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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 24.03.2021

Judgment Delivered on : 08.04.2021

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 1123 of 2021

- M/s Ram Gopal Somani Through its Partner, Ram Gopal Somani, S/o Late Shri Ganesh Narayan Ji Somani, age 62 Years, R/o Station Road, Champa, District- Janjgir-Champa, Chhattisgarh 495671

---- Petitioner

Versus

1. Bilaspur Smart City Limited Through its Managing Director, 3rd Floor, Pinglee Bhawan, Nehru Chowk, 495001 Bilaspur, Chhattisgarh.
2. The Manager Bilaspur Smart City Limited, 3rd Floor, Pinglee Bhawan, Nehru Chowk, 495001, Bilaspur, Chhattisgarh.
3. M/s Future Engineering a Company Incorporated under the Companies Act 2013 having its Registered Office at Vidya Nagar Bilaspur, Chhattisgarh 495001.

---- Respondents

For Petitioner	:	Mr. Kshitij Sharma, Advocate
For Respondents No.1 & 2	:	Mr. Mateen Siddiqui, Advocate
For Respondent No.3	:	Mr. B.D. Guru and Mr. S.S. Baghel, Advocates

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Narendra Kumar Vyas, Judge

CAV JUDGMENT

Per P. R. Ramachandra Menon, Chief Justice

1. Identification of the successful bidder, pursuant to an allegedly wrong decision making process, ignoring the specific terms in the Tender Notification, in an attempt to extend undue favour to the 3rd Respondent, is the subject matter of challenge in this writ petition. The main ground of challenge is that, the 3rd Respondent is not qualified both on the financial and experience criteria, as revealed from the documents uploaded by them along with the Tender.

2. The Respondent Bilaspur Smart City Limited ('BSCL' for short) floated Annexure-P/2 Tender dated 13.11.2020 for External Electrification with cable link in RCC Duct at Vyapar Vihar Smart Road, Bilaspur for Bilaspur Smart City with the 'estimated cost of work' at Rs. 1121.76 Lakhs. The project was to be completed within 4 months and the 'defect liability period' was 2 years from the date of handover. The bid was to be submitted in 3 envelopes – 'A', 'B' & 'C', where Envelope 'A' would contain the EMD, Bid-Security, Bid-Fees and Integrity Pact/Affidavit; Envelope 'B' would contain the documents pertaining to pre-qualification and technical evaluation; whereas Envelope 'C' would contain the financial bid. After issuing the Tender, the Respondent-BSCL issued Annexure-P/3 corrigendum dated 21.11.2020, whereby some material changes were brought in, particularly with regard to the experience in the work by replacing the relevant clause enabling also a participant who was proceeding with the ongoing works, instead of the necessity to have satisfactory completion of the work. The last date for submission of the On-line bid was 04.12.2020 and the bids were to be opened on 08.12.2020, which subsequently came to be adjourned to 05.01.2021.

3. The Petitioner, who is a partnership firm qualified in all respects, submitted the bid strictly in conformity with the terms and conditions of the Tender. The 3rd Respondent and another party were also in the forefront and on opening the bid on 05.01.2021, the 3rd Respondent was declared as L-1 while the Petitioner was placed at L-2. On coming across the various discrepancies and inconsistencies with regard to the credentials of the 3rd Respondent with reference to the documents

produced, Annexure-P/5 objection was preferred by the Petitioner on 07.01.2021, pointing out that the 3rd Respondent was not qualified, having not satisfied the requisite parameters notified in the Tender. It was also specifically brought out that the allocation of 'full marks' (30) under the 'financial criteria' was not correct, as the turnover disclosed from the certificate issued by the auditor clearly revealed that the 3rd Respondent was having only less than '8.00 crores' of turnover during the past three years and hence eligible to get only '20 marks' under this head. This by itself would have pushed down the 3rd Respondent (who was given 75 marks) to be with only 65 marks and since the Tender clearly stipulated a minimum of 70 marks, the 3rd Respondent was liable to be disqualified. It was further pointed out by the Petitioner that, though in Annexure-P/2 Tender conditions, under the head 'Work Experience', the ongoing work to the requisite extent was also liable to be reckoned for awarding the marks as per Annexure-P/3 corrigendum issued, the yardstick to have “satisfactory completion” of the work was observed. In the said circumstance, the 3rd Respondent was not having the requisite experience as well and hence was liable to be disqualified.

4. The above objections were turned down by the Respondent-BSCL vide Annexure-P/1 dated 21.01.2021, whereby it was stated that the evaluation of the credentials was done by the Bid Evaluation Committee strictly in accordance with the terms of the Tender and that since the 3rd Respondent was having a turnover of 11.854 crores for the Financial Year 2018-19, it was above 8.00 crores, thus justifying allocation of 30 marks (full marks) under this head; adding that the decision of the Bid

Evaluation Committee was final in all respects. This made the Petitioner to challenge the same by filing the writ petition, which contained the following prayers :

> "10.1 A writ and/or an order in the nature of writ of appropriate nature commanding respondent no. 1 & 2 to submit all the relevant records pertaining to the subject tender process.
>
> 10.2 A writ and/or an order in the nature of writ of appropriate nature quashing the impugned communication dated 22.01.2021, since the same suffers from non-application of mind.
>
> 10.3 A writ and/or an order in the nature of writ of appropriate nature, directing respondent no. 1 and 2 to reject the bid of the respondent no.3, since the same is rendered unresponsive because of ineligibility in technical evaluation.
>
> 10.4 A writ and/or order of an appropriate nature commanding the respondent no.1 & 2 to award the contract to the petitioner as it being thus lowest bidder after disqualification of the respondent no.3.
>
> 10.5 Cost of the proceedings.
>
> 10.6 Any other relief that may be deemed fit and just in the facts & circumstances of case."

5. The Respondent-BSCL has sought to justify their action, pointing out that the 3rd Respondent has submitted Work Experience (Annexure-R-1-2/1) issued by the Chhattisgarh State Power Distribution Company Limited on 25.11.2020, wherein it was clearly stated that the 3rd Respondent had satisfactorily completed the work in respect of the contract amount of Rs.10,66,95,776/- and that the final bill was pending. Reference was made to corrigendum dated 21.11.2020 revising the RPF clause, which says "satisfactorily completed at least one similar work of value 80% of

the probable amount of contract as on date of submission of financial offer" and that the 3rd Respondent, who comes within the purview of the same is qualified and is eligible to get 15 marks under this head. *(However, the said Respondent has given the qualification requirement in the tabulated form under para 3, wherein reference is made to previously existing clause with regard to the work experience i.e. with reference to the ongoing works, whereas the corrigendum insisting satisfactory completion of the work is omitted to be extracted on analysed)*. With regard to the turnover requirement, to assess the financial criteria, the said Respondent has submitted in paragraph 5 that in view of some discrepancies in the audit report submitted by the 3rd Respondent and the certificate issued by the Auditor, a clarification was sought for from the 3rd Respondent on 29.12.2020 vide Annexure/R1-2/5. Annexure/R1-2/2 reply dated 30.12.2020 was submitted by the 3rd Respondent enclosing some additional documents which included a letter addressed to the Respondent-BSCL with reference to the 3rd Respondent and the Tender, whereby the figures showing the annual turnover for the year 2016-17, 2017-18 and 2018-19 were given and enhanced showing that it was inclusive of taxes and thus giving the average turnover for the three years including taxes as 800.91 Lakhs *(In the said letter date given beneath the signature of the Auditor shows that it was issued only on "30.11.2020". It is also relevant to note that, unlike Annexure-P/4, the said document is not notarised)*. It was on the basis of the said document that the matter was finalized declaring the eligibility / qualification of the 3rd Respondent.

6. The 3rd Respondent has filed their version almost in similar lines, however, adding that pursuant to identification of the 3rd Respondent as the successful bidder, Annexure-R-3/1 Letter of Acceptance dated 30.01.2021 and Annexure-R-3/2 work order dated 03.02.2021 have been issued to them. It is stated that pursuant to this, the 3rd Respondent has furnished bank guarantee as borne by Annexure-R-3/3 communication dated 02.02.2021 and after deploying men and machinery, has sought for permission to use the various infrastructure vide Anneuxres-R-3/4 and R-3/5; both dated 23.02.2021. Making a reference to such other documents as to conducting of the survey, satisfaction of advance amount for procurement of materials and the electricity connection sought to be obtained for construction of godown (Annexure-R-3/6, R-3/7, R-3/8 and R-3/9); the 3rd Respondent contends that the writ petition preferred on 10.02.2021 is belated and not liable to be entertained. The 3rd Respondent has asserted that, as certified by the Auditor / Chartered Accountant and as disclosed from the additional materials produced, the said Respondent is qualified in all respects; both under the financial criteria and the experience criteria.

7. The Petitioner has filed a rejoinder, pointing out that the glaring inconsistencies/discrepancies in the figures reflected from the documents which were produced earlier (which are available online) and the additional documents produced. Copies of the 'Account Statement' of the 3rd Respondent for the years 2016-17, 2017-18 and 2018-19 have been produced as Annexure-P/7, P/8 and P/9 respectively. It is pointed out that the new certificate obtained from the Auditor and submitted along

with the letter dated 30.12.2020 appears to be a “revised certificate” which does not reconcile with the financial statement submitted along with the bid documents and hence cannot be acted upon. The documents and the stand taken by the Respondents are stated as an afterthought, pursuant to the serious objection raised by the Petitioner.

8. Mr. Kshitij Sharma, the learned counsel appearing for the Petitioner referred to the specific pleadings and documents brought on record in support of the contentions raised by the Petitioner. Mr. Mateen Siddiqui, the learned counsel for Respondents No.1 and 2 addressed the Court, seeking to justify their stand as pleaded by them; while the submissions on behalf of the 3rd Respondent were advanced by Mr. B.D. Guru, the learned counsel.

9. It is brought to the notice of this Court by Mr. Kshitij Sharma, the learned counsel for the Petitioner that the relevant clauses in the Tender Notification governing the essential conditions have to be interpreted and adhered to strictly, in view of the law declared by the Apex Court in ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Others*** reported in ***(2006) 11 SCC 548***; ***Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited & Others*** reported in ***(2016) 8 SCC 446*** and ***Vidarbha Irrigation Development Corporation v. Anoj Kumar Agarwala*** reported in ***2019(2) SCALE 134***. We find considerable force in the said submissions, as the law stands well settled in this regard.

10. Mr. Kshitij Sharma, the learned counsel for the Petitioner points out that there is absolutely no merit or *bona fides* in the submissions / contentions made by the 3rd Respondent that after obtaining the work order, substantial efforts have been taken by providing the necessary infrastructure and that the work has been commenced / advanced to considerable extent. The learned counsel makes a reference to Annexure-R-3/6 dated 08.02.2021, whereby the 3rd Respondent has written to the Respondent-BSCL, referring to the inadequacies / lapses and that the work cannot be carried forward for the reasons mentioned therein.

11. Evaluation of the 'Technical Criteria' is given under paragraph 5.2 of Annexure-P/2 NIT. The contents can be summarised with regard to the different heads and the maximum marks, as given below :

"Technical Evaluation Criteria :

S. No.	Evaluation Criteria	Max Marks
1.	General understanding of the project.	10
2.	Experience in managing/execution of Government project for Identical Works.	30
3.	Financial Capacity.	30
4.	Man-Power & Machinery (10 marks each)	20
5.	If the bidder is an 'original-equipment manufacturer' (OEM) of HT underground XLPE cable.	10

12. It is necessary to have a look at the process of evaluation as well, as given the Tender Notification, which consists of three stages namely, Stage-I : Evaluation of Pre-Qualification, Stage-II : Evaluation of

Technical Bid and Stage-III : Evaluation of Financial Bid. Stage-II dealing with Evaluation of Technical Bid, which is to the following effect :

> **“ Stage – II: Evaluation of Technical Bid**
>
> The Bidder who qualify through all the criteria and evaluation processes in Stage-I shall be considered for Technical Evaluation.
>
> 1. The Bid Evaluation Committee (BEC) may invite each Bidder to make a presentation and demonstration as part of the technical evaluation.
>
> 2. The bidders' technical solutions proposed in the bid document shall be evaluated as per the requirements specified in the RFP and technical evaluation criteria as mentioned in the RFP.
>
> 3. Each Technical Bid will be assigned a Technical Score out of a maximum of 100 marks as per the Technical Evaluation Criteria in the RFP. Only the bidders who get Technical Score of more than or equal to 70% of total marks in Technical Evaluation will qualify for Evaluation of Financial bid stage.
>
> 4. BEC will evaluate bid as per the Technical evaluation criteria and award the appropriate marks against each criteria.
>
> 5. The awarded marks shall be undisputed and unanimous decision among all the members of the BEC.
>
> 6. Bidders would be informed of their qualification/ disqualification through e-mail.
>
> 7. The decision of the Bid Evaluation Committee (BEC) in the evaluation of bids shall be final. No correspondence will be entertained outside the process of evaluation with the Committee.
>
> **8. In Technical Qualification, bid of those bidders which score minimum 70 marks will be eligible for financial opening of bid.”**

From the above, it is quite clear that in the 'Technical Qualification', bids of only those bidders <u>who score minimum 70 marks will be eligible</u> for opening of the Financial Bid.

13. Admittedly, the document / Audit Certificate produced by the 3rd Respondent along with bid was Annexure-P/4, which gives the total turnover of the 3rd Respondent for the three years 2016-17, 2017-18 and 2018-19, as extracted below :

ANNEXURE P/4

Anil Ankita & Associates
CHARTERED ACCOUNTANTS

Shop No. 06,Bagadia Complex,Akaltara
Email-Caanilagrawalakt@gmail.com

Contact -9907746146
07817-252046

To,
Managing Director,
Bilaspur Smart City Limited,
Pragati Bhawan, Nehru Chowk,
Bilaspur-495001, Chhattisgarh

Sub: RFP for **External Electrification with cable laying in RCC Duct at Vyapar Vihar Smart Road, Bilaspur for Bilaspur Smart City** in Bilaspur.

Annual Turnover for Last 3 Financial Years 2016-17, 2017-18 & 2018-19) of **M/s Future Engineering**.

Sir/Madam,

I have carefully gone through the Terms & Conditions contained in the RFP Document for Selection of Agency for **External Electrification with cable laying in RCC Duct at Vyapar Vihar Smart Road, Bilaspur for Bilaspur Smart City**" in Bilaspur

I also hereby declare that I have gone through all the financial documents of **M/s Future Engineering** and Certify that below are the details Regarding Overall turnover over last 3 financialyears for the Firm **M/s Future Engineering** for the year 2016-17, 2017-18 & 2018-19.

Annual Turn Over for 2016-17 (INR)	Annual Turn Over for 2017-2018 (INR)	Annual Turn Over for 2018-2019 (INR)	Average Turn Over for the 3 Years (INR)
28,555,697.54	69,453,817.37	115,422,281.22	71143931.67

Attested True-Copy

TRUE COPY

Rakesh Pandey
Notary,
Bilaspur, Distt. Bilaspur (C.G.)
3 DEC 2020

Future Engineering
Proprietor

I further certify that I am competent officer in my company to make this declaration.

Yours Sincerely,

Signature of Auditor (With Official Seal)

30/11/2020

Date:

Name	:ANIL KUMAR AGRAWAL
Designation	:PARTNER
Address	:AKALTARA
Landline	:
Mobile	:9907746146
E-mail address	:caanilagrawalakt@gmail.com
UDIN	: 20425054AAAAEL6546

Attested True-Copy

Rakesh Pandey

Notary

Bilaspur, Distt. Bilaspur (C.G.)

- 3 DEC 2020

COPY

KSHITIJ SHARMA

14. It is to be noted that the said declaration has been given by the Auditor, subscribing his signature and seal on '30.11.2020' and it has been attested by a Notary on 03.12.2020. It was on the basis of this document and such other documents produced, that the 3rd Respondent

participated in the bid, which came to be assessed by the Respondent-BSCL, allotting the maximum of 30 marks for the Financial Criteria.

15. On confronting the position by filing the objections and the present writ petition, the Respondent-BSCL have come up with a new case that some discrepancy in the figure was noted in respect of the year 2018-19 as to gross receipts while showing a different figure in Annexure-P/4 issued by the Auditor, which was sought to be clarified as per Annexure/R-1-2/5. It was pursuant to this, that some new documents were obtained including a fresh letter issued by the Auditor to the Respondent-BSCL, showing entirely different figures as to the turnover of the 3rd Respondent for the years 2016-17, 2017-18 and 2018-19 stated as inclusive of the tax portion, which was stated as not included in Annexure-P/4. The version of the 3rd Respondent in the return filed by them as given in paragraphs 11 and 12 are also relevant and hence reproduced below :

> "11. That, it is most humbly and respectfully submitted that the certificate provided by the Chartered Accountant regarding the average turnover is concerned, the same was excluding the GST, but on 29/12/2020 the Manager of the BSCL issued a communication to the answering respondent vide ANNEXURE-R3/10 seeking explanation regarding difference in the Gross turnover in the audit report and the certificate provided by the Chartered Accountant.
>
> 12. That, it is submitted that in compliance of the same, the answering respondent submitted a certificate issued by the Chartered Accountant, vide ANNEXURE -R3/11 Dt. 31.12.2021. The Chartered Accountant certified about the answering respondent by stating the annual turnover for the financial years 2016-17, 2017-18 and 2018-2019 including the taxes. It was found that the earlier certificate was issued by excluding the taxes. On including the taxes the annual turnover for the financial years 2016-17, 2017-18 and 2018-19 is Rs.305.10; RS.771.92; and RS.1325.70, respectively. The average

> turnover for these three years including taxes is Rs.800.91. It means it exceeds Rs.8.00 crores and hence the marks provided to the answering respondent for financial criteria is just and proper warranting no interference as it exceeds Rs.8.00 crores."

16. It is pursuant to Annexure-R-1-2/5 letter dated 29.12.2020 of the 2nd Respondent-BSCL (which is same as Annexure-R-3/10), that the 3rd Respondent submitted Anneuxre-R-3/11 certificate dated "30.12.2021" (which actually is of "30.11.2020") issued by the Chartered Accountant, giving the annual turnover for the years 2016-17, 2017-18 and 2018-19 inclusive of taxes; average of which was above 8.00 crores. When the 3rd Respondent conceded that Annexure-R-3/11 certificate was obtained from the Chartered Accountant pursuant to the clarification sought for by the 2nd Respondent on 29.12.2020, vide Annexure-R-3/10, the certificate issued by the Auditor / Chartered Accountant could not have been a certificate issued prior to this and it can only be after 29.12.2020. Since the said certificate is signed by the Chartered Accountant on "30.11.2020", it can be reasonably presumed that there was an attempt to make it appear that the certificate was issued much earlier i.e. to have formed part of the records when the bid was submitted i.e. before the last date of submission of bid. This is a conscious attempt to fill up the lacuna; though we are not expressing any opinion whether there was any malicious intent on the part of the Chartered Accountant, at the instance of any of the Respondents. In any view of the matter, this document, having been issued only after 29.12.2020, it could not have been part of the tender documents submitted by the 3rd Respondent and admittedly, it was not there as well. Absolutely no explanation is offered in the returns

filed by the Respondent-BSCL or the 3rd Respondent/bidder as to the issuance of two different Audit Certificates by the Auditor; firstly excluding the tax and the other one inclusive of the tax; simultaneously on the same date i.e. “30.11.2020”. In view of the submission of the 3rd Respondent in the return, that such a certificate was obtained from the Chartered Accountant only on getting Annexure-R-3/10 dated 29.10.2020, i.e. on seeking clarification by the Respondent-BSCL, it was admittedly not in their possession on the date of submission of the bid. Even if it is presumed that both the certificates were issued by the Chartered Accountant on the same day i.e. 30.11.2020, how two different certificates could be issued and under what provision; are not brought to light. Further, if the 3rd Respondent was having possession of both the certificates issued on the same date i.e. 30.11.2020, why they did not produce the 'better certificate', showing higher turnover so as to cross the hurdle of average 8.00 crores at the time of submission of the bid remains a matter of mystery.

17. Mr. Mateen Siddiqui, the learned counsel appearing for the Respondent-BSCL submits that power is vested with the Respondent-BSCL, as per Tender conditions, to call for clarification. Clause 5.3, of the same is to the following effect :

> “**5.3 Evaluation Process**
>
> 1. BSCL will appoint a Bidder's Evaluation Committee (BEC) to scrutinize and evaluate the pre-qualification of bidders, technical and financial bids received.

> External Electrification with cable laying in RCC Duct at Vyapar Vihar Smart Road, Bilaspur for Bilaspur Smart City. System Tender No.65319
>
> 2. In the event to the specified date of bid opening being declared a holiday for the BSCL/Employer, the bids will be opened at the appointed time and location on the next working day.
>
> 3. The EMD / Bid Security amount shall be returned to the respective disqualified Bidders after the submission of Performance Bank Guarantee by the successful Bidder.
>
> 4. The BEC may require written clarifications from the Bidders to clarify ambiguities and uncertainties arising out of the evaluation of the Bid documents (to be stated precisely as it should be in BSCL's interest). BEC shall evaluate the responses to the RFP and all supporting documents/documentary evidence. Inability to submit requisite supporting documents/ documentary evidence by bidders may lead to rejection of their bids. BSCL may waive any informality or nonconformity in a Bid which does not constitute a material deviation according to BSCL.
>
> 5. Only substantially responsive bid shall be considered for further processes.
>
> 6. BSCL would have the right to review the Proposals and seek clarifications where necessary. The response from the Bidder(s) shall only be in writing but no change in the substance of the Proposal would be permitted. It is clarified that Bidders are free to make suggestions but are not allowed to submit any conditional bid as specified earlier."

18. It is true that sub-Clause 4 of Clause 5.3, enables the BSCL to seek for clarifications where necessary. The very same clause stipulates that <u>no change in the substance of the Proposal would be permitted</u>. The stipulation in the above clause clearly shows that clarification can only be with reference to the facts already brought on record as per the documents produced and it is not a power to call for additional

documents and to have the eligibility decided afresh on the basis of such additional documents. This being the position, since the Annexure-R-3/11 was admittedly not in the possession of the 3rd Respondent on the date of submission of the bid and further since it was not submitted Online along with the bid (not a notarised document), it was a totally new document and not a clarification with reference to the facts disclosed from the existing documents produced along with the tender.

19. Mr. Mateen Siddiqui, the learned counsel appearing for the Respondent-BSCL submitted that the bid value in the instant case was 1121.76 lakhs, 80% of which was to be completed which comes to 8,97,40,800/-. Going by Annexure-R-1-2/4 reply given to the clarification sought for, the 3rd Respondent has completed work of Rs.9,76,76,774/- and hence he has experience in similar work. We find it difficult to agree; firstly, for the reason that the bidder can't be eligible if he has satisfied only a portion of the work which is equal to 80% of the contract amount *w.r.t.* the instant case. This was the situation in the 'unamended clause' referring to the ongoing / executing work. After issuing the corrigendum, <u>satisfactory completion of the work is mandatory</u> and the percentage given therein is with reference to the value of such work i.e. the completed work should be having a value of not less than 80% of the probable contract amount in the instant Tender. It does not enable a person to put forth the candidature based on the ongoing work, if 80% of such work carrying a value equal to 80% of the contract amount involved herein has already been done. <u>The entire work has to be completed to the satisfaction of the Awarder</u>, which obviously has not taken place in respect of the work

given by the Chhattisgarh State Power Distribution Company Limited to the 3rd Respondent.

20. There is a contention for the Respondents that the turnover will include tax portion as well. Reliance is sought to placed by Mr. Mateen Siddiqui on the law declared by the Constitution of the Supreme Court in ***State of Kerala v. Ramaswami Iyer & Sons*** reported in ***AIR 1966 SC 1738***. There is no dispute that turnover will include the tax as well. The question is, how the total gross receipts declared and shown in the records and certified by the Auditor came to be pushed up, to take the average turnover beyond 8.00 crores for the three different years 2016-17, 2017-18 and 2018-19, giving totally different figures in the form of reply to clarification; that too <u>by issuing a pre-dated certificate 30.11.2020</u> (after seeking for the clarification on 29.12.2020) which is not liable to be reckoned as a valid document that formed part of the Tender documents produced online by the 3rd Respondent at the time of submitting the bid.

21. Mr. Mateen Siddiqui also submits that the Petitioner has not challenged the 'work order' issued by the 3rd Respondent and that the writ petition has not been amended in this regard. We do not find any force in the said submission; insofar as the pleadings and prayers, challenging the course of action pursued by the Respondent-BSCL in finalizing the Tender, awarding the same in favour of the 3rd Respondent, who is stated as not qualified, are adequate enough to sustain the challenge. Apart from seeking to quash Annexure-P/1 rejection of the objection, the Petitioner has also sought to direct the Respondent-BSCL to reject the

bid of the 3rd Respondent and further to award the contract to the Petitioner. The 'work order' given is only a consequential one and as such, the prayers raised by the Petitioner will automatically take in the subsequent course and events as well.

22. It is quite evident that the Respondent-BSCL has deviated from the notified Tender conditions and has invited and accepted fresh materials / documents from the 3rd Respondent. The new documents were never under consideration and it was not on the basis of the said documents that the technical qualification was decided, but for another reason as disclosed in the impugned order Annexure-P/1. As mentioned already, the rejection of the objections raised by the Petitioner with reference to the turnover of the 3rd Respondent for the year 2018-19 *i.e.* 11.5 crores which was stated as more than 8.00 crores and hence awarding of full marks (30) by the Bid Evaluation Committee was sought to be justified. This is cent percent contrary to the terms of the Tender, which does not make anybody eligible, if among the three years, turnover of above 8.00 crores is satisfied in any single year; but clearly stipulates that average 8.00 crores shall be there for the three years 2016-17, 2017-18 and 2018-19 so as to get the full marks (30 marks) under the Financial Criteria. This being the position, since the average turnover of the 3rd Respondent for years 2016-17, 2017-18 and 2018-19, as certified by the Auditor vide Annexure-P/4 was only less than 8.00 crores, the 3rd Respondent was eligible to get only '20 marks' and not 30 marks. If this be the position, the total marks given to the 3rd Respondent as '75' was liable to be brought down to 65 and as such, having not scored the

minimum of 70 marks as insisted in the Tender conditions, the 3rd Respondent was not liable to be declared as qualified. The decision making process done by the Respondent-BSCL is wrong and not transparent, which cannot but be deprecated in the strongest possible words.

23. The evaluation of the 3rd Respondent with regard to the 'Experience Criteria' is also relevant in the context. It is stated by the Respondent-BSCL that the Chhattisgarh State Power Distribution Company Limited vide Annexure-R-1-2/1 letter dated 25.11.2020 had stated that the 3rd Respondent had satisfactorily completed the work having the contract amount of Rs. 10,66,95,776/- and that the final bill was pending. After stating this in paragraph 3 of the return, they have conceded issuance of corrigendum notification dated 21.11.2020 as to the revised RPF clause which says "satisfactorily completed" the work to the requisite extent. The percentage given therein is to show the value of the work contract as equal to 80% of the probable amount of contract involved in the instant case. What is important is "satisfactory completion of the work" and not an ongoing work (which was the condition stipulated earlier *i.e.* before issuance of the corrigendum). Annexure-R-1-2/4 certificate is pressed into service by the Respondent-BSCL to contend that they had sought for a clarification to the certificate issued by the Chhattisgarh State Power Distribution Company Limited on 25.11.2020 vide the letter dated 20.01.2021 (Annexure-R-1-2/3) of the Respondent-BSCL, when it was answered as per reply dated 22.01.2021 (Annexure-R-1-2/4), which is to the following effect :

''छत्तीसगढ़ स्टेट पावर डिस्ट्रीब्यूशन कंपनी लिमिटेड

(छत्तीसगढ़ शासन का एक उपक्रम) (छ.रा.वि.मं. की एक उत्तरवर्ती कम्पनी)

कार्यालय कार्यपालन अभियंता (परियोजना) छ.ग.रा.वि.वि.कं. मर्यादित चाम्पा

No: EE/Project/495 *Date 22.01.2021*

प्रति,

प्रबंधक
स्मार्ट सिटी लिमिटेड बिलासपुर (छ.ग.) ।

विषय :— आपके द्वारा मांगी गयी अनुभव प्रमाण पत्र की कार्यपूर्णता की जानकारी बाबत ।

संदर्भ :— 1) M/s Future Engineering Work Experience no. 394 dated 25.11.2020 ।
2) आपका पत्र क्रमांक/BSCL/2020-21/2344 बिलासपुर, दिनांक 20/01/2021

———00———

M/s Future Engineering को अवार्ड संख्या 02-08/IPDS/5710A Raipur के द्वारा 19.03.2020 Balance Work of Korba (O&M) circle under Bilaspur region package under IPDS में sub-contractor का कार्यादेश जारी किया गया था । पुनः work Experience no.394 dated 25.11.2020 का सन्दर्भ लेने का कष्ट करें, जिसमें निविदा राशि रू. 106695776/— का उल्लेख है एवं work Experience जरी दिनांक 25.11.2020 तक राशि रू.64426101/— भुगतान होने का उल्लेख है ।

M/s Future Engineering के द्वारा राशि 97676774/— का कार्य पूर्ण कर लिया गया है । शेष कार्य का माप होना बाकी है ।

सही/—
कार्यपालन यंत्री (परियोजना)
छ.ग.रा.वि.वि.कं. मर्यादित चाम्पा''

The above letter clearly shows that, though it is stated that work to an extent of Rs. 9,76,76,774/- in respect of the work having the contract amount of Rs.10,66,95,776/- was competed, <u>it does not say anywhere that there is 'satisfactory completion' of the work</u>. The word 'satisfactory' is missing. It is also discernible from the last sentence that, with regard to remaining part, the <u>measurement is still to happen</u>. This means, once the measurement is completed, if it is not meeting the requirement as per the Tender, it cannot be said that there is 'satisfactory completion' of the project. The payment effected by the Awarder of the contract in respect of the completed portion of the work is different from the satisfactory completion of the project as insisted in the corrigendum notification. This being the position, the allocation of the marks as given in the instant case presuming that the project had been satisfactorily completed is also not in conformity with the Tender conditions. Since, we have already held that the allocation of full marks for the 'Financial Criteria' was not sustainable, for want of relevant documents submitted along with the Tender and this by itself would disqualify the 3rd Respondent, further deliberation with reference to the 'Experience Criteria' is not necessary to be carried forward.

24. In the above facts and circumstances, we are of the firm view that the Respondent-BSCL has not properly considered the objections raised by the Petitioner while turning down the same vide Annexure-P/1, declaring that the 3rd Respondent was qualified because of having satisfied 11.54 crores of turnover in the year 2018-19, which was treated as enough, instead of the average of 8.00 crores to be maintained for all the three years 2016-17, 2017-18 and 2018-19. Thus, it is revealed that the 'decision making process' is quite bad and not sustainable in the eye of law.

25. For the reasons stated above, we hold that the 'decision making process' done by the Respondent-BSCL is *per se* wrong and unsustainable. Accordingly, Annexure-P/1 order dated 22.01.2021 and Tender proceedings finalized by the Respondent-BSCL in favour of the 3rd Respondent stand set aside. It is open for the Respondent-BSCL to

invoke sub-clause 10 {Stage – III : Evaluation of Financial Bid of Clause 5.3} to call the Petitioner, who is stated as L-2 and negotiate to have L-1 rate for awarding the Tender to him or to go for fresh Tender, specifically, incorporating the clear terms and conditions with regard to the qualification and such other requirements.

26. The writ petition stands allowed. No cost(s).

Sd/-	Sd/-
(P.R. Ramachandra Menon)	**(Narendra Kumar Vyas)**
Chief Justice	**Judge**

Chandra