

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
WPC No. 2518 of 2019

Order Reserved on 18.9.2019
Order Delivered on 06/12/2019

1. M/s Pahalwan Construction, a partnership firm through its partner Shyam Babu Yadav, S/o Late Ramvilas Yadav, aged about 33 years, R/o Agarkhar, Jamnipali, District Korba (CG)

---- Petitioner

Versus

1. National Thermal Power Corporation Limited, through its General Manager (SSC-Sipat-C&M) Shared Service Centre, Sipat, Western Region-II, Ujjawal Nagar, Bilaspur (CG)
2. National Thermal Power Corporation Limited, through its General Manager (O&M) Korba Super Thermal Power Station, PO Vikas Bhawan, Jamnipali, Korba (CG)

---- Respondents

For Petitioner	:	Shri Amit Soni, Advocate
For Respondents	:	Shri BD Guru, Advocate.

Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu

CAV Order

Per Parth Prateem Sahu, J

1. Petitioner being aggrieved by issuance of a tender by the respondent Corporation authorities combining four different works as one work and also incorporation of Condition No.6.1.1 in the tender document providing 'technical criteria', has preferred this writ petition challenging the same.
2. Facts of the case, in brief, are that the petitioner firm is registered with the respondent Corporation and is engaged in the business of mechanical maintenance & manpower supply. For the last

three years the petitioner has been executing the work of 'Annual Maintenance Contract' for Ash/Water Pipeline from Outside Plant Boundary Wall to Dhanra and inspection of ash and water pipeline along with pipeline corridor from plant boundary wall to Dhanras ash dyke. The petitioner is also executing work of 'inspection of pipeline for ash slurry pipeline' for the last one year. Aforementioned work was awarded to the petitioner by way of different notice inviting tenders floated by respondent authorities from time to time. However, for the first time, the respondent Corporation authorities have floated a single tender for the work "Combined Contract Proposal for Ash Slurry, Pipeline Inspection, Pipeline Maintenance, Pipe Replacement & Fugitive Dust Control (Dyke Wetting) Outside Boundary Wall at NTPC, Korba", which the petitioner had executed in lieu of the award of contracts under different NITs/ tender proceedings. The petitioner is aggrieved by Clause 6.1.1 of the NIT, which relates to technical qualification and also of the issuance of combined tender.

3. Contention of learned counsel for the petitioner is that the works advertised under the NIT in question were earlier awarded by the respondent Corporation separately by issuing separate NITs. He submits that technical evaluation in Clause 6.1.1 of NIT has been erroneously prescribed as the respondent Corporation in the subject NIT has mentioned the experience of technical nature and nothing has been prescribed with respect to supply of manpower. He also submits that Clause 6.1.1. of the NIT has been so made so as to eliminate small capacity bidders. It is contended that the aforementioned technical qualification, as

enumerated in Clause 6.1.1, is contrary to the guidelines issued by the Central Vigilance Commission (CVC) by way of different Notifications. The CVC guidelines have been issued only to make the system of tender proceedings transparent; to prevent corruption; for better supply of goods & service and to restrict the Government or its instrumentalities from making pre-qualification criteria to be clear and not to make condition very stringent or lacks. He submits that the purpose of issuing guidelines by the CVC has been frustrated because firstly the number of works have been combined in one work in the subject NIT and further experience of execution of work for a sum mentioned in Clause 6.1.1. On the basis of aforementioned submission, it has been prayed by the learned counsel for the petitioner that the petitioner be permitted to participate in the subject tender proceedings.

4. Per contra, Shri BD Guru, learned counsel representing the respondents submits that there is no arbitrariness or malafide on the part of the respondents in floating NIT in question. The works mentioned in the NIT have been combined pursuant to the direction issued by the Corporate Office vide Memo Dated 5.9.2018 to rationalize and reduce the numbers of O&M contracts for better administration and supervision of works to be awarded to the contractors. He submits that in the said Memo dated 5.9.2018 as many as 12 different works were listed which require rationalization including the work related to 'Maintenance of Ash Handling System Including Pumps & Pipeline Outside Plant Boundary Ash Dyke Fugitive Dust Suppression & Patrolling Abandoned Dyke'. Pursuant to aforesaid direction and

considering the fact that all the works, as mentioned in the NIT, are inter-related and symbiotic to each other, the same have been combined and a single tender has been floated. He further submits that merger of different works will make the tender process more competitive and lean. He also submits that the guidelines issued by the CVC have been followed by them in floating the NIT in question. He submits that the CVC Guidelines No.12-02-1-CTE-6 dated 17.12.2002, in particular Para 3 (vi), provides for mentioning of requirement of experience of 'similar works' and in the present NIT, the similar work has been specifically prescribed at Clause 6.1.1 and there is no ambiguity as such in it. He also submits that even the work executed has been very specifically defined in the NIT itself by putting note below Clause 6.1.1 separately. It is also submitted that technical criteria as mentioned in the bid includes technical as well as manpower part because Clause 6.1.1 mentions the mechanical maintenance / mechanical erection and maintenance will cover the manpower part of the work. It is also submitted that only because the petitioner, who is finding himself to be ineligible, looking to the nature of work as advertised in the NIT cannot blame by challenging the eligibility criteria pointing it to be contrary to the CVC guidelines. He submits that instances have been noted where poor labourers are made to suffer on account of securing contract by agencies by inflated financial competencies who later on fail to make labour and other payments, forcing respondent to intervene. It is submitted that the technical criteria as mentioned in Clause 6.1.1 of the NIT

cannot be relaxed in favour of the petitioner as the respondents are guided by the Pan India direction issued by the Corporate Office of the respondent Corporation from time to time. There is no malafide on the part of respondent in putting technical criteria, as mentioned in Clause 6.1.1, but it is only in the interest of the respondent Corporation to have better monitoring and administration so that there can be smooth functioning of the plant without any hindrance.

5. We have heard learned counsel for the parties and perused the records.
6. Main grievance of the petitioner is that four different nature of works, which were earlier awarded by respondent Corporation through different NITs and some of which have been awarded to the petitioner during last four years, have been combined and a single tender has been floated incorporating a condition that a bidder should have successfully executed the work, as advertised in the NIT, of atleast Rs.174 Lakhs in a single contract during any period of preceding 7 years. Clause 6.1.1 which deals with 'Technical Criteria' is reproduced below:-

“6.1.1. .The bidder should have successfully executed contract for Mechanical Maintenance/Mechanical Erection of Ash disposal pipelines or Ash water recirculation pipelines or Ash Dyke sprinkling System as per the following during the preceding seven (7) years reckoned as on the date of techno commercial bid opening;

- Executed value not less than Rs.174 Lakhs in a Single Contract.

Or

- Executed value not less than Rs.109 Lakhs in Two Contracts each.

Or

- Executed value not less than Rs.87 Lakhs in Three Contracts each.”

7. However, it is for the agency floating tender to consider best way for execution of work for smooth running, maintenance or erection of the industry or plant. It is the choice of the government/agency to have an agreement of contract with most suitable, capable and efficient company/firm so that they can have best quality of work without any interruption. As submitted by learned counsel for the respondent that all the works are inter-related to each other, it is for them, who have expertise in the field, to get the work executed in a particular manner and by one or more contractors. In the case at hand, as it has been stated that a memo was issued by the Corporate Office of the respondent for rationalizing and reducing number of running O&M contracts with intent to have better administration and supervision of work awarded to a contractor and the list of 'Other/Common Jobs Packages' attached with Memo (Annexure R-1) issued by the Corporate Office, which includes the work of 'Mechanical Maintenance/Mechanical Erection of Ash disposal pipelines or Ash water recirculation pipelines or Ash Dyke sprinkling System'. Pursuant to the aforesaid direction issued by the Corporation Office, the respondent Corporation combined all the works and issued a single tender. The action of respondent Corporation in floating single tender for different works, which are infact inter-related to each other, does not suffer from any irrationality or malafide. It is always for the government/agency floating tender to decide the terms and conditions, technical qualification and manner of execution of any work. The terms

and conditions in the tender are prescribed by the government/ agency keeping in mind the nature of work and financial/technical qualification required for it and in such matters, the authority calling for the tender is the best Judge to prescribe terms and conditions of tender. The Court need not interfere with the terms and conditions prescribed in a tender unless the same are perverse or malafide or against the public interest or tailored to favour one of the bidders.

8. Hon'ble Supreme Court in the matter of Tata Cellular v. Union of India reported in (1994) 6 SCC 651 has laid down the grounds on which the Court can exercise power of judicial review. Para-77 of the said judgment is reproduced below;-

“77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. vs. Secretary of State for the Home Department, ex Brind*, (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'".

If we consider facts of the present case in the light of guidelines laid down by Hon'ble Supreme Court in above cited judgment, we find that none of grounds, as enumerated in the said judgment, has been met out by learned counsel for the petitioner. Infact, the terms and conditions mentioned in the NIT in accordance with the directives issued by the Corporate Office and the criteria of technical qualification is in accordance with the guidelines issued by the CVC.

9. Hon'ble Supreme Court in the case of **Michigan Rubber (India) Ltd., Vs State of Karnataka and Others** reported in (2012) 8 SCC 216 has held thus:

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) xxxxxxxx

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) xxxxxxxx

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

10. Hon'ble Supreme Court in its another decision rendered in the matter of **Silppi Constructions Contractors Vs Union of India and another etc** (SLP Nos.13802-13805 of 2019) held thus:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the

appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.....”

11. In the above rulings Hon'ble Supreme Court have laid down that action of the State should be fair and non-arbitrary. The action of the State can be amenable to judicial review if it suffers from arbitrariness, unreasonableness or found to be malicious & misuse of its statutory power. Hon'ble Supreme Court has further held that the Court cannot sit like a Court of appeal over the appropriate authority because authorities floating tender are best judge of its requirement. In the case at hand, learned counsel for the petitioner has raised sole ground that conditions incorporated in the tender are contrary to the CVC guidelines. The guidelines itself in Para-5 provide the points for fixing eligibility criteria and looking to the entire Clause 6.1.1, in the opinion of this Court, the respondent Corporation authorities have not violated or by-pass any of the guidelines of the CVC. The office order No.44/9/03 dated 04.09.2003 which was relied upon by learned counsel for the petitioner, provides for pre-qualification criteria, performance criteria and evaluation criteria to be in clear and unambiguous term and looking to Clause 6.1.1 of the NIT, the pre-qualification criteria has been specifically mentioned and there is no ambiguity in understanding need and requirement of the government/agency floating tender.

12. From the reliefs sought by the appellant it is clear that the petitioner's grievance is not on account of combining of work, but for imputation of Clause 6.1.1 which is a clause of technical qualification, and therefore only he has claimed a relief directing respondents to permit the petitioner to participate in the tender proceedings. As already held in above paras that, it is for the State or agency floating tender to make terms of contract including technical qualification making a tenderer eligible, we are of the firm view that the petitioner cannot be granted relief as sought for by him.
13. For the foregoing reasons, we do not find any good ground to interfere with the tender proceedings initiated by the respondent No.1 vide Annexure P-1.
14. In the result, the petition being devoid of substance is liable to be dismissed and is dismissed accordingly.

Sd/-

(PR Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

roshan/-