

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 18.06.2020****Order Delivered on 09-07-2020****WPC No. 1128 of 2020**

- M/s Kalyan Toll Infrastructure Ltd. Vidya Deep, 15/3 Manorama Ganj, Indore, (M.P.) through Rajesh Garg, Authorized, Representative, S/o Kalyanmal Garg, aged about 58 years R/o Sampat Farms, 41-C, Bicholi Mardana, Indore, District : Indore, Madhya Pradesh.

---- Petitioner**Versus**

1. Bilaspur Smart City Limited, 3rd Floor, Vikas Bhawan, Nehru Chowk, Bilaspur (CG) through Managing Director, 3rd Floor, Vikas Bhawan, Nehru Chowk, Bilaspur District: Bilaspur (CG)
2. Manager, Bilaspur Smart City Limited, 3rd Floor, Vikas Bhawan, Nehru Chowk, Bilaspur District : Bilaspur, Chhattisgarh
3. CMO, Nagar Panchayat Aarang District Raipur Chhattisgarh

---- Respondents

For Petitioner	:	Mr. Saurabh Dangi, Advocate
For Respondent No.1 & 2	:	Mr. M. Siddique, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, CJ**Hon'ble Shri Parth Prateem Sahu, J****C A V Order****Per Parth Prateem Sahu, J**

1. Challenge in this petition is to the action of respondent No.2 in declaring the bid of the petitioner to be invalid; cancelling the entire proceeding of System Tender No.57552 dated 14.10.2019 and intimating petitioner regarding initiation of proceeding against him for forfeiture of Earnest Money Deposit (EMD)/ performance security and blacklisting for a

period of two years.

2. Facts of the case, in brief, are that the petitioner is a limited company, having its registered office in Indore (MP) and is engaged in the business of infrastructure constructions. On 14.10.2019 respondent No.2 issued a NIT 'Request For Proposal ('RFP')' inviting online bids for 'selection of agency for smart road development work from Sarkanda Old Bridge to Indira Setu for Smart Bilaspur'. Initially, last date for submission of online bid was 5.11.2019, which was extended subsequently upto 15.11.2019. In response to the RFP, the petitioner and other tenderers submitted their bids. After opening of the bids, one M/s VKJ HHA (JV), Raipur was declared as 'lowest bidder', whereas the petitioner was declared as 'second lowest bidder'. Since the lowest bidder refused to execute the contract work, the petitioner was invited by respondent No.2 for negotiations. During the course of negotiation, a complaint was received by one of the tenderers that the petitioner deliberately did not furnish information relating to his existing commitment/ongoing work namely "Gourav Path at Arang Baihar Chowk N.H.53 to Khallari Mata Chowk N.H.53", which was awarded by respondent No.3 vide Work Order No.1524 dated 30.9.2019 against Tender No.51163. Accordingly, show cause notice dated 28.4.2020 was issued by respondent No.2 requiring the petitioner to explain as to why he has not disclosed information relating to work-in-hand in his tender document, which is one of the mandatory conditions of the RFP document. The petitioner

submitted reply dated 30.5.2020 to said show-cause notice explaining the reason for non-furnishing details of work of Gaurav Path, Arang. Dissatisfied with the petitioner's reply, respondent No.2 vide impugned order dated 8.5.2020 (Annexure P-1) declared the bid of petitioner to be invalid, terminated the entire process of RFP dated 14.11.2019. Thereafter, respondent No.2 vide letter dated 11.5.2020 (Annexure P-2) intimated the petitioner about initiation of the proceeding against him for forfeiture of security deposit and blacklisting for a period of two years. This action is subject matter of this petition.

3. Mr. Dangi, learned counsel for the petitioner submits that there is no suppression of fact on the part of the petitioner. The petitioner does possess requisite eligibility criteria and submitted all the required information and documents as per the RFP document. He submits that particulars of work, namely "Gourav Path from Arang Baihar Chowk N.H.53 to Khallari Mata Chowk N.H.53" against Tender No.51163, awarded to the petitioner by Municipal Council, Aarang, District Raipur vide Work Order No.1524 dated 30.9.2019 have not been disclosed in the tender document of petitioner for the reason that the said work was not commenced on the date of online submission of bid against the RFP in question. The respondent No.3 vide letter dated 21.10.2019 consented / permitted the petitioner for not disclosing the said work as ongoing work / work-in-hand in any other tender process. Petitioner submitted bid on the online portal on 14.11.2019,

whereas respondent No.3 vide letter dated 15.11.2019 called upon the petitioner to commence the work. Thus, it is a subsequent development which took place after submission of bid by the petitioner.

He also submits that the impugned order is passed in arbitrary and whimsical manner without considering reply of petitioner to show cause notice dated 28.4.2020. It is submitted that initially in the entire tender document there was no such condition requiring the bidders to disclose about ongoing works/existing commitments and only after incorporation of 'bid capacity' clause in the RFP by way of amendment dated 6.11.2019, the participating bidders are required to disclose details of existing commitments / ongoing works in order to assess their bidding capacity. It is also pointed that 'N' years, as defined in tender document, is only with respect to number of years required to complete the tender work and not for mentioning of work-in-hand. Thus, non-disclosure of work awarded by Municipal Council Arang to the petitioner does not amount to fraudulent practice or act of supplying incorrect information, as defined under Clause 61 of the RFP.

He also submits that order dated 11.5.2020 (Annexure P-2) was passed without issuing notice and giving opportunity of hearing to the petitioner. Rejection of representation submitted by petitioner against initiation of proceeding for forfeiture of EMD and blacklisting, without considering the reasons and explanation mentioned therein, on the ground

that signature appearing on the representation does not match the signature on the bid of the petitioner i.e. authorized signatory Mr. Varun Garg, is per se arbitrary. He submits that due to pandemic 'Covid-19', the authorized signatory Mr. Varun Garg, was not coming to the office which made the DGM of the petitioner company to sign representation and forward the same to respondent No.2. In these circumstances, the action taken by respondent No.2 against the petitioner is unreasonable, arbitrary and bad in law.

Learned counsel further submits that no separate notice was issued by respondent No.2 regarding initiation of forfeiture of EMD amount & blacklisting of petitioner. The notice which has been issued only mentions about termination of subject tender process. He places his reliance on the decision of Hon'ble Supreme Court in the case of Gorkha Security Services v. Government (NCT of Delhi) & ors reported in (2014) 9 SCC 105.

4. Mr. Mateen Siddique, learned counsel representing respondent Nos.1 & 2 submits that extended last date for submission of bid was 15.11.2019. As many as seven tenderers have submitted their bids and out of which , only four were found technically qualified including the petitioner. The amendment in the subject tender was incorporated on 6.11.2019, which was made known to all the interested bidders by flashing it online. Petitioner submitted its bid only on 14.11.2019 i.e. after 07 days of incorporation of amendment in the RFP, as claimed by the petitioner with

regard to bid capacity at Page No.154 of the tender document. He submits that amendment very specifically mentions that a bidder should possess bid capacity to be calculated by specified formula mentioned therein i.e. $A \times M \times N - B$. The letter 'B' stands for value (updated at the current price level) of the existing commitments and ongoing works to be completed in the next 'N' years. It is argued by learned counsel for respondents No.1 & 2 that there is specific mention about disclosure of details of ongoing works which are to be completed in the next 'N' years. He contended that during the proceeding of negotiation with the petitioner, being second lowest bidder, respondent No.2 received a complaint from another bidder, who was declared fourth lowest bidder, alleging therein that the petitioner has not disclosed in his bid the work-in-hand which was awarded vide work order dated 30.9.2019 by respondent No.3. On receipt of such complaint, show-cause notice dated 28.4.2020 was issued giving details of fact which was not disclosed by petitioner at the time of submission of bid and the petitioner was called upon to clarify the questions/points formulated therein and further to explain as to why action for non-disclosure of information be treated as conditional bid and suitable action be taken against the petitioner. He submits that the show-cause notice is very clear & specific requiring the petitioner to explain as to why action be not taken against as per Clause 53 of RFP and on failure, further treating the petitioner's bid as a conditional bid suitable action be taken. Reply to show cause notice was

