Ltd. has submitted a list of 6 similar single completed works (F-335) • The work vide Srl. No.1 does not qualify for value and period of completion. • The works vide Sr. No.2 & 6 qualify for value and period, but do not qualify for work on type of wagons defined in Similar nature of work. The works pertain to BRN and MG Brake Van respectively. Convenor stated that BRN and MG Brake Van do not qualify for defined types of wagons in the work. Tender documents specifies BG open wagons/BOXN/BOXNHS/BOXNR/BOXNHL wagons. • The works vide Srl. No.3 & 4 do not qualify for the value of work. v. The work vide Srl. No.5 i.e. "Preparation, Fabrication and Assembly of BOXNHL wagon" does not qualify as it does not fit in to any of the specified definition of similar nature of work. • M/s. N.F. Forging Pvt. Ltd. had not submitted supporting documents of RDSO approved BG open

		wagon manufacturer for IR. OR • The work does not qualify for Rebuilding/Renewal/Rehabilitation/Upgradation and Rehabilitation OR • <u>Firm has done only manufacturing/ fabrication. As the work does not include the supply of side walls, end walls and floor as a part of work in enclosed supporting documents of the work (PO Ref:230339 dated 21.12.13 of M/s. Braithwaite Co. Ltd., F-323)"</u>
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6. From a reading of the Tender Committee's Minutes as well as the observations of the Tender Accepting Authority, it seems that the petitioner's firm did not have the requisite experience in relation to the eligibility on many accounts of the six works they had earlier performed in the three financial years and the shortfalls in those works, which were pressed to show their capability and eligibility have been dissected and analysed separately. However, the sum and essence of the findings, which has emerged from the deliberation is that the firm has done only manufacturing/fabrication. As the work does not establish or include supply of side walls, end walls and floor as a part of the work in the enclosed supporting document of the work, which was said to have been done as part of contract carried out by the petitioner firm in relation to one M/s. Braithwaite Co. Ltd.

7. Learned counsel for the petitioner submits that there was some

mischief played in not awarding contract to the petitioner by the Railway authorities because for a similar tender earlier his technical bid was found to be in order and for the same or similar kind of 2nd NIT, the Railway authorities have found him technically disqualified.

8. On the surface, such submission sounded very convincing but the stand of learned counsel for the Railways is that there are distinctions of a significant kind in the terms and conditions which were part of the previous NIT and the second NIT. There were significant departures and variances in the second NIT incorporated by the Railways keeping in mind the reasons for failure of the previous successful bidder to deliver, in terms of the contract. Out of 350 upgradations of the BOXN Wagons, only 16 came to be completed over a long period of time of almost 3 years against a period of 12 months. Some part of the differences in the Second NIT was highlighted before this Court and it was the stand of Counsel for the Railways that the second NIT was evaluated on the basis of the terms and conditions, which is Annexure P/5 of the writ petition. He has pointed out that supply was integral part of the nature of work/contract required to be completed.

9. The documents on which the petitioner relied on to show experience of similar kind specially with regard to supply in the work carried out for M/s. Braithwaite Co. Ltd., on a closer and critical analyses demonstrate that the supplies made to the said company were for couplers and draft gears only. This is evident from the work order or the supply order issued in favour of the petitioner by the said company.

10. What is clear from reading of the Notice Inviting Tender is that the Railway authorities were looking for a person or a company who was capable of and had requisite experience related to upgradation and rehabilitation of the BOXN Wagons including supplies of all the materials for the same and since the present petitioner did not have the capacity or capability or experience to show that he had also made supplies in manufacture of such wagons or for their upgradation to any other firm, the shortfalls found by the Tender Committee in his technical bid cannot be said to be an irrational or arbitrary exercise.

11. An effort has been made by learned counsel for the petitioner that the Company, which has been awarded the contract carried some kind of taint since they had failed to perform certain responsibility in the past and in this regard, a letter which has been issued by one Mr. K.P. Sonkuwar, Chief Workshop Engineer, has been brought on record as Annexure P/15 to press home the point that contract should not have been awarded to him.

12. We have gone through the letter. This letter is neither here nor there. It is neither a letter of disqualification or blacklisting of the Company. It only expresses some anxiety on the Company not meeting the deadlines of the supplies which they were required to make. One of the reasons seems to be fluctuation in the steel price existing in the market then.

13. We have gone through the records and verified the terms and conditions of the NIT as well as the reasons which have been recorded by the Tender Committee as well as the Tender Approving Authority. The reasons so provided do fit into the terms and conditions of the

eligibility which the Railway authorities were looking for. There is failure on the part of the petitioner to meet such eligibility which included complete supply of side walls and end walls as well as flooring which is part and parcel and integral to the upgradation and rehabilitation of the wagons in question. Not any kind of work or similar kind of work without the specifications being met in terms of the Notice Inviting Tender can be acceptable or refusal to accept the same can be accepted as irrational exercise on the part of the respondent in rejecting his tender.

14. The stand of the private respondent in whose favour the tender has been awarded is though LOA has already been issued in his favour, since he had fulfilled all the requirements and eligibility, because of the restraint order passed by the Court way back in the year 2016, more than 2 years have been lost out in execution of the contract which also has significance for him and for the Railways.

15. We are not satisfied that the reasons provided by the Tender Committee or Tender Approving Authority for rejection of the Technical bid suffer from any vice.

16. The writ petition has no merit and it is accordingly dismissed.

Sd/-

(Ajay Kumar Tripathi)
Chief Justice

Sd/-

(Prashant Kumar Mishra)
Judge