

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**Writ Petition (C) No.2581 of 2020**

M/s VNC-SVC-JV (Joint Venture Firm) of M/s Vijay Nirman Company Private Limited (VNC) (**'Lead Partner'**) and M/s SVC Projects Private Limited (SVC) (**'Partner'**) through its Special Power of Attorney Holder Shri Rajkumar Joshi, Aged About 56 Years, S/o Late Shri Karamchand Joshi, Resident of MIG-121, R.P. Nagar, Korba (C.G.).

---- Petitioner**Versus**

South Eastern Coalfield Limited Through its General Manager (Civil), Head Quarter Seepat Road Bilaspur, District Bilaspur-495006.

---- Respondent

For Petitioner	: Shri Vikram Sharma, Advocate
For Respondent	: Shri Vivek Chopda, Advocate

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

Order on Board**Per Parth Prateem Sahu, Judge****22.01.2021**

1. Rejection of technical bid of the petitioner and consequent disqualifying its further participation in tender proceedings in Notice Inviting Tender (for short 'NIT') No.GM(C)/SECL/BSP/eT-TK/GVR/2020/185 dated 15.06.2020 for the work of Designing, Engineering, Construction and Commissioning of Workshop and Store of Gevra OCP, including Maintenance during defect liability period (DLP) on turnkey basis, caused the petitioner to

approach this Court by filing instant writ petition with following reliefs :

“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 and allow the petitioner firm to submit the clarificatory documents and then to consider the candidature of the petitioner firm on its own merits.

10.2 Cost of the proceedings.

10.3 A writ and/or an order in the nature of writ of certiorari quashing the impugned communication dated 01.10.2020 (Annexure P-6) in the interest of justice.

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

2. Facts of the case in nutshell are that, respondent had issued online tender notification on 15.06.2020 for the work of Designing, Engineering, Construction and Commissioning of Workshop and Store of Gevra OCP, including Maintenance during defect liability period (DLP) on turnkey basis. As per tender notification, last date for submission of bid was 27.07.2020 and date of opening of technical bid was 29.07.2020. In the said tender proceedings, three bidders participated including the petitioner. After opening of technical bids, Tender Evaluation Committee has made deliberations with

bidders and found some shortcomings on the bid submitted by petitioner and others. Tender Evaluation Committee asked the bidders to upload the documents between 10.08.2020 to 17.08.2020, but petitioner could not upload the documents to remove shortcomings. After conclusion of period granted for removing the shortcomings, two bids including one of the petitioner came to be rejected on technical evaluation. The information/notice with regard to rejection of technical bid of petitioner was received by them on 01.10.2020 and on the same date, representation was made mentioning therein that due to COVID-19 pandemic, petitioner could not access tender portal because of closure of office during that period and sought permission for submission of documents for removing shortcomings.

3. Respondent submitted reply to the petition mentioning therein that filing of writ petition before this Court against the subject tender is an attempt to halt the entire proceedings of subject NIT. The bidders were required to submit their bid online latest by 27.07.2020, whereas bid starts date was 27.06.2020, full one month time has been granted to bidders to complete their formalities and to submit tender documents along with supporting documents online. All the confirmatory documents with regard to eligibility criteria was to be submitted along with tender documents, petitioner has filed documents, but failed to submit some important documents, hence, opportunity was

granted to the petitioner for submission of confirmatory documents through its link from 10.08.2020 to 17.08.2020. The extended period has been granted was of about 8 days. The information of requirement for submission of confirmatory documents has been sent through Whatsapp and E-mail to the bidders, but even then, petitioner failed to submit confirmatory documents even on the extended period of 8 days. Office of lead partner of joint venture firm i.e. Vijay Nirman Company Pvt. Ltd. was completely opened in all respects and documents could have been submitted. All the activities was to be done by nominated and authorized signatory i.e. Mr. Y.V. Ramana as per joint venture agreement, but confirmatory documents have not been submitted. The essential documents relating to lead partner and MOA of lead partner was not produced. COVID-19 pandemic situation has not only affected the petitioner firm but entire country as a whole, but even then, works are being carried out after unlock by all the parties concerned and firm as per directives and protocols issued by the Government. As per clause 12F of NIT, clarification sought with regard to documents submitted is only as one time measure within a period of 7 days and in terms of Clause 12H if bidder fails to confirm online submitted document then the bid shall be rejected. The petitioner failed to submit the shortcomings documents within the time prescribed, as such, as per tender condition, petitioner has been disqualified and its bid was rejected.

4. A rejoinder was filed in response to the return submitted by the respondent mentioning therein that Shri P. Vishnu Kumar Raju was authorized signatory in the tender proceedings who is having digital signature was detected COVID positive and as per tender condition, only those persons who have authorized digital signature, are authorized to submit the bid.

5. Shri Vikram Sharma, learned counsel for the petitioner submits that petitioner has submitted bid as per original time schedule and bid was submitted as a joint venture firm, but due to unfortunate COVID-19 pandemic situation, most of the important persons of firm have been detected COVID positive. The office of petitioner remained closed for a long period and during that time only, extended period of 8 days has been declared for submission of online confirmatory documents. Petitioner could not able to submit confirmatory documents because important persons of petitioner's firm has been detected COVID positive. He further submits that suddenly, respondent has informed on 01.10.2020 with regard to rejection of technical bid, thereafter, petitioner had immediately made a representation seeking permission of a week's time to submit online confirmatory documents, but that has not been arbitrarily considered. The entire act of respondent authorities in rejecting the bid of petitioner suffers from malice in law and fact as well as arbitrariness. The respondent has not provided equal opportunity and level playing field to the petitioner. The action of

respondent infringes the fundamental right of petitioner as guaranteed under Article 19(1)(g) and violative to Articles 301 and 304 of the Constitution of India.

6. Controverting the submission made by learned counsel for the petitioner, Shri Vivek Chopda, learned counsel for the respondent submits that writ petition filed in its form is not maintainable because petitioner has not arrayed the successful bidder as respondent in party array. On the date of getting information with regard to rejection of bid, petitioner was well aware with regard to party/bidder who became successful, but deliberately not made as party respondent, hence, there is non-joinder of necessary party and in absence of successful bidder, no order can be passed in favour of petitioner affecting the rights of successful bidder, which accrued in its favour. He further submits that respondent has acted strictly in accordance with law followed the date schedule fixed in tender proceedings. After opening of technical bid, upon detecting certain shortfalls, deliberations were made and window of 7 days has been provided from 10.08.2020 to 17.08.2020 for submitting the confirmatory documents to remove the shortfalls/shortcomings. The opening of period of window has been intimated through Whatsapp and E-mail, but even then, petitioner has chosen not to upload shortcomings of confirmatory documents. The ground taken by petitioner of COVID-19 pandemic situation is also of no help because confirmatory documents were to be uploaded

by lead partner and office of lead partner is fully working, but even the documents submitted with regard to test and report of some of the persons of petitioner's firm, their test and their report was subsequent to the extended period of 8 days. There is no arbitrariness or unreasonableness in the action taken on the part of respondent and no tenable grounds have been raised in writ petition calling interference in the tender proceedings.

7. We have heard learned counsel for the respective parties and perused the documents placed on record along with the pleadings.

8. Learned counsel for the petitioner has raised only one ground with regard to non-granting of further opportunity to submit confirmatory documents after extended period. The only ground taken in writ petition is with regard to some of the persons of petitioner's firm were detected COVID positive and due to COVID-19 pandemic, office of petitioner was closed from 03.08.2020 to 20.09.2020.

9. To appreciate the submission made by learned counsel for the petitioner, we have perused the document placed on record as Ex.P/5. The first page of Annexure P/5 bears list of persons who are forming part of petitioner's firm and have tested COVID positive and dates have also been mentioned therein. Mr. Katla Satyanarayana (Vice President of SVC Projects Pvt. Ltd.) has been shown to be COVID positive on

03.08.2010 and tested negative on 17.08.2020. Mr. R. Gurunadha Rao (Vice President Technical of SVC Projects Pvt. Ltd.) has been shown to be COVID positive on 16.08.2010, thereafter he went to home isolation from 16.08.2020 to 24.08.2020. He was admitted to hospital on 26.08.2020 and discharged on 17.09.2020. Mr. P. Murali Maheswara Raju (Director of SVC Projects Pvt. Ltd.) has been shown to be COVID positive on 03.09.2020 and was tested negative on 17.09.2020. Mr. P. Vishnu Kumar Raju (Managing Director of SVC Projects Pvt. Ltd.) has been shown to be COVID positive on 04.09.2020, thereafter, he went to home isolation and was tested negative on 19.09.2020. As per pleadings made in rejoinder controverting the pleadings of respondent that Mr. Y.V. Ramana to be authorized signatory as mentioned the authorized signatory to be Mr. P. Vishnu Kumar Raju.

10. From perusal of Annexure P/5 would show that authorized signatory Mr. P. Vishnu Kumar Raju has been shown to be tested positive only on 04.09.2020, whereas 8 days period started from 10.08.2020 and ended on 17.08.2020. Apart from above, even after getting the information of extended period for submission of confirmatory documents, petitioner has not pleaded in the writ petition that they have made any representation or letter to the respondent bringing to their notice with regard to any unavoidable situation like closer of office due to COVID-19 pandemic spread and asking for more time to

submit the confirmatory documents. It is not a case of petitioner that they have not got the information within time from the part of the respondent with regard to extended period and also shortcomings pointed out during technical evaluation. The petitioner cannot blame others for inaction of not complying with the directions and conditions of tender notification. Here it is a case where after detecting some shortcomings/shortfalls in the eligibility documents submitted by petitioner, more time of 8 days has been provided for rectifying defects and submitting confirmatory documents. In these facts of the case, we do not find any arbitrariness, unreasonableness or malafide on the part of respondent in rejecting the bid of petitioner.

11. The Hon'ble Supreme Court in case of **Tata Cellular v. Union of India** reported in **(1994) 6 SCC 651** has laid down the guidelines as to in what circumstances principles of judicial review can be exercised in tender matters and held thus :

“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 fulfillment 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, Wednesday 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. v. Secretary of State for the Home Department, ex Brind* reported in (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".

12. The Hon'ble Supreme Court in case of **Michigan Rubber (India) Limited v. State of Karnataka and others** reported in

(2012) 8 SCC 216 has considered as to what action of awardee of contract can be made to judicial review and 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) Fixation of a value of the tender is entirely within the purview of the executive and the 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 confirmatory 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.”

13. In the case at hand, the petitioner could not able to point out any arbitrariness, unreasonableness and malafide in the action taken by the respondent in rejecting the technical bid of petitioner, but for that they could not able to assess their e-portal due to COVID-19 pandemic, but said ground from the pleadings and documents in writ petition itself do not support their contention.

14. For the foregoing reasons, we do not find any merit in the submission made by learned counsel for the petitioner that action on the part of the respondent is arbitrary, unreasonable and violative to Article 14 of the Constitution of India.

15. The other important ground raised by learned counsel for the respondent is that petitioner though having knowledge of

successful bidder is not impleaded as party respondent. Successful bidder is a necessary party because passing of any order in favour of petitioner will adversely affect the rights and interest of successful bidder. In absence of successful bidder, no relief could have been granted in favour of the petitioner.

16. In the result, we do not find any tenable ground to grant relief as sought for. The petition being devoid of merit, is liable to be and is hereby dismissed.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge