

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 359 of 2018**

M/s Krishna Infrastructure Pvt. Ltd. Through Its Partner Karshanbhai Devabhai Karmur, S/o Devabhai Karmur, Aged 40 Years, Office Address 101-104 Panchvati Point Complex Opp. Mansarovar Building Bedi Bunder Road, Jamnagar, Gujrat, District : Jamnagar, Gujarat

---- Petitioner**Versus**

1. South Eastern Coalfield Ltd. Through Its Chairman Cum Managing Director, Secl Bhawan, Seepat Road, Bilaspur, Chhattisgarh.
2. General Manager (Contract Management Cell), South Eastern Coal Field Ltd. Secl Bhawan, Seepat Road, Bilaspur, Chhattisgarh.

---- Respondents

For Appellants : Shri Rajeev Shrivastava and Shri Gagan Tiwari, Advocate.
For Respondents : Shri Vivek Chopda, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice
Hon'ble Shri Justice Parth Prateem Sahu

Judgment on Board**Per Ajay Kumar Tripathi, Chief Justice****12.09.2018**

1. Heard counsel for the parties.
2. Vide order dated 28.08.2017 contained in Annexure P/1, the Respondent-South Eastern Coalfields Limited (for short 'the SECL') cancelled the award of tender in relation to NIT. No.SECL/BSP/CMC/E-tender/147 dated 09.01.2017. Besides the cancellation of the E-tender, the earnest money deposit (for short 'the EMD') of the Petitioner-Company has been forfeited, decision for re-tender in relation to the work of NIT was taken and this decision is the bone of contention before this Court.

3. The power vested upon the concerned authority for forfeiture reads as under:

“11. Evaluation of Tender

x x x

x x x

v) In case the L-1 bidder fails to submit requisite documents on-line as per NIT or if any of the information/declaration furnished by L-1 bidder on-line is found to be wrong by Tender Committee during evaluation of scanned documents uploaded by bidder, which changes the eligibility status of the bidder, then his bid shall be rejected and **EMD of L-1 bidder will be forfeited**”

4. There is no argument with regard to the vesting of the power in the Competent Authority to order forfeiture. The issue is the manner in which such power has been exercised.
5. Submission of the counsel for the Petitioner-Company is that based on the terms and conditions laid down in the NIT, the Petitioner-Company was of the wisdom that they fulfill all the requirements not only to be eligible for such participation, but may even be a successful bidder.
6. So far as being L-1 is concerned, the Petitioner-Company did succeed, but when the Technical Evaluation Committee examined the declaration which were made on-line by the Company showing their eligibility, certain infirmities going to the root of the matter was found. To use the words of the Tender Committee and the reasons provided by them, the same is extracted hereinbelow :-

“ Reason of Cancellation :

Tender Committee has observed that

1. Against the requirement of working experience of Rs.2936.14 lakh, as per SES the bidder has uploaded the experience for a value of Rs. 5826.44 lakh (updated) from 01.04.14 to 31.03.15 of the work of hiring of HEMM for excavation of OBR at Jhingurda OCP, NCL as sub contractor. The executed amount of work as per the certificate issued by GM, Jhingurda Project of NCL is excluding Service Tax.

Tender Committee deliberated on the above observed as under :

- i. As per NIT clause No.6 A, similar nature of works for OB removal means **“Work of mechanical loading and transportation of Coals/Soil/Ash/Any excavated material”**. The bidder has uploaded the experience of the work for hiring of HEMM for removal of OB, which do not fall in the category of similar nature of work as defined in the NIT but the description of work experience of work uploaded by bidder is identical to the work described in present NIT hence, TC opined that the work experience uploaded by tenderer for hiring of HEMM for OBR may be considered for eligibility of tenderer.
- ii. On perusal of execution certificate issued by GM, Jhingurda Project of NCL, the executed amount of work is Rs.5356.13 lakh {Rs.5826.44 lakh (updated) is from the period of Feb'14 to May'16.
- iii. In this regards clause 6A of NIT states that **“The bidder must have in its name or proportionate share as a member of JV/Consortium, experience of having successfully executed (includes completed/ongoing) works of similar nature valuing 65% of the annualized estimated cost of the work put to the tender (for period of completion over 1 year) / 65% of the estimated cost of the work (for completion period upto one year) put to tender in any year (consecutive 365 days) during last 7 (seven) years ending last day of month previous to the one in which the applications are invited.”**
- iv. The updated executed amount of work is Rs. 5826.44 lakh as shown in SES is of more than 365 days period hence, is not as per NIT.
- v. Year wise breakup has been given in the uploaded execution certificate (folio: 167) and considering the same the executed & updated executed amount during the corresponding period is tabulated below:

SI. No.	Period	Executed Amt. Excl. S Tax (in lakhs RS)	*Updated Executed Amt Excl. S Tax. (in lakh Rs)
1	2013-14 (February 14 to March 14)	250.18348	286.68285
2	2014-2015	2325.94473	2530.18179
3	2015 -2016	2331.37126	2419.51626
4	2016- 2017 (April 16 to May 16)	448.62851	461.84154
TOTAL		5356.12798	5698.22244 (*)

(*) Updated total amount of Rs.5698.22244 lakh from Feb 14 to May 16 as per the calculation made in the above table differs from the executed amount of Rs.5826.44 lakh as shown in SES due to the weightage calculated by system for total execution (Feb 14 to May 16) wef May 16 till the last day of month previous to one in which e-tender has been invited whereas in the above table the weightage has been calculated on year wise execution from the end date of that particular financial year till the last day of month previous to one which e-tender has been invited.

Tender Committee deliberated on the above table and observed that during none of the above periods the bidder has required working experience of Rs. 2935.14 Lakh as per NIT, hence, the L-1 bidder is not eligible for award of work due to not meeting the requirement of clause 6 (A) of NIT.”

Tender Committee observed that auto evaluation of the uploaded documents of L-1 bidder has been done by the system, in which the L-1 bidder has put the executed value of Rs. 5826.44 lakh (updated) from 01.04.14 to 31.03.15 of the work of hiring of HEMM for excavation of OBR at Jhingurda OCP, NCL. On perusal of the execution certificate the executed value (updated) from 01.04.14 to 31.03.15 comes to Rs. 2530.18 lakh, which is less than as per NIT requirement and also opined not to ask any clarification from the L-1 bidder under confirmatory document link because as per the clause 7 of NIT, if **the bidder uploads any other document** to prove its eligibility as per clause 6A, which will not be given any cognizance hence, the L-1 bidder is for award of work due to not meeting the requirement of clause 6A of NIT.

7. The argument against this decision so taken by the Respondent-SECL on behalf of the Petitioner is that so far as experience is concerned, looking at the nature of work done by the Company, the Tender Evaluation Committee was of the opinion that their work experience may be considered. Though strictly speaking, it is evident from reading of the said decision that the Petitioner-Company was more involved in the work of hiring of Heavy Earth Moving Machinery (HEMM) for excavation in what is known Jhingurda as a sub-contract, but they were not involved in the actual work of mechanical loading and transportation for coal, soil, ash, or any excavated material.
8. It has also been noticed that the Petitioner-Company had loaded a total amount of work from the previous calendar years amounting to Rs. 5826.44 Lacs. However, when the said figure was closely examined the Tender Committee found that at no point of time in any financial year, which could extend 7 years prior to the date of NIT, adds up to a figure of Rs. 2935.14 Lacs which was one of the conditions for eligibility as per Clause 6A of the NIT.
9. So far as the 'work experience' is concerned, the eligibility criteria in the NIT specifically lays down as to what would a calendar year in relation to the NIT mean and in this regard Clause 6A is reproduced, which reads as under :-

“6. Eligibility Criteria :-

A. **Work Experience** – The bidder must have in its name or proportionate share as a member of JV/Consortium, experience of having successfully executed (includes completed/ongoing) works of similar nature valuing 65% of the annualized estimated cost of the work put to tender (for period of completion over 1 year) / 65% of the estimated cost of the work (for completion period upto one year) put to tender in any year (consecutive 365 days) during last 7(seven) years ending last day of month previous to the one in which bid applications are invited.

(emphasis supplied)

Similar nature of work shall mean :

Work of mechanical loading and transportation of Coal/Soil/Ash/Any excavated material

Annualized value of the work shall be calculated as the
“(Estimated Cost/ Period of completion in days) x 365 ”

The cost of executed works shall be given a **simple** weightage to bring them at current price level by adding 5% for each completed year (total number of days/365) after the end date of experience **till the last day of month** previous to one in which e-Tender has been invited.”

10. Even though learned counsel for the Petitioner tried to impress upon the Court that since his bid was accepted and processed in the Auto Evaluation Process, the infirmities which had been pointed out by the Committee on evaluation, is required to be either ignored or would amount to nitpicking on the eligibility of the Petitioner as a successful bidder.
11. The said submission, counsel representing SECL submits that the data which was loaded by the Petitioner on the computer was processed on the basis of the inputs so provided. However, they have to be manually verified as to the authenticity thereof before a final acceptance could be made. It is only during the process of manual verification of the declaration that the infirmities so noticed by the Technical Evaluation Committee which has been reproduced in the earlier part of the order was found by them and then the ineligibility of the Petitioner emerged.

12. Since the Tender Evaluation Committee itself has given up the objection with regard to the work experience, as to the nature of work done by the Petitioner-Company previously, the debate now focuses on the volume of work or the turnover which the Company has had prior to the bidding by the Company in relation to the NIT.
13. The facts and figures are before us. There is no argument as to what has been declared by the Petitioner on the website in his effort for bidding against the NIT. The figures do not indicate that they have any turnover in terms of the working experience in a particular year prior to the issuance of the NIT amounting Rs. 2935.14 Lacs.
14. The total figure which was fed by the Petitioner-Company amounting to Rs. 5826.44 Lacs, therefore, was a red-herring and did reflect the true picture of the work done in a year. The Auto Evaluation Process cannot, therefore, be used to the advantage of the Petitioner because such a declaration on a closer scrutiny did not reflect in actual state of affairs in relation to the turnover prior to the issuance of the NIT.
15. The Petitioner, therefore, fails to make out the case that the decision taken by the Respondent-SECL in terms of Annexure P/1 is either irrational or arbitrary and is required to be interfered with.
16. Since the consequence are there on failure, on the part of such bidder, the exercise of such power in relation to the NIT in question cannot be said to be erroneous or irrational.
17. The writ application has no merit. It is dismissed.

Sd/-

(Ajay Kumar Tripathi)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge