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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgement Reserved on 17.12.2019****Judgment Delivered on 23/1/2020****WPC No. 2566 of 2019**

- M/s Probit Plus Pvt. Ltd., Having its Registered Office At S.No. 11/1A, Sukhsagar Nagar, Katraj, Pune - 411046, Through its Director, Aarty S. Kale, Aged about 48 years, W/o Shri Shirish Kale, E-40-02-DRDO Township, C.V. Raman Nagar, Bangalore-560093

---- Petitioner**Versus**

1. State of Chhattisgarh Through its Secretary, School Education Department Mantralaya, Mahanadi Bhawan, Atal Nagar, Naya Raipur, District Raipur (CG)
2. The Mission Director (MD), Samagra Shiksha (SS), Composite Building, Second Floor, Pension Bada, Raipur (Chhattisgarh) India.
3. M/s Bennet Coleman & Company Ltd. Time Professional Learning Division, Ground Floor, Vkaratunda Corporate Park, Vishweshwar Nagar, CTS No.256, Off Aarey Road, Goregaon (E), Mumbai- 400063.
4. Edique Solutions Pvt Ltd. (Consortium Partner to M/s Bennet Coleman & Company Ltd) Registered Office At B-1003, Advant Navis Towers, Greater Noida Expressway, Noida Sector 142, Noida-201305.

---- Respondents

For Petitioner	:	Shri Gary Mukhopadhyay & Shri Vivek Verma, Advocates
For Respondent No.1 & 2	:	Shri Gagan Tiwari, Dy. Govt. Advocate.
For Respondent No.3 & 4	:	Dr. N.K. Shukla, Sr. Advocate with Shri S. Shukla, Advocate.

Hon'ble Shri PR Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****CAV Order****Per Parth Prateem Sahu, J**

1. Challenge in this petition is to the course & procedure adopted by respondent No.1 & 2 in issuing Letter of Intent dated

10.5.2019 and awarding contract in favour of respondent No.4 for supply and commissioning of Digital teaching learning resources (curriculum mapped content & assessment) and hardware for Digital Classrooms, under ICT @ Schools Scheme for 4330 government schools in Chhattisgarh.

2. Shorn of unnecessary details, the facts giving rise to this writ petition are that on 7.1.2019 respondent No.1 issued 'Request For Proposal (RFP)' in the form of a tender for 'supply and commissioning of Digital teaching learning resources (curriculum mapped content & assessment) and hardware for Digital Classrooms, under ICT @ Schools Scheme for 4330 Government Schools in Chhattisgarh'. As per tender conditions forming part of RFP, the bids were to be submitted on or before 12th February, 2019 till 5.00 p.m. and commercial bid was to be opened on 13th February, 2019 at 12.00 noon. Petitioner along with M/s RailTel Corporation of India Ltd., Delhi and M/s Sujata Computers Pvt. Ltd., Pune formed a consortium and participated in the tender in question by submitting bid through 'lead partner'. As per Deed of Consortium dated 22.12.2018 (Annexure P-3), M/s RailTel Corporation of India Ltd., Delhi was the leader of the said consortium. Respondents No.3 & 4 have also formed a consortium and participated in the RFP/tender process. After following the procedure prescribed under the RFP, the bid of respondent No.3, which was found to be lowest, was accepted and accordingly, Letter of Intent dated 10.5.2019 was issued in favour of respondent No.3 informing acceptance

of his tender as a 'lowest bidder' and calling upon him to enter into agreement. The order to start work has been issued on 11.6.2019.

3. Aggrieved by award of contract and issuance of work order in favour of respondent No.3, the petitioner has filed this petition and sought for following reliefs;-

“i. This Hon'ble Court be kindly pleased to Call for entire records pertaining to the Request for Proposal Annexure P-2 and subsequent processes like issuance of Letter of Intent and MOU/Work Order etc.

ii. This Hon'ble Court be kindly pleased to hold that, the issuance of Letter of Intent to the Respondent No.3 was arbitrary and illegal in as much as the Respondent No.3 was not at all eligible and the Financial Bid of the Respondent No.3 was not eligible to be opened at all.

iii. This Hon'ble Court be pleased Quash the impugned Letter of Intent dated 10.05.2019 / Annexure P-1 and subsequent issuance of work order to the Respondent No.3.

iv. This Hon'ble Court be kindly pleased to direct the Respondents to issue Letter of Intent in favour of the Petitioner and award the work to the petitioner being qualified.

v. Cost of this petition be awarded to the petitioners.

vi. Any other relief/reliefs, order/orders, direction/directions and writ/writs as may be deemed fit by the Hon'ble Court in the facts and circumstances of the case.”

4. The action of respondent No.2 was questioned on the ground *inter alia* that, respondent No.3 failed to fulfil pre-qualification prescribed in Clause 4 (2) of the RFP; the effective date of submitted service agreement with place IIM Kozhikode is 06.09.2016, execution date is 23.09.2016, but franking with place Mumbai, date is 29.9.2016; service agreement submitted is of 'Times Centre of Learning Limited (TCLL), which was

signed prior to merger of TCLL with respondent No.3, therefore, it cannot be considered as experience of respondent No.3; service agreement submitted by respondent No.3 does not disclose value of project undertaken by respondent No.3; no purchase order or commencement certificate has been submitted as required under Clause 4 (11) of the RFP; value of project has been considered, though not mentioned, but on the basis of certificate issued by the Chartered Accountant, which was illegal, respondent No.2 favoured respondent No.3 in awarding contract and respondent No.2 has given a complete go-by to the term 'experience'. Petitioner has further pleaded that the objections raised by petitioner in its representation have not been considered by respondent authorities in a proper manner and the contract was awarded to respondent No.3 by issuing Letter of Intent dated 10.5.2019 (Annexure P-1), which is liable to be quashed in exercise of writ jurisdiction.

5. Respondent Nos.1 & 2/State submitted reply to writ petition stating that the documents uploaded by petitioner and respondent No.3 were verified by a team consisting of six technical experts and both were declared eligible. Petitioner did not raise any objection on 6.3.2019 with regard to eligibility of respondent No.3, though documents submitted by respondent No.3 along with its bid/offer were available from 27.2.2019, and the same was raised by petitioner (M/s RailTel) for the first time on 3.5.2019 and thereafter on 6.5.2019 & 20.5.2019. In the meeting of the POC and the Technical Committee held on

6.5.2019, after the proof of concept by participating bidders and on technical evaluations, M/s RailTel Corporation secured 37.5 out of 50 (75%) and respondent No.3 secured 42.75 out of 50 (85%). Financial bids were opened on 7.5.2019 and prior to that, objections raised by M/s RailTel Corporation India Ltd. were examined and after recording satisfaction of the bids etc., the financial bids were opened and the bid of respondent No.3 was found to be lowest one. Price quoted by respondent No.3 is Rs.3,45,80,06,655/-, whereas petitioner quoted Rs.7,04,17,42,297/- and thus there is overall difference of 51% between the rates quoted by petitioner and respondent No.3. After opening of financial bid, on 10.5.2019 a Letter of Intent was issued in favour of respondent No.3, which was followed by the work order dated 11.6.2019. It was pleaded that petition filed by petitioner is not maintainable as the 'lead bidder' i.e. M/s RailTel Corporation, vide letter dated 17.7.2019 had requested for release of Earnest Money Deposit / Bank Guarantee of Rs.6.5 Crore furnished for taking part in the RFP/tender process and the same was returned vide letter dated 18.9.2019. M/s RailTel Corporation being the lead bidder of the consortium was authorized to conduct negotiation, to sign agreement/ contract, incur liabilities, receive information and all other necessary affairs in connection with all matters related to or arising from the RFP. It was also pleaded that other partners of the consortium i.e. M/s RailTel Corporation and M/s Sujata Computers, have not been arrayed as party to

writ petition. Objections raised by M/s Railtel Corporation vide letters dated 3.5.2019 & 6.5.2019 were decided prior to opening of financial bids by the Committee. On account of technical failure of the web portal, some documents were physically presented/ submitted including certificate of TCLL. After issuance of work order, respondent No.3 has already achieved the first milestone, as per RFP. This petition has been filed with unexplained inordinate delay.

6. In the return filed by respondent No.3 it is mentioned that by virtue of Letter of Intent dated 10.5.2019 and consequent work order dated 11.6.2019, respondent No.3 had furnished bank guarantee of Rs.34,58,00,666/- and also made huge investment of Rs.180 Crore in procuring various equipments and materials required for completion of project. Out of total contract work, around 50% work has been completed and respondent No.3 has payment obligation of more than Rs.200 crore. There was difference of almost double in the price quoted bid by petitioner and respondent No.3. Writ petition has been filed after lapse of sufficient period. On request being made by M/s Railtel Corporation, lead bidder of the consortium, Earnest Money Deposit has already been returned. As per deed of consortium filed by petitioner, M/s Railtel Corporation, who is the 'lead bidder', is only authorized to prosecute all matters related to the RFP in question and as such, the petitioner has no locus standi to file this petition.

7. In the rejoinder, all adverse pleadings made by respondents in

their respective returns have been denied by the petitioner. It is submitted that petitioner has locus standi to challenge legality of decision taken by the respondent State authorities. There is nothing in law preventing petitioner from challenging arbitrary and illegal action of the Government instrumentalities. Petitioner has written letters to M/s Railtel Corporation and the lead bidder was always ready and willing to perform its obligation. The consortium agreement is a document sharing responsibility in bid participation & execution of work and only by the contents of agreement, the right of petitioner to challenge illegal and arbitrary action of respondent No.2 by filing writ petition, cannot be restricted.

8. Mr. Mukhopadhyaya, learned counsel for petitioner submits that all the tender conditions prescribed in the RFP are required to be complied with in its words and spirit. Clause-7 of the RFP talks about pre-qualification criteria and Clause 7 (a) prescribes 'minimum eligibility criteria' for participation in tender process. Though respondent No.3 did not fulfil minimum eligibility criteria, as prescribed in the RFP, his bid was accepted. It is also argued that respondent No.3 has neither successfully implemented similar work in minimum 500 schools of the Central Government or any of the State Governments including PSUs nor have experience of implementing one project of similar work costing not less than Rs.100 Crore, yet respondent State authorities have awarded contract to respondent No.3. It was submitted that as per Noting -2 appended to Clause-7, the

value of completed project and scope of work/ services are to be clearly highlighted, but respondent No.3 has not mentioned value of completed project. Further, the document annexed in support thereof, which was issued by the Chartered Accountant, is not reliable and authentic so as to fulfil criteria as mentioned in the Note appended to Clause-7. He submits that since beginning the petitioner had been raising objections and submitting representations regarding ineligibility of respondent No.3, but the same have not been considered and decided by respondent authorities in an objective manner. Certificate issued by IIM, Kozhikode is showing only value of Rs.14.84 Crore and thus it is clear that respondent No.3 is not having experience of completing similar project costing not less than Rs.100 Crore, however, respondent No.2 has not declared respondent No.3 to be disqualified and thereby acted in an arbitrary & illegal manner and contrary to tender conditions mentioned in the RFP. Action on the part of respondent Nos.1 & 2 is liable to be interdicted and the Letter of Intent issued in favour of respondent No.3 dated 7.5.2019 be quashed.

9. Per contra, Mr. Gagan Tiwari, learned counsel for respondents No.1 & 2 submits that writ petition itself is not maintainable because the consortium consisted of three partners including petitioner herein, but other two partners have not been impleaded as party to writ petition. He further submits that M/s Railtel Corporation, who is the lead bidder, is only authorized to represent and act on behalf of all the consortium partners, but

neither this writ petition has been filed by said M/s Railtel Corporation nor the petitioner has been authorized by M/s Railtel Corporation & M/s Sujata Computers (other consortium partners) to file this petition. Lead partner of the consortium filed an application for return of Earnest Money Deposit, which was returned by respondent No.2 and after refund of Earnest Money Deposit/Bank Guarantee, other partners of the Consortium cannot challenge the tender proceeding, which has already been finalized in favour of respondent No.3. To buttress the submission, he places reliance on the decision of Hon'ble Supreme Court in the matter of Siemens Aktiengesellschaft & Siemens Limited v. Delhi Metro Rail Corporation Ltd. & ors reported in (2014) 11 SCC 288.

On merits, learned counsel for respondents No.1 & 2 submits that as the business of TCLL got merged with respondent No.3, all the assets, liabilities, rights and obligations of TCLL got merged with respondent No.3 and as such, the agreement signed by TCLL with IIM, Kozhikode was also conferred on respondent No.3. As per Section 233 (9) of the Companies Act, 2013, agreement of respondent No.3 with IIM, Kozhikode was for long term project, therefore, service agreement was executed, which was a valid agreement and it shows that business of respondent No.3 with his client and service agreement is more of a rate contract. He submits that agreement between IIM and respondent No.3 was for a period of five years and in initial three years, respondent No.3 had

already executed work of Rs.57.87 Crore and looking to the work executed till date, the value of agreement/project would be more than Rs.100 Crores.

During pendency of writ petition, the proceeding dated 6.5.2019 was placed on record by respondent No.1 & 2 to support the argument that prior to opening of financial bids, the objections raised by M/s Railtel Corporation (lead bidder) was decided and while rejecting the objections, reasons have also been assigned for recording satisfaction of the Committee on the documents annexed by respondent No.3 along with the tender document.

10. Dr. Shukla, learned Senior Counsel for respondent No.3 & 4 submits that respondent No.3 had submitted all relevant documents with respondent No.2 as required under the RFP. The Expert Committee of respondent No.2 had evaluated all the documents submitted and found respondent No.3 to be eligible. He argued that before opening of price bids, on 7.5.2019 the objections raised by M/s Railtel Corporation, who is lead bidder in the consortium, have been decided and thereafter on 10.5.2019 Letter of Intent was issued in favour of respondent No.3. This Letter of Intent was followed by the work order dated 11.6.2019. He submitted that after issuance of work order, respondent No.3 had furnished bank guarantee of Rs.34,58,00,666/- and also invested more than Rs.180 Crore for procuring materials and equipments for execution of the contract work. He submits that almost 50% sites are ready

and more than 50% work has already been completed. He also submits that there was huge difference in the price offered by petitioner and respondent No.3. This difference is almost double the price quoted by respondent no.3 for the same work. First milestone of the project has already been successfully achieved. He also reiterated the argument with respect to maintainability of writ petition.

11. We have heard learned counsel for the parties and perused the documents brought on record by respective parties.
12. Since the question relating to maintainability of writ petition, raised by learned counsel for the respondents, goes to the root of the matter, it is expedient to consider the same at the first instance.
13. It is not in dispute that petitioner and respondent No.3 had participated in the RFP by forming a consortium. As per Deed of Consortium (Annexure P-3) annexed by petitioner, M/s Railtel Corporation India Limited is Party No.1; M/s Probit Plus (petitioner) is Party No.2 and M/s Sujata Computers is Party No.3. In this Deed of Consortium, M/s RailTel Corporation of India Ltd. has been authorized to fully represent and act on behalf of, and as 'lead bidder' of the consortium. All members of the consortium were to be jointly and severally responsible for discharging all obligations under the Contract. Relevant portion of Deed of Consortium is reproduced below:-

“M/s RailTel Corporation of India Ltd. as a member/partner of the said consortium and having its registered address as 6th Floor, IIIrd Block, Delhi Technology Park, Shastri Park, Delhi- 110053 is

hereby duly authorized to fully represent and act on behalf of, and as 'lead bidder' of the said consortium to sign and tender proposal, conduct negotiation(s), sign agreement(s), contract (s), incur liabilities and receive communication (s) for, and on behalf of, the consortium, and, further, to transact all other necessary affairs in connection with all matters related to, or arising from, with the said NIT. We hereby confirm that we are jointly and severally liable, together, with the other member (s) / partner (s) of the said consortium, to the Government of Chhattisgarh in the Department of Information Technology for all obligations of the consortium in respect of all matters related to, or arising from, the said NIT.”

14. Perusal of above quoted portion of the Deed of Consortium would show that for all purposes, M/s RailTel Corporation has been authorized as 'lead bidder' including to transact all other necessary affairs in connection with all matters relating to or arising from, with the RFP in question. Admittedly, M/s RailTel Corporation, who being a lead bidder raised objection before the Tender Evaluation Committee, has not filed this petition challenging the RFP/tender process, issuance of Letter of Intent or award of contract to respondent No.3. This writ petition has been filed by the petitioner, one of the partners of the said consortium, who was not at all authorized under the Deed of Consortium to participate under the consortium deed or to question the affairs in connection with all matters related to or arising from the RFP/tender process in question.
15. Another important aspect of the matter is that on 17.7.2019 itself M/s RailTel Corporation, lead bidder under the said consortium, had submitted an application (Annexure R-6) before respondent No.2 for return/release of bank guarantee/ earnest money deposit of Rs.6.5 Crore and during the

pendency of writ petition, the same was returned to M/s RailTel Corporation. Since the lead bidder itself has withdrawn EMD/BG, other partners of the said consortium have no right or authority to subsequently challenge the tender proceeding because as soon as EMD/Bank Guarantee is refunded on the request of a bidder, the same shall be treated as withdrawal of said tenderer from tender process.

16. This writ petition is not filed as 'public interest litigation' but the petitioner has filed this petition in his capacity as a partner of the said consortium, and as we have already held above after considering the Deed of Consortium (Annexure P-3) that, the authorization for all purposes has been given to M/s RailTel Corporation only as a 'lead bidder' and no authorization letter or proceeding have been filed by petitioner along with this petition authorizing him to file this petition and secondly, the EMD/bank guarantee submitted for the subject RFP/tender is withdrawn, this Court is of the considered view that the petitioner has no locus standi to file this petition challenging the RFP/tender proceedings. The work of contract cannot be granted to petitioner even if he succeeds. In these circumstances, we have no hesitation in holding that writ petition as filed by petitioner is not maintainable.
17. Since the writ petition itself has been held to be not maintainable in the given facts and circumstances of the case, we need not adjudicate other grounds raised by the petitioner in the writ petition.

18. At this stage, we must express our displeasure to the course and procedure adopted by respondent No.2 in finalizing the tender process i.e. evaluation of bids. However, keeping in mind the nature of work sought to be carried out by way of the RFP/tender process in question i.e. supply and commissioning of digital teaching and learning course for digital classrooms under ICT @ schools scheme for 4330 government schools in Chhattisgarh, and considering the submission made by learned counsel for the respondent State that almost 50% work has been completed, we refrain from interfering with the tender process in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, as the same would not only affect interest of the students, who are studying in those government schools, but also deprive them from the benefits of digital teaching learning resources, which is very important in the present scenario to compete with other students who are studying in better private schools equipped with all modern facilities.

19. For the foregoing reasons, the petition fails and is accordingly dismissed.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-