submitted by the petitioner and thereafter considering the reply to show-cause notice, the order impugned has been passed. There is no ground and reason for the petitioner to say that the authorized signatory and power of attorney holder Shri Varun Garg had not signed the representation forwarded on 19.5.2020 & 23.5.2020 through email due to pandemic 'Covid-19'. He submits that contention of the petitioner itself is that the person who signed representation dated 19.5.2020 & 23.5.2020 was at Indore (MP) and even said Mr. Varun Garg was at Indore but he did not choose to sign representations for the reasons best known to him. Respondent authorities cannot consider any representation by a person who is not authorized under the tender document submitted by any tenderer. It is pointed out that authorized signatory of the petitioner submitted reply on 26.5.2020 to the letter dated 11.5.2020 with regard to initiation of proceeding for blacklisting and forfeiture of EMD / performance security, which was considered and only thereafter the final order was passed on 30.5.2020. This final order dated 30.5.2020 is not under challenge in this petition. It is argued that Clause 53 of the tender document mentions about the right to reject any proposal. Clause 53 (A) itself mentions about conditional bid and it includes as mentioned in Clause 53A (b) that information provided by a bidder if found to be incorrect or misleading, fraudulent at any stage/time during tendering process. Further, clause 61 (b) defines 'fraudulent practice' and the act of petitioner of not disclosing the work-in-hand for

the purpose of calculating bid capacity comes within the purview of definition of fraudulent practice. Therefore, appropriate action has been taken against the petitioner strictly in accordance with terms and conditions mentioned in the RFP document, after affording opportunity of hearing to the petitioner/ issuance of show-cause notice. He also points out that petitioner has suppressed one more fact that the petitioner has been suspended by the Public Works Department, Madhya Pradesh for a period of 2 years i.e. from 24.9.2019 to 23.9.2021, whereas the petitioner has filed affidavit stating on oath that there was no blacklisting. The petitioner has also undertaken that if any information is found to be incorrect, the action of forfeiture of security and RFP, to the extent accepted, may be cancelled. He submits that the petitioner does not have any cogent ground calling interference of this Court.

5. In reply to the submissions made by learned counsel for respondents No.1 & 2, learned counsel for petitioner submits that the submission made by learned counsel for respondents No.1 & 2 that petitioner was suspended for a period of two years i.e. from 24.9.2019 to 23.9.2021 is not correct. Respondents have downloaded the status of petitioner from Madhya Pradesh Public Works Department before its correction. He submits that the contract was terminated by M.P. Road Rural Development Authority against which an appeal was preferred by petitioner in which the order of termination of contract was revoked and the petitioner was

permitted to continue with the work. He further submits that the petitioner was aware on the date of submission of online bid that the blacklisting/suspension of petitioner has been revoked by the MP Public Works Department but due to mistake of authorities it was not corrected on the official website. He submits that he placed on record the list of blacklisted / suspended contractors of the MP Public Works Department, which was uploaded by him and placed along with rejoinder as Annexure P-14 and registration of petitioner is being shown as 'active'. The manner of assessing 'bid capacity', as stated by learned counsel for respondents No.1 & 2 and mentioned in the amended part of the tender document, is not correct. Requirement of the bid capacity for the subject tender is of only Rs.38-02 Crore, whereas the petitioner is having much more capacity than required. He also submits that submission made by learned counsel for respondents No.1 & 2 that Bhumi Pujan of the work of Gaurav Path, Arang has already been done, therefore, the petitioner was aware of the commencement of the work is not correct. Bhumi Pujan of any work could not mean that the work is commenced unless and until there is an order /letter to this effect and it only means that the intent to commence the work has been made. To support the submissions with regard to maintainability of writ petition and opportunity of hearing for passing the order of blacklisting, he places his reliance on the decision of Hon'ble Supreme Court in the matter of HL Trehan v. Union of India & ors reported in (1989) 1 SCC 764; Uma Nath Pandey v. State

of UP reported in (2009) 12 SCC 40; State of Punjab v. Davinder Pal Singh Bhullar reported in (2011) 14 SCC 770; Adi Saiva Sivachariyargal Nala Sangam & ors Vs. Government of Tamil Nadu & an reported in (2016) 2 SCC 725; Siemens Ltd. v. State of Maharashtra reported in (2006) 12 SCC 33; Mohinder Singh Gill v. Chief Election Commr. reported in (1978) 1 SCC 405.

6. We have heard learned counsel for the parties and perused the documents placed on record.
7. Every tenderer taking part in any tender process is required to follow and comply with each and every clause of terms enumerated in the tender document for submission of their tender bid. Terms of requirement of submission of bid cannot be interpreted of its own by any tenderer, but it requires its full compliance by the tenderer as it is, mentioned and provided. Respondent No.2 had issued a NIT calling request for proposal of System Tender No.57552 RFP No.28-1 on 14.10.2019. Last date for submission of bid initially was mentioned as 24.10.2019 till 5.30 p.m., but it was extended time to time and last date for submission of bid by interested tenderers has been fixed as 15.11.2019. On 6.11.2019 a corrigendum to RFP was issued incorporating additional clauses in the RFP, which included incorporation of 'Bid Capacity' clause in 'Pre-Qualification Criteria' under the heading 'Particular Conditions of Contract', which is as follows;-

“Bid Capacity”:-

The bidder should possess the bidding capacity as calculated by specified formula. The formula to be used is;

Available Bid Capacity= $A \times M \times N - B$, where

A = Maximum value of engineering (Civil / Electrical/ Mechanical as relevant to work being procured) works executed in any one year during the last five years (updated at the current price level), taking into account the completed as well as work in progress.

M= Multiplier to be applied (usually 2.5)

N= Number of years prescribed for completion of the work in question.

B= Value (updated at the current price level) of the existing commitments and ongoing works to be completed in the next 'N' years.”

8. Amendment in the RFP bringing additional clause has been made much prior to last date of online submission of bids i.e. 15.11.2019. As per pleadings of petitioner itself, the petitioner submitted online bid on 14.11.2019 i.e. after about 7 days from the date of issuance of corrigendum amending terms of tender document and adding 'bid capacity' clause as a qualification criteria. As the amendment was brought into through a corrigendum much prior to the last date of submission of tender document, the petitioner cannot say that the petitioner failed to comply with additional clauses as it was not forming part of the tender document. It is for the tenderer to be vigilant, who is interested to participate in the tender proceeding about the instructions or orders of the authority who is floating tender specifically when subject tender is online tender and every information and instruction

is available on the official website. In view of above, the submission made by learned counsel for the petitioner that additional clause, which has been inserted by way of amendment, will not come in the way of considering the bid of the petitioner to be invalid/non-responsive on that account, is not sustainable and is hereby repelled. More so, when it is pleaded that non-disclosure of work-in-hand is for other reason i.e. letter dated 21.10.2019 issued by respondent No.3.

9. The submission of learned counsel for the petitioner that he has not mentioned/disclosed the work of Gaurav Path, Arang awarded to him by the Chief Municipal Officer, Municipal Council Arang, District Raipur only because of the letter dated 21.10.2019 issued by the Chief Municipal Officer informing the petitioner that since the said work is not yet commenced, the same be not shown as work-in-hand in any other tender process. We have perused the letter dated 21.10.2019, which forms part of Annexure P-6 filed by the petitioner. Perusal of the said letter reveals that it was issued by the office of the Municipal Council, Arang, District Raipur in response to the letter dated 5.10.2019 written by the petitioner mentioning that due to non-commencement of the work awarded to the petitioner, bid capacity of petitioner is being affected. Considering this request of the petitioner, the respondent No.3 had given consent that till the commencement of work of Garuav Path, Arang, the petitioner is not required to show that work as work-in-hand. Contents

of the letter dated 21.10.2019 reads thus:-

“साईट में अतिक्रमण होने के कारण कार्य प्रारम्भ किया जाना अभी सम्भव नहीं है, यह तथ्य मान्य है एवं इसलिए आपको यह निर्देशित किया जाता है कि कार्य निष्पादन प्रारम्भ नहीं हो सकने के कारण उक्त अनुबंधित कार्य वास्तविक कार्य प्रारम्भ होने की तिथी तक निविदा इत्यादि में वर्क-इन-हैंड के रूप में न दर्याये जाने हेतु सहमति प्रदान की जाती है”

10. From the above conduct of the petitioner in writing letter to respondent No.3, it is apparent that the petitioner is well aware of the fact that if the petitioner will participate in any other tender process, the existing commitments / ongoing works of petitioner would be considered for assessing its bidding capacity. Therefore, submission is made by learned counsel for petitioner on the basis of pleadings made in the rejoinder to writ petition that requirement of bid capacity is only to assess financial capacity of a bidder. Perusal of amendment incorporated in the tender document by inserting additional clauses, particularly 'bid capacity' clause, which is quoted above, would reveal that it provides a formula i.e. 'A x M x N- B', by which available bid capacity of a tenderer is to be assessed. For the purpose of this formula, 'B' stands for 'value' (updated at the current price level) of the existing commitments and ongoing works to be completed in the next 'N' years. The letter 'N' is defined as 'number of years prescribed for completion of the ongoing work. The reason assigned by the petitioner for not disclosing the work-in-hand i.e. letter issued by respondent No.3, is not appealing to us.

Respondent No.3 can issue any such letter for its use within its own jurisdiction because letter dated 21.10.2019 relied upon by the petitioner is only a consent given by respondent No.3 based on the letter written by the petitioner.

11. Other ground on which present petition is filed challenging action of respondents No.1 & 2 is the action taken against the petitioner and proceeding drawn is in violation of the principles of natural justice as the petitioner was not served with any notice for initiating any proceeding against him. In the 'subject-matter in brief' of writ petition, the petitioner has pleaded thus;-

“.....on 28.04.2020 a show cause notice was issued to the petitioner a show cause notice was issued to the petitioner company raising an allegation that the petitioner did not disclose the complete works-in-hand i.e. work order issued by the CMO, Aarang, Raipur for construction of Gaurav Path road was not disclosed, which was a mandatory condition and further stated that if the petitioner company could not provide satisfactory answer the bid of petitioner shall be considered a conditional bid and will be liable for rejection.....”

In Para-8.4 of writ petition, the petitioner has pleaded that letter dated 28.4.2020 (Annexure P-7) was issued to the petitioner by respondent No.2 requiring the petitioner to clarify the points mentioned therein. Letter / notice dated 28.4.2020 is filed by respondents No.1 & 2 as Annexure R1-2/2 and relevant part of the same is extracted below;-

“.....However, it has come to notice of Bilaspur Smart City Limited that the Bidder has not disclosed the details of a particular Ongoing Work namely “Gourav Path at Arang, Baihar Chow, N.H. 53 to Khallari Mata Chown N.H. 53” against Tender No.51163 having Work Order Number 1524 Dated 30.09.2019 from the client Urban Administrative and Development (UADD) under Govt. of Chhattisgarh.

Please note, that this is a serious issue and may be termed as a conditional bid if not justified and clarified to the sanctification of BSCL and ultimately resulting in rejection of the Bid under RFP Clause 10, Point No.53 (Right to Reject any Proposal)

Therefore, the Bidder M/s Kalyan Toll Infrastructure Limited is instructed to clarify the following points within 2 Working Days from receiving of the letter, failing to which appropriate steps shall be taken by BSCL as per RFP clauses:-

1. Clarify why the said work was not considered during the disclosure of Bid Capacity for System Tender No.57552.
2. Share Work Order Copy of the Said work along with Work Execution Quantity as on 17.10.2019 and all other relevant clarification documents (if any) in support of the action of the Bidder of non-disclosing of the said work.
- 3.Explain to BSCL why this action of non-disclosure of information be treated as conditional bid and suitable actions be taken against M/s Kalyan Toll Infrastructure Limited.”

12. Clause -3 of the notice specifically mentions as to why this action of non-disclosure of information be treated as a conditional bid and suitable actions be taken against the petitioner. This notice specifically mentions about the suitable

actions and not only particular or specific action to be taken against the petitioner. It is only after issuance of show-cause notice and considering reply, order Annexure P-1 cancelling the proceedings with respect to System Tender No.57552 was passed. In the notice dated 28.4.2020 it is specifically mentioned that the proceeding or action will be initiated against the petitioner under Clause 10, Point No.53 (Right to Reject any Proposal). The term 'conditional bids' is defined in Clause 53-A of the NIT, which is one of the ground to reject any proposal. Clause 53-A is reproduced below;-

“A. Conditional Bids

- a. conditional bid will not be accepted.
- b. if information provided by the bidder is found to be incorrect/ misleading/fraudulent at any stage/time during the tendering process.
- c. Any effort on the part of a Bidder to influence the bid evaluation, bid comparison or contract award decisions;
- d. Bids received after the prescribed time & date for receipt of bids;
- e. Bids without signature of person (s) duly authorized on required pages of the bid;
- f. Bids without power of attorney / board resolution or its certified true copy.
- h. Bidders submitting more than one make or model for any item.”

13. Clause 61 of RFP deals with fraudulent and corrupt practice and it provides for forfeiture of EMD or performance security and blacklisting of a bidder / successful bidder for a period of two years, if such bidder is found engaged in fraudulent or corrupt practice.

14. Basis on which notice dated 28.4.2020 has been issued is

with regard to non-disclosure of work-in-hand by the petitioner. Additional clause of tender document specifically mentions about value of existing commitments and period in which ongoing works to be completed, which is required for the purpose of assessing bidding capacity. Notice was replied by the petitioner, as per submission made and documents placed on record as Annexure P-6, whereas order Annexure P-1 has been passed only on 8.5.2020 and thereafter letter of information of proceeding under Clause 61 dated 11.5.2020 was issued. In view of facts pleaded and submitted by learned counsel for the petitioner himself, it is clear that before issuance of Annexure P-1 & P-2, a notice has been issued to the petitioner which also specifically mentions that suitable actions to be taken treating the bid of petitioner to be conditional bid.

15. What is required before taking any adverse action against a bidder is to give notice seeking his explanation on any wrong committed, action to be taken against him and only after considering the reply, if filed, to pass any order against him. In the matter *Gorakha Securities (supra)*, reliance on which has been placed by the petitioner and Para No.21, 22 & 28 of which are reproduced in the petition, Hon'ble Supreme Court has held that show-cause notice should bear the action to be taken against person / tenderer to be specifically worded. If we consider the facts of the case at hand, respondent No.1 & 2 have issued notice dated 28.4.2020 with the subject

“Clarification regarding bid capacity details provided by the Bidder M/s Kalyan Toll Infrastructure Limited' mentioning the action to be taken on the part of petitioner is not clarified or justified to the satisfaction of respondent No.2. and further mentions that non-disclosure of information to be treated as conditional bid and suitable action be taken against the petitioner. True it is that first part of the notice/letter, Annexure P-7, specifically mentions that non-submission of clarification to the satisfaction of respondent No.1 will ultimately result in rejection of bid under Clause 10, Point No.53 of the RFP and there is no specific mention of Clause 61 of RFP. Pursuant to cancellation of the entire bid proceeding of System Tender No.57552, order dated 8.5.2020 was passed and thereafter a letter was issued on 11.5.2020 intimating about the proceeding drawn under Clause 61 for forfeiture of EMD and blacklisting. Respondents have not passed the order of blacklisting and forfeiture of amount of Earnest Deposit Money along with passing the order of cancellation of tender proceeding after holding the bid of the petitioner to be invalid, but information has been supplied vide letter dated 11.5.2010 to the petitioner that they are initiating proceedings under Clause 61 of RFP.

16. In pursuance of the letter dated 11.5.2020 the petitioner had submitted representation which was not considered for the reason that it was signed by a person who is not authorized under the tender document and subsequently on 26.5.2020,

letter/ representation has again been submitted and forwarded, which was duly signed by the authorized signatory.

17. So far as the order/letter Annexure P-1 is concerned, Clause 53 of the tender document clearly mentions about the right of the tendering agency to reject any proposal. In this case respondent Nos.1 & 2 found that the petitioner has not disclosed information in terms of bidding capacity clause. The explanation offered by the petitioner to show-cause notice dated 28.4.2020 was not found by them to be acceptable and in the said circumstances the order Annexure P-1 was passed. Learned counsel for the petitioner vehemently argued that it was bonafide and on the basis of letter dated 21.10.2019 issued by respondent No.3, but what could not be lost sight that petitioner was awarded work with respondent No.3 on 30.9.2019 and on 5.10.2019 he wrote letter that there was encroachment and as per contents of the letter dated 21.10.2019, which is at Page No.65, the petitioner requested respondent No.3 to permit not to disclose the work awarded as work-in-hand i.e. only within four days of the award of work by respondent No.3. It is not a case where for several months the work awarded could not be commenced due to any reason not attributable to the petitioner. In the proceedings under Article 226 of the Constitution of India, in tender matter what is required to be looked into is the decision making process and not correctness of the decision.

18. 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, Wednsebury 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”.

19. 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.”

20. Hon'ble Supreme Court in its another decision rendered in **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 judgements 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 th 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.....”

21. Main ground urged by the petitioner to challenge letter dated 11.5.2020 (Annexure P-2), presuming it to be an order of forfeiture of EMD and blacklisting of petitioner, is that this order has been passed without affording opportunity of hearing to the petitioner. Perusal of letter dated 11.5.2020 (Annexure P-2) reveals that it was issued by respondent No.2 intimating the petitioner about the proceeding drawn as per Clause 61 of the RFP of System Tender No.57552 and at the bottom of this letter, it is specifically mentioned that as the petitioner breached Clause 61 of the RFP, therefore, proceeding for forfeiting security deposit of Rs.19,00,000/- and blacklisting the petitioner for a period of 2 years, is being initiated against the petitioner. Thus it is manifestly clear that it is only an intimation to the petitioner about initiation of proceeding against the petitioner for forfeiture of EMD and blacklisting for violating Clause 61 of the RFP.

22. Hon'ble Supreme Court in the case of Gorakha Securities (supra), which has been relied upon by learned counsel for petitioner, has considered the purpose and necessity of issuance of show-cause notice and held thus:-

“33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned ASG. In the first

instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show cause notice has not caused any prejudice to the appellant. Moreover, had the action of black listing being specifically proposed in the show cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non mentioning of proposed blacklisting in the show cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.”

23. In the light of above quoted observation of Hon'ble Supreme Court, we will proceed to consider the facts of present case. On account of failure of petitioner to furnish all the information as required under the RFP after giving show-cause notice and considering reply submitted by petitioner, letter/order dated 8.5.2020 (Annexure P-1) has been issued by respondent No.2 invoking clause 53A (b) of the RFP, which deals with right to reject any proposal, and cancelling the entire tender proceeding and only thereafter letter Annexure P-2 dated 11.5.2020 has been issued intimating the petitioner about initiation of proceeding for forfeiture of EMD and blacklisting

of petitioner for violating Clause 61 of the RFP. Pursuant to receipt of letter (Annexure P-2), the petitioner put forth his version vide letter dated 26.5.2020 (Annexure R1-2/10). Before passing an order of forfeiture of security deposit and blacklisting the petitioner, if it is brought to the notice of petitioner that respondent No.2 is proceeding against the petitioner for forfeiting his EMD/Performance Security and blacklisting him, and the same was responded by the petitioner, putting forth his version, in the opinion of this Court, it cannot be said that there is any violation of principles of natural justice because the petitioner has got an opportunity to send his reply/ representation and put forth his version before the respondent authorities concerned for their consideration.

24. The order directing forfeiture of EMD and blacklisting of the petitioner for a period of two years has also been placed on record as Annexure R1-2/4 and a glance of the same reveals that it was passed only on 30.5.2020 after taking into consideration the letter/reply dated 26.5.2020 sent by the petitioner pursuant to receipt of letter Annexure P-1 dated 8.5.2020. In *Gorakha Securities (supra)* the order of blacklisting itself was passed without issuing any notice to that effect, whereas in case at hand, the petitioner has been served with a letter of intimation of proceeding of forfeiture & blacklisting to which he submitted his reply and only thereafter the order of blacklisting and forfeiture of EMD has

been passed. Thus, the facts of Gorakha Securities (supra), relied by the petitioner, are quite distinguishable from the facts of present case and are not helpful to him. Petitioner tried to project the letter dated 11.5.2020 (Annexure P-2) to be an order of blacklisting passed by respondent No.2, but the contents of this letter itself make it clear that it is only an intimation to the petitioner about initiation of proceeding against him for forfeiture of EMD and blacklisting.

As regards the reliance placed by petitioner on the decision of Hon'ble Supreme Court in Siemens Ltd. (supra), the facts of that case is different from the facts of present case as in that case only a show-cause notice was under challenge, whereas here in his case Annexure P-2 is challenged by the petitioner on the presumption that it is an order of forfeiture and blacklisting. Thus, the said judgment is of no help to the petitioner.

Other judgements relied upon by petitioner i.e. H.L. Trehan (supra), Umanath Pandey (supra), Davindar Pal Singh Bhullar (supra); Adi Saiva Sivachariyargal Nala Sangam (supra) & Mohinder Singh Gill are also distinguishable on facts.

25. Submission of learned counsel for petitioner and as raised by him in the rejoinder, that before issuing letter / order dated 8.5.2020 (Annexure P-1) & letter dated 11.5.2020 (Annexure P-2) no notice was issued to him is not correct in view of the

discussions made in preceding paragraphs. The petitioner was served with notice dated 28.4.2020 specifically mentioning therein the clauses under which action is required to be taken against the petitioner. Further, the proceeding under Clause 61 of RFP is a consequential proceeding for the reason on which orders under Clause 53A (b) has been passed. Intimation of proposed action in letter Annexure P-2, as pleaded in the rejoinder, has been given to the petitioner and the same was also responded by petitioner vide letter dated 26.5.2020 and only thereafter the order dated 30.5.2020 was passed under Clause 61 of RFP directing forfeiture of EMD and blacklisting of petitioner.

26. We do not find any substance in the submission of learned counsel for the petitioner that mentioning of amount to be forfeited and period of blacklisting in the notice itself shows that the show-cause notice issued to the petitioner was an empty formality with a pre-determined mind to blacklist the petitioner and forfeit his security deposit. Clause 61 of RFP in clear terms stipulates that if a bidder or successful bidder is found by the authority to have engaged, directly or indirectly, in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the bidding process or thereafter, such bidder shall not be eligible to participate in any tender of RFP issued by the authority during a period of two years from the date when such bidder is found involved / engaged in any of aforementioned practices.

Respondent No.2 had issued letter in terms of Clause 61 of RFP. Clause 61 of RFP is not challenged by the petitioner and once after going through all the clauses of the RFP, the petitioner participated in tender process, then all the clauses enumerated in the RFP are binding upon all the tenderers and petitioner in this case.

27. For the foregoing discussions, we do not find any tenable ground in this petition warranting interference by this Court in exercise of its writ jurisdiction. The writ petition being devoid of substance is liable to be dismissed and it is accordingly dismissed.

28. However, in view of the fact that this Court has only considered the 'decision making process' adopted by respondent No.2 while passing order dated 8.5.2020 (Annexure P-1) and not the merits of the order, and also that we have not considered the correctness of the order dated 30.5.2020 (Annexure R-1/2-4) passed by respondent No.2, as it is not under challenge, but for the ground of not granting of opportunity of hearing before passing of the order of blacklisting and forfeiture of EMD, the petitioner will be at liberty to assail action of respondent No.2 before appropriate forum available to him under the law.

Sd/-

(P.R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge