

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 13.07.2020****Judgment Delivered on : 20.07.2020****WPC No. 1514 of 2020**

- M/s Shanti Enggicon Private Limited Registered Address : Clubpara Bolangir Orrisa, Corporate Office : Shanti Niwas in Front of Agrasen Bhawan Korba (C.G.) 495677; Through its Director Shri Rohit Agrawal, aged about 32 Years, R/o Shanti Niwas in front of Agrasen Bhawan Korba (C.G.) 495677

---- Petitioner**Versus**

1. State of Chhattisgarh Through Secretary Department of Urban and Rural Administration, Mahanadi Complex, Nawa Raipur (C.G.)
2. Bilaspur Smart City Limited (Classified as State Government Company), Through its Directors, 3rd Floor, Vikash Bhawan, Nehru Chowk, Bilaspur Chhattisgarh India 495001

---- Respondents**WPC No. 1515 of 2020**

- M/s Shanti Enggicon Private Limited Registered Address : Clubpara Bolangir Orrisa, Corporate Office : Shanti Niwas in Front of Agrasen Bhawan Korba (C.G.) 495677; Through its Director Shri Rohit Agrawal, aged about 32 Years, R/o Shanti Niwas in front of Agrasen Bhawan Korba (C.G.) 495677

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---- Respondents

For Petitioner	: Shri Harshwardhan Parganiha, Advocate
For Respondent No.1/State	: Shri Gagan Tiwari, Deputy Govt. Advocate
For Respondent No.2/Company	: Shri Mateen Siddiqui, Standing Counsel

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****CAV JUDGMENT****Per P. R. Ramachandra Menon, Chief Justice**

1. Propriety of incorporation of a Clause involving 'Street Lighting' in the definition of the term 'Similar Work' dealing with 'Work Experience', to get qualified in the tender floated by the 2nd Respondent for "Construction of

Bituminous Road and Drain Work from Arpa River Indra Setu to Shanichari Rapta”, is put to challenge in these writ petitions.

2. We heard Shri Harshwardhan Parganiha, the learned counsel appearing for the Petitioner in both the cases, Shri Gagan Tiwari, the learned Deputy Government Advocate representing the 1st Respondent / State and Shri Mateen Siddiqui, the learned Standing Counsel representing the 2nd Respondent / Company, who floated the tender.
3. As suggested by the learned counsel for the Petitioner, WPC No. 1515/2020 is treated as the lead case and reference is made to the parties and proceedings as mentioned therein, except where separate reference is made depending upon the context.
4. The factual matrix reveals that the 2nd Respondent, which is cited as a State Government Company, had floated a Request for Proposal (RFP) {**System No.65010**} for “Construction of Bituminous Road and Drain Work from Arpa River Indra Setu to Shanichari Rapta Right Side”, for Rs.4944.11 lakhs. A similar RFP (**System No.65011**) for “Construction of Bituminous Road and Drain Work from Arpa River Indra Setu to Shanichari Rapta Left Side”, for Rs.4516.83 lakhs is involved in WPC No.1514/2020. Clause 9.6 of the RFP deals with the Pre-Qualification Criteria; Sub-Clause (3) of which stipulates the 'Experience'. This has been sub-divided into two categories i.e. (A) Similar Work Criteria and (B) Additional Work other than Similar Work Criteria. So as to get qualified, the participant bidders must have in his / their name and style the Experience of having executed 'Similar Work' as well as 'Additional

Work'. The term 'Similar Work' has been defined under Clause (3); which contains sub-clauses a, b and c. The dispute is only with regard to sub-clause 'c', which reads as follows :

“c. Street light (with underground cable) minimum total length of 1.5 K.M. (One and half kilometer), executed on divider / side of the road. It must be executed in the same agreement either by the same Contractor or some other electrical Contractor having Electrical-License of 'B' & above category.”

5. Incorporating the specific norm / stipulation / qualification as above, Annexure-P/3 Notification was issued by the 2nd Respondent on 09.06.2020. The said stipulation, with reference to the 'Street Lighting', according to the Petitioner, ought not to have been part of the Qualification in so far as it is an 'Electrical Work' and not connected with the 'Civil Construction Works'. The contention of the Petitioner is that, such a clause has been incorporated only with intention to identify the bidders of choice of the 2nd Respondent, confining the scope of consideration to a few and ousting many qualified Construction Contractors like the Petitioner and hence the challenge.
6. The learned counsel for the Petitioner points out that incorporation of the 'Street Lighting' work as part of the eligibility condition is nothing but an abuse of the powers and that serious objections were raised by many Contractors in the 'pre-bid meeting' convened by the 2nd Respondent. According to the Petitioner, out of the total '09' Contractors who responded, '07' Contractors raised objections as to the unsustainability of the eligibility condition of having done Similar Work involving 'Street Lighting' as well, to get qualified for the work for Construction of

Bituminous Road and Drain Work. Pursuant to the objections raised as above, the matter was considered and corrected, leading to issuance of a revised amendment dated 30.06.2020. A copy of the pre-bid response sheet dated 30.06.2020 has been produced as Annexure-P/4 and a copy of the revised amendment stated as issued on the same date has been produced as Annexure-P/5. However, to the shock and surprise of the Petitioner, another corrigendum/revised amendment was issued on the very next day i.e., 01.07.2020, whereby the modification made as per Annexures-P/4 and P/5 was cancelled and the clause as it contained in Annexure-P/3 original notification was restored vide Annexure-P/6; which is to the chagrin to the Petitioner and hence put to challenge in the writ petition filed with the following prayers :

"10.1. A writ and/or an order in the nature of writ of mandamus directing the respondent authorities to consider the candidature of petitioner in the Tender in response of the revised amendment dated 30th June 2020 to evaluate the bid of the petitioner in light of the experience certificate issued for Civil Work.

10.2. A writ and/or an order in the nature of writ of certiorari do issue quash the revise amendment dated 01st of July 2020 (ANNEXURE P-6), and to further direct the respondent authorities to evaluate the pre-qualification of the eligible bidders, excluding the Clause (c) in the definition of similar work as provided in the amendment notification dated 30th June 2020 (ANNEXURE P-5).

10.3. A writ and/or an order in the nature of writ of mandamus directing the respondent authorities to consider the qualification and eligibility of the candidates in accordance with the revised amendment dated 30th June 2020 (ANNEXURE P-5).

10.4. A writ and/or an order in the nature of writ of mandamus or such other nature directing the respondent company to strictly adhere to the PWD Manual and to go by the Norms Provided by the Indian Road Congress commonly known as MORTH Specification and to formulate the eligibility conditions as provided by the

PWD Manual and as prevailing in the normal tenders floated by the other State Instrumentalities.

10.5. A writ and/or an order in the nature of writ of mandamus or such other nature do issue restraining the respondent authorities in proceeding further with their process of award of contract in question in favour of any person whosoever and / or entering into agreement with the respondent No.2 and if for any reason whatsoever any work order is issued, then restrain the respondents from proceeding further with the work in the facts and circumstances of the case.

10.6. Cost of the proceedings.

10.7. Any other writs and directions that may be deemed fit and just in the facts and circumstances of case.”

7. Shri Harshwardhan Parganiha, the learned counsel for the Petitioner submits that the amendment as borne by Annexures-P/4 and P/5 was made after conscious deliberation of the relevant aspects based on the objections raised by the Contractors in the pre-bid meeting; but it was absolutely without any rhyme or reason that the matter was put back to square one; vide Annexure-P/6. This only shows the tainted/colourful exercise of power and the decision making process and hence it requires to be interdicted by this Court. The learned counsel submits that, considering the nature and scope of the work involving Civil Construction of Bituminous Road and Drain Work, Clause 'c' in the definition clause (3) defining 'Similar Work' involving Street Lighting is an unconscionable one and hence it does not set a level playing field. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Reliance Energy Ltd. v. Maharashtra State Road Corridor*** reported in **(2007) 8 SCC 1** {paragraph 36}. Reliance is also sought to be placed on the verdict passed by the Apex Court in ***Tata Cellular v. Union of India*** reported in **(1994) 6 SCC 651** to emphasize the test of reasonableness.

8. Shri Gagan Tiwari, the learned counsel representing the 1st Respondent / State submits that the tender has been floated by the 2nd Respondent, who is the Competent and free to stipulate the relevant terms depending upon the job requirements.

9. Shri Mateen Siddiqui, the learned counsel appearing for the 2nd Respondent submits that, the work involved is of challenging nature. By virtue of its nature, extent and the scope, it has been sought to be awarded to duly qualified parties with proven experience treating it as a composite contract. Major part of the work is of Civil Construction, but Street Lighting (**with underground cable**) forms part of the essential work and it is in the said circumstance, that the Experience has been decided to be counted with reference to 'Similar Work' as defined in the disputed clause. There cannot be any valid dispute with regard to the rights of the Awarder to stipulate the terms and Qualification to be satisfied by the Bidder and the bids could be submitted by parties, having the requisite qualifications / work experience, either individually or as a joint venture. The learned counsel also submits that the scope of interference by this Court in exercise of the power and jurisdiction under Article 226 of the Constitution of India in contractual matters is very limited. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Tata Cellular*** (supra) {paragraph 94}, ***Siemens Public Communication Network Private Limited and Another v. Union of India and Others*** reported in (2008) 16 SCC 215 {paragraphs 38 & 40} and ***Michigan Rubber (India) Limited v. State of Karnataka and Ors.***, reported in (2012) 8 SCC 216 {paragraphs 17, 18, 23, 24 & 35}.

The learned counsel also makes a reference to the verdict passed by the Apex Court in ***Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa and Another*** reported in **(2012) 6 SCC 464** to contend that even in a case where the party is entitled to have some damages, it cannot be entertained invoking the power of judicial review and the remedy lies elsewhere. In the instant case, there is absolutely no question of any arbitrariness and as such, the challenge raised against the relevant clause in the tender is thoroughly wrong and misconceived. It is also pointed out that Annexures-P/4 and P/5 were issued by a Manager of the 2nd Respondent, who was virtually carried away by the objections raised by the Contractors in the 'pre-bid meeting'. In the said circumstance, a Committee of Experts consisting of 'five' members was constituted to examine the matter. After detailed deliberation, the Committee was of the view that the stipulation contained in the disputed Clause 'c' was to be an integral part of the tender and hence it could not have been deleted; that too after commencement of the process by issuing the Tender Notification vide Annexure-P/3. It was accordingly, that the said Clause was restored as per Annexure-P/6 on the very next day of issuance of Annexures-P/4 and P/5.

10. The learned counsel for the Petitioner submits in reply that, the Governmental Authorities including the PWD have been issuing Tender Notifications segregating the Civil Work from the Electrical Work and as such, it is not correct or proper for the 2nd Respondent to have clubbed the same together. Reference is made to some of the documents produced alongwith the writ petition and related to the PWD .

11. At the very outset, it is to be noted that there cannot be any dispute with regard to the power and authority of the Awarder of the contract to stipulate the relevant terms and conditions in the Tender Notification. It is on the basis of the nature and scope of the work and the task to be met, that the qualifications are prescribed, which cannot be tinkered with by anybody. No interference is possible by this Court as well, unless it is demonstrated as actuated by *malafides* or resulted because of arbitrariness. The scope of judicial review is very limited and the field of scrutiny has to be confined only with regard to the “decision making process” and not the decision in the matter of awarding the contract. This is more so, when it comes to the stipulation of relevant qualifications and the Court cannot substitute its views with the view of the Awarder of the contract.
12. In ***Tata Cellular*** (supra), the Apex Court (in paragraph 77) held that the duty of the Court is to confine itself to the question of legality and 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 or natural justice,
 4. reached a decision which no reasonable tribunal would have reached or,
 5. abused its powers."

As it stands so, it is not for the Court to consider whether a particular policy or particular decision taken in fulfilment of that policy is fair and that the concern of the Court shall only be as to the manner in which the decision has been dictated. In paragraph 94, the principles deducible were summarized as follows :

“(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

13. It was after referring to the law declared by the Apex Court in **Tata Cellular** (supra) and such other decisions, that the Apex Court rendered its verdict in **Siemens Public Communication Network Private Limited** (supra), holding in paragraphs 38 and 40 are as follows :

“38. The matter can be looked at from a different angle. As noted in the case of *Reliance Airport Developers (P) Ltd.*, (2006) 10 SCC 1, at para 77, if two views are possible and no malafides or arbitrariness is alleged or shown, there is no scope for interference with the view taken by the authorities in inviting tenders.

40. On examining the facts and circumstances of the present case, we are of the view that none of the criteria

has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna."

While asserting the principle of judicial restraint as to interference in contract matters, the Apex Court also held that, if two views are possible and no malafides or arbitrariness is alleged or shown, there is no scope for interference with the view taken by the Authorities in inviting tenders.

14. In ***Michigan Rubber (India) Limited*** (supra), the Pre-Qualification Criteria with reference to manufacture and supply of Tyres, Tubes and Flaps was the subject matter for consideration. Here again, the verdict passed by the Apex Court in ***Tata Cellular*** (supra) was referred to; besides various other rulings rendered by the Apex Court on different points of time. The principles that emerge from the various decisions have been summarized in paragraph 23, which is extracted below :

- “(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) Fixation of a value of the tender is entirely within the

purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(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) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(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.”

With reference to the above principles, the Apex Court held that, a Court before interfering in tender or contractual matters, in exercise of power of the judicial review, it should pose to itself the following questions :

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;? and
- (ii) Whether the public interest is affected.

It was by applying the above principles, that the disputed question was answered to decline interference and dismissed the appeal preferred by the unsuccessful bidder.

15. There is no dispute to the law declared by the Apex Court in ***Reliance Energy Ltd.*** (supra) cited by the learned counsel for the Petitioner as to the necessity to fix a level playing field. But this does not mean that the bidder should be permitted to dictate terms to the Awarder as to the Qualification or Experience to be included in the tender, nor can it be ordered or suggested by this Court, directing the Awarder to carry out modifications. The Court does not have any special knowledge or expertise as to the nature and scope of the work or the qualification experience required; which lies within the exclusive domain of the Awarder of the contract. This cannot be watered down, invoking the limited jurisdiction of judicial scrutiny in contract matters.
16. It is relevant to note that the Petitioner seeks to have the matter pursued with liberty to participate in the bid on the basis of Annexures-P/4 and P/5 amendment dated 30.06.2020 and ignoring Annexure-P/6 revised amendment effected, based on the report of the 'five' member Expert Committee issued on the very next day, whereby the original stipulation, as contained in Annexure-P/3 Tender Notification, has been restored. There is no challenge against the Clause contained in Annexure-P/3 dated 09.06.2020. The Annexures-P/4 and P/5 amendment was made by a Manager of the 2nd Respondent-Company, based on the objections raised by some of the Contractors in the 'pre-bid meeting'. It has to be borne in mind that, because of the incorporation of a such Clause in Annexure-P/3, several other equally or more competent parties like the Petitioner might not have participated in the Tender and if the prayer in the writ petition to proceed with the Tender on the basis of Annexures-

P/4 and P/5 amendment is given effect to, it will be prejudicial to interest of such other similarly situated persons. It is settled law that, the rules of the game cannot be changed after commencement of the game, as held by the Apex Court in ***K. Manjusree v. State of A.P. & Another*** reported in **(2008) 3 SCC 512**. The above decision rendered, though in a service matter, can be applied with equal force to the given context as well. Even otherwise, for the reasons already mentioned, it is not for this Court to stipulate the Qualifications or Experience for the Tender, in the limited jurisdiction available by way of judicial scrutiny.

17. The contention of the Petitioner is that 'Street Lighting' is an Electrical Work, whereas the main contract is a 'Civil Work' in respect of Bituminous Road and Drain Work on either side of the Road and hence these two works have to be segregated and given separately; as being done by various other organs of the State like the PWD. What is the course pursued by the aforesaid organs like the PWD is not a matter for consideration for this Court. The 2nd Respondent is a separate Entity of its own, being a Company registered under the Companies Act and it is always open for the 2nd Respondent to identify the qualified bidders, who are capable of undertaking the work, treating it as a 'composite work' deploying experts, either jointly or made available through a joint venture.
18. Coming to the practical side, it is pertinent to note that the relevant Clause as to the experience in 'Similar Work', it insists the Street Lighting with underground cable through the divider or the side of the road. It goes without saying that the divider may be having different cuttings at different places to enable the vehicles / passengers to cross the road or

take a U-turn. In such portions as well, the Bituminous work has to be done (over the portions through which the underground cables pass). If the 2nd Respondent has decided, as a matter of policy, that, if the work is segregated and given to Civil and Electrical Contractors separately, it may adversely affect the quality of work and timely completion, for want of proper co-ordination between the two different Contractors, in turn affecting the public interest at large, this Court cannot brand it as an arbitrary decision. This is more so since, there may be chance for non-completion of work by either of such Contractors (Civil or Electrical), insinuating the other for the lapse / delay, which may lead to various unnecessary litigations, which could be avoided, if the work is awarded as a 'composite contract'. This may be a reason why such a Clause has been incorporated by the 2nd Respondent as a matter of policy; the correctness of which cannot be doubted or interfered with, by this Court in view of the law declared by the Apex Court in ***Michigan Rubber (India) Limited*** (supra).

19. In the above facts and circumstances, we are of the view that the writ petition is devoid of any merit and none of the grounds raised in support of the same could be held as tenable. Interference is declined and both the writ petitions are dismissed accordingly.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge