

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****WPC No. 2079 of 2018**

M/s Shivam Coal Carriers Private Limited Through Its Director Captain Ram Singh, Having Its Registered Office At 206, Palco House. 2162/t-10 Guru Arjun Nagar, Main Road, West Patel Nagar, New Delhi- 110008

**---- Petitioner****Versus**

South Eastern Coalfields Limited Through Its General Manager (HOD, CMC), SECL Bhavan, Seepat Road, Bilaspur, Chhattisgarh

**---- Respondent**


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| For Petitioner | : Shri Kshitij Sharma, Advocate. |
| For Respondent | : Shri Vivek Chopda, Advocate.   |

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

**Order on Board****07/01/2019****Per Ajay Kumar Tripathi, Chief Justice**

1. Heard counsel for the parties.
2. Writ application came to be filed by the Petitioner-Company when the Respondent- South Eastern Coalfields Limited ('SECL') decided to forfeit the earnest money deposited to the extent to Rs.16,09,000/- as part of a Notice Inviting Tender ('NIT') for hiring of HEMM for excavating OB removal and its associated works for the Raigarh area at Bijari.
3. Pursuant to the NIT, many bidders responded. However, three bidders were short-listed which included the present Petitioner, who was listed as Sl. No. 02 as L-2. The last date for the auction was fixed as 04.05.2017 at 5.00 pm, but for some reason or the other, it seems that no decision could be taken by the Respondent-

Company and an effort to keep the bids alive, repeated communications were made with the present Company extending the bid validity of the work. The earliest communication in this regard is dated 10.08.2017, which extended the bid period by 120 days.

4. The Petitioner gave his consent and the bid came to be extended till 30.12.2017. Before the expiry of the said date, yet another communication was made by the Company with a request for extending the bid period by yet another 120 days i.e. up till 30.04.2018. This was also accepted by the Petitioner.

5. Before the expiry of the extended period, yet another communication dated 24.04.2018 was made with an offer to extend the bid period by another two months i.e. 30.06.2018. To this, the Petitioner refused and vide letter dated 30.05.2018, they requested for refund of the Earnest Money Deposit ('EMD'). Instead of doing so, the Respondent- SECL decided to forfeit the earnest money and therefore, the writ application.

6. Submission of the counsel for the Petitioner is that even though he was short-listed as one of the successful bidder as L-2, he was never declared as L-1 because he did not receive any communication from the Respondent indicating to him that for whatever reason, the L-1's bid has been rejected and he has been declared L-1, for which, he had to complete certain formalities, before award of the contract could be made.

7. It is the contention of the counsel for the Petitioner that from the deliberations which have been made by the Respondent-Company internally, it is evident that they are still to make up their mind to declare the Petitioner as L-1 bidder and based on the internal deliberations, which are part of the annexures, annexed as Annexures R/4 and R/5 as well as R/6 that there was even some kind of consensus reached in the meeting held by the Board that the tender itself ought to be cancelled. However, for some strange reason, the Respondent-SECL

decided to punish the Petitioner by ordering forfeiture of its EMD even though, there is no clear decision either communicated to the Petitioner or brought on record to show that the Company had decided to declare the Petitioner as L-1 and award the contract upon him within the extended period of the bid validity.

**8.** The decision for cancellation and forfeiture is dated 06.07.2018 and has been assailed as Annexure P/1 to the writ application.

**9.** It is the contention of the counsel for the Petitioner that there should have been clear communication made with the Petitioner that the bid of L-1 has been rejected or cancelled and that the Company had contemplated or decided to award the contract to the L-2, who would become L-1 in view of the above contingencies. But without any such communication or decision by treating the Petitioner's decision not to extend the period of the bid validity and the demand for refund of his EMD made on 30.05.2018 as his failure to comply with the decision of the Respondent-Company in the matter of award of the contract in question or Annexure P/1 was issued.

**10.** In the return filed on behalf of the Respondent-Company, they tried to justify the decision that as early as 09.02.2018, an auto-generated communication was made with the Petitioner directing them to upload certain documents and this self-generated computer communication has been brought on record with additional reply filed on behalf of the Respondent. Yet another reminder of similar kind was also made subsequently and since the Petitioner failed to respond and upload the documents, it was considered failure on his part to not comply with the requirement of the NIT and the decision to forfeit the EMD was a natural corollary.

**11.** Attention of the Court has been drawn to the 'Instructions To Bidders' especially to Clause-14. Power to forfeit the earnest money has been provided for, but prior to the same, reliance was also placed on the NIT, especially Clause 11(v), 11(vii) and 14, which reads as follows:-

**“11.Evaluation of Tender :-**

X X X

v) In case the L-1 bidder fails to submit requisite documents online as per NIT or if any of the information/declaration furnished by L-1 bidder online 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.**

vii) In case the L-1 bidder is rejected due to non-compliance of confirmatory documents then the L-2 bidder will become L-1 bidder and confirmatory documents of L-2 bidder shall be evaluated by Tender Committee and the process shall be followed as mentioned in clause No. (i) to (v) above.

**14. Tender Status:** It will be bidder's responsibility to check the status of their Bid online regularly, after the opening of bid till award of contract. Additionally, information shall also be sent by system generated e-mail and SMS at nodal points (Date of bid opening, Requisition for Clarification on Confirmatory document from L-1 bidder, award of work etc.). No separate communication will be required in this regard. Non-receipt of e-mail and SMS will not be accepted as a reason of non-submission of Confirmatory documents within prescribed time. The Tender Status will be in public domain and anyone visiting the site can view it by identifying the tender.”

**12.** To counter this submission on behalf of the Respondent-Company, Petitioner's counsel relies upon the 'Instructions To Bidders' wherein the process and procedure required to be followed after a bid is accepted to be valid. In terms of Clause 23, there has to be notification of the award and signing of the agreement. Clause 23 of the 'Instructions To Bidders' reads as follows:-

**“23. NOTIFICATION OF AWARD AND SIGNING OF AGREEMENT**

23.1 The Bidder, whose Bid has been accepted, will be notified of the award by the Employer prior to expiration of the Bid validity period by e-mail and confirmed by registered letter. This letter (hereinafter and in the Conditions of Contract called the “Letter of Acceptance”) will state the sum that the Employer will pay the Contractor in consideration of the execution and completion of the Works by the Contractor as prescribed by the Contract (hereinafter and in the Contract called “the Contract Price”).

23.2 The notification of award will constitute the formation of the Contract.

23.3 The Agreement will incorporate all agreements between the Employer and the successful Bidder within 28 days following notification of award alongwith the letter of Acceptance and / or Work Order issued by department. In case of failure to enter in to agreement within specified period of extended period on the request of the bidder, if any, the department in addition to other penal measures as per clause 14.5 of ITB shall be at liberty to debar the selected bidder from participating in future Bids for at least 12 months.

23.4 In the bidding process, the cause of rejection of bid of any bidder should be intimated to non-qualified bidder after the award of the work to the successful one and the Security/Earnest Money shall be refunded to unsuccessful bidders as per provision of Cl. 14.3.

23.5 The contractor shall enter into and execute contract agreement in the prescribed form. The cost of the stamp papers for the contract agreement shall be borne by the contractor. Two sets of contract document/agreements shall be prepared and signed by both the parties One of the sets shall be stamped "Original" and the other "Duplicate". The duplicate copy and one additional copy will be supplied to the contractor free of cost and the original is to be retained by the company. For any additional copy, additional cost to be charged.

All additional copies should be certified by the Engineer-in-Charge."

**13.** If the above Clauses are taken into consideration, the stage for the same never reached. Whatever reliance have been placed in the deliberations of the tender Committee or the Board of the Company, they are internal deliberations which remained between the covers of the decision making. There seems to be differences of opinion as to how to proceed in the matter, especially since a component of GST had also intervened w.e.f. 01.07.2017. The NIT did not contemplate any such changes and that by itself had implications on the bids so received, including that of the Petitioner.

**14.** In absence of any clear communication to the Petitioner to award the contract or the decision by the Respondent-Company to declare the Petitioner as

L-2 as L-1, merely because there were some decision taken internally by the Respondents without consequential order ever being communicated to the Petitioner, it cannot be the case that the Petitioner had failed to honour the award of the contract and therefore, a case for forfeiture of the EMD was made out.

**15.** In fact, all deliberations, which have been annexed as part of the return of the Respondent- SECL, seems to have been made after the Petitioner refused to extend the validity of the bid for the work and obviously, there is something amiss in the manner the Respondent authorities have taken the decision which have civil consequences for the Petitioner.

**16.** We are satisfied that the decision of forfeiture of the EMD of the present Petitioner was irrational and arbitrary and therefore, fit to be set aside.

**17.** Annexure P/1 dated 06.07.2018 insofar as it relates to the present Petitioner stands quashed. The Respondent- SECL is directed to refund the EMD to the Petitioner within a period of four weeks from the date of production of a copy of this order.

**18.** Writ application is allowed in terms of the above.

Sd/-  
(Ajay Kumar Tripathi)  
**CHIEF JUSTICE**

Sd/-  
(Parth Prateem Sahu)  
**JUDGE**