

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on 18.3.2021****Order delivered on 25/03/2021****WPC No. 2982 of 2020**

- Raipur Construction Pvt. Ltd., a Company duly incorporated under the provisions of The Companies Act, 1956 and having its office at 24 Ground Floor, Babla Complex, G.E. Road, Raipur, Chhattisgarh.

---- Petitioner**Versus**

1. State of Chhattisgarh Through Secretary, Urban Administration and Development Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, District Raipur (CG)
2. Municipal Corporation Raipur through its Commissioner, Near Gandhi Chowk, New Head Office Building, Raipur (CG)
3. Commissioner, Municipal Corporation Raipur, Near Gandhi Chowk, New Head Office Building, Raipur (CG)
4. M/s Yash Construction & Suppliers, through its Proprietor Shri Subhash Agrawal, Near Deshbandhu English School, Station Road, Raipur, District Raipur (CG)

---- Respondents

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For Petitioner	:	Shri Manoj Paranjpe, Advocate
For Respondent No.1	:	Shri C. Shrivastava, Dy. Adv. General
For Respondents No.2 & 3	:	Shri Sudeep Agrawal, Advocate
For Respondent No.4	:	Shri Kshitiz Sharma, Advocate

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HON. SHRI P.R. RAMACHANDRA MENON, CJ**HON. SHRI PARTH PRATEEM SAHU, J****CAV ORDER****Per Parth Prateem Sahu, J**

1. Declaration of respondent No.4 as successful bidder being LI in the tender proceedings initiated by respondent No.2 made the petitioner to approach this Court by way of filing this writ petition.
2. Facts necessary for disposal of this petition, in brief, are that respondent No.2 issued Tender Notification bearing

No.405/Project/RMC/2020 dated 31.8.2020 inviting tenders for construction and beautification of Awanti Vihar Garden and Pond situated at Telibandha in Municipal Corporation, Raipur. Total value of tender was Rs.1256=10 Lakhs. As per tender notification, bid start date was 13.8.2010. Pre-bid meeting was fixed on 10.9.2020 at 12.00 noon. Bid due date, on-line submission, was 22.9.2020 upto 17.00 hrs. Physical document submission end date was 29.3.2020 upto 17.00 hrs. Date of opening of Technical bid was 23.9.2020 at 17.30 hrs. On 11.9.2020 respondent No.2 had issued first corrigendum notification, whereas second corrigendum notification was issued on 21.9.2020 and submission of physical documents was rescheduled on 01.10.2020 till 5.00 p.m. In the aforementioned tender proceedings, four interested participants submitted their bids. On 6.10.2020 the techno commercial bids were opened, the petitioner and respondent No.4 were found eligible for opening of their price bids. Upon opening of price bids on 3.11.2020, respondent No.4 appeared as 'L1' and petitioner as 'L2'. On 9.11.2020 the petitioner submitted objection before respondent No.2 stating therein that respondent No.4 does not fulfill terms and conditions of tender notification. When the objections raised by the petitioner have not been decided by respondent No.2, the petitioner has filed instant petition with following reliefs:-

“10.1. This Hon'ble Court may kindly be pleased to call for the entire records from respondent No.2 with respect to the impugned tender process for its kind perusal.

10.2. This Hon'ble Court may kindly be pleased to issue an appropriate writ quashing and setting aside the decision of respondent No.2 corporation to the extent that respondent No.4 was declared as eligible and further to quash and set aside the finding recorded in the financial bid comparison wherein respondent No.4 was declared as L-1 (ANNEXURE P-1).

10.3. This Hon'ble Court may kindly be pleased to issue an appropriate writ declaring respondent No.4 as ineligible as per the NIT and pre-qualification criterion and bid document under NIT dated 31.08.2020 issued by respondent No.2.

10.4. This Hon'ble Court may kindly be pleased to issue an appropriate writ directing respondent No.2 to declare the petitioner as being L-1 amongst the qualified bidders and thereafter to proceed in terms of the tender document for award of work.

10.5. And pass such other order/orders as the Hon'ble Court may deem fit and proper and for this act of kindness, the petitioner as in duty bound shall every pray.”

3. Petitioner in writ petition has pleaded that bids are to be submitted on-line by the participants. Respondent No.2 in the tender document has specified several qualifications for being eligible to participate in the financial bid. Respondent No.4 does not fulfill as many as eight pre-qualifications enumerated in the tender document. In support of pre-qualifications, the bidders are required to on-line submit their supporting documents. Respondent No.4

submitted its bid but does not fulfill all pre-qualification criterion and other mandatory terms, that are eligibility criteria fixed under Clause 2 Eligibility Criteria / Clause 2.7 (f), Clause-3 Pre qualification Criteria / 3.4 (vii); Clause 3.2 (Technical Criteria), Clause-2 Eligibility Criteria/2.2; Clause3 Pre-qualification Criteria / Clause 3.4 (i); Clause-2 Eligibility Criteria, Clause 2.4; Clause 2.7 (i) & (j), Clause 2.7 (k) of the tender document. It was further pleaded that action of respondent No.2 in relaxing essential terms and conditions forming part of tender document, is *per se* illegal and arbitrary. Respondent No.4 does not fulfill eligibility and essential qualifications, not having resources and despite deficiencies, respondent No.4 has been declared successful bidder. Under Clause (2) of Pre-qualification Criteria if lowest bidder is found to be disqualified, the respondent Corporation is having right to consider second lowest bidder, hence the petitioner is having right to get the award of contract.

4. Respondent No.2 & 3 submitted reply to writ petition mentioning that as per tender evaluation report, there is mention that all the bidders are required to appear in the office along with all relevant documents. After opening of Techno Commercial Bid submitted by interested participants/bidders, respondent No.2 has opened the financial bid. Petitioner has not raised any objection after opening of technical bid and only after opening of financial bid, the objections are raised, hence there was delay on the part of the petitioner. Respondent No.4 submitted income tax return and audit report to fulfill requirement of financial analysis. Respondent No.4

upon seeking clarification from respondents No.2 & 3 had submitted further documents. Similarly, with regard to experience in the Drip Irrigation, the Tender Evaluation Committee has sought clarification and respondent No.4 submitted that objection raised was merely misnomer. The Technical Evaluation Committee has further sought clarification with regard to equipment. Respondent No.4 has on-line submitted the document Appendix-10. Respondent No.4 has fulfilled all essential terms and conditions of tender document. Difference between the rate quoted by petitioner and respondent No.4 is much higher i.e. of Rs.1.11 Crores.

5. Respondent No.4 submitted reply to writ petition pleading that petitioner itself has not fulfilled all essential terms and conditions of tender document of eligibility criteria. If each and every objection is to be considered then the tender proceeding could not be concluded in specified time. Writ jurisdiction cannot be invoked to scrutinize terms of contract. There was no allegation of malice, malafide and illegality. Evaluation of bid of respondent No.4 by respondent No.2 along with other bidders was done in impartial, transparent and equitable manner. Evaluation of tender document was done by expert body and writ court cannot sit over the decision taken by the expert committee as an appellate authority. Petitioner has selectively objected to various conditions of tender document but for selection of successful bidder wholesome approach is to be adopted by respondent Corporation in evaluation of tender document. Respondent No.4 has furnished required proof and certificates of the qualification sought by respondent No.2 & 3 and

after evaluation of the documents, the Expert Committee has declared respondent No.4 to be eligible.

6. Petitioner by way of rejoinder has again pleaded that terms, conditions and eligibility criteria fixed under the tender document are mandatory. Respondent No.4 has not fulfilled about 08 pre-qualification criteria, which are pointed out in writ petition. Further, specified the terms & conditions not fulfilled by respondent No.4. It is also pleaded that respondent No.4 does not fulfill eligibility criteria with regard to ownership of equipment as mentioned in Clause (2) of Eligibility Criteria.
7. Mr. Manoj Paranjpe, learned counsel for the petitioner submits that immediately after opening of financial bid, the petitioner has raised pointwise objections (Annexure P-5) before respondent No.2 against respondent No.4 on 09.11.2020, mentioning the clauses of tender document, its requirement and position of respondent No.4 as to how respondent No.4 does not fulfill eligibility criteria fixed under the terms & conditions of tender document. Respondent No.2 has not considered and decided specific objections raised by petitioner in either way. Respondent No.2 sitting over the objection raised by petitioner was proceeding to finalize the tender in favour of respondent No.4, therefore, the petitioner has to file this writ petition. He submits that requirement under Clause 2.7 (f) of tender document is with regard to submission of audit reports for the past five years. Respondent No.4 submitted financial reports of last three years only. As per Clause 3.4 (vii), respondent No.4 or its authorized sub-contractor has mentioned in Appendix -14 about not

having experience of Drip Irrigation, not having similar work experience as per Clause 3.1 under first Corrigendum Notification. As per certificate of Chartered Account, last five years net worth of a bidder should be minimum 40% of tender value to be certified by Chartered Accountant, whereas, respondent No.4 is having net worth of 24% of tender value. Respondent No.4 has not given correct information as required under Clause 3.4 (i) with regard to applicability of ESIC. As per terms and conditions of tender document, any bidder who makes misleading or incorrect statement will not be eligible. Likewise, respondent No.4 does not fulfill qualification with regard to equipment, MoU with OEM, not submitted methodology and program of construction as per requirement under Clause 2.7 (k). Respondent No.4 has made misrepresentation, as such under the terms & conditions of tender document he is disqualified. Petitioner has raised very specific eight objections but the same have not been considered and decided till date by respondent Corporation. Respondent Corporation authorities are well aware with regard to sustainability of objections raised by petitioner specifically mentioning the clauses of tender document, therefore, respondent authorities are sitting over the same. Under Clause 3.4. of the terms and conditions of tender document there is specific mention that if a bidder does not submit mandatory documents along with bid, then bid of bidder will be disqualified. He further argued that under Clause (e) of Clause 11.2 of tender document, which deals with rejection of bids, it is specifically mentioned that if any misrepresentation or improper response made by a bidder is

detected, then the said bidder will be declared disqualified and after rejection of bid of such bidder, the Municipal Corporation will have right to consider next best bidder or to take any other measures. He further contended that decision of respondent No.2 declaring respondent No.4 to be eligible be quashed and petitioner be declared as lowest bidder. Reliance is placed on the decisions of Hon'ble Supreme Court in case of **Tata Cellular vs. Union of India** reported in **(1994) 6 SCC 651** and **Municipal Corporation , Ujjain & another vs. BVG India Limited & ors** reported in **2018 (5) SCC 462**.

8. Mr. Sudeep Agrawal, learned counsel for respondent Corporation submits that as per checklist, respondent No.4 has submitted entire documents and for some of clauses, upon evaluation by Tender Evaluation Committee, clarification was sought from respondent No.4 upon which he submitted clarificatory letter and further documents in support of it. After considering clarification submitted by respondent No.4, the Tender Evaluation Committee was satisfied and proceeded to open financial bid of respondent No.4. There is some confusion with regard to checklist and other terms & conditions in the tender document, therefore, upon seeking clarification, respondent No.4 submitted necessary information and documents. He submits that documents attached with letter of clarification were not mandatory. Respondent Nos.2 & 3 are having exclusive right to consider terms & conditions and to arrive at a conclusion. Decision arrived at by the Expert Committee could not be reviewed. Scope of judicial review in tender matters is very

limited. Interference in tender proceeding for award of contract can be entertained only when some public interest is involved. In commercial matters the awarder of contract can choose its own method to arrive at a decision. He further contended that respondent No.2 may be permitted to cancel the entire contract and to go for fresh tender notification. In support of his submissions, learned counsel places his reliance on **Reliance Energy Ltd. Vs. Maharashtra Road Development Corporation Ltd.** reported in (2007) 8 SCC 1; **Raunaq International Pvt. Ltd. vs. IVR Construction Ltd.** reported in (1999) 1 SCC 492; **Air India Limited vs. Cochin International Airport Ltd.** reported in (2020) 2 SCC 617; **Master Marine Services Pvt. Ltd. vs. Metcalfe and Hodgkinson Pvt. Ltd. & anr** reported in (2005) 6 SCC 138 & **Heinz India Pvt. Ltd. vs. State of UP** reported in (2012) 5 SCC 443.

9. Mr. Kshitiz Sharma, learned counsel for respondent No.4 submits that as per requirement of tender document, respondent No.4 fulfills all pre-qualification criterion, submitted all relevant documents in support thereof, the Tender Evaluation Committee upon evaluation of tender document supported with documents submitted by respondent No.4 has declared respondent No.4 to be eligible and LI. The tender proceeding has been concluded in a very fair and transparent manner. Unless and until there is pleading and proof with regard to malice, malafide, the Courts cannot invoke writ jurisdiction for scrutinizing fulfillment of terms and conditions. Leniency shown in the evaluation of tender document was for every

bidder to make their bid to be responsive with a purpose. Petitioner has not submitted any document of his own. When once the entire tender proceeding has been concluded and respondent No.4 has been declared to be LI after evaluating and analyzing all the documents enclosed along with tender document. Respondent No.2 & 3 may not be permitted to cancel the entire tender proceedings. In support of aforementioned submissions, learned counsel places reliance upon judgments of Hon'ble Supreme Court in **BSN Joshi & Sons Ltd. vs. Nair Coal Services Ltd. & ors** reported in (2006) 11 SCC 548; **Bakshi Security and Personnel Services Private Limited vs. Devkishan Computed Private Limited & ors** reported in (2016) 8 SCC 446; **The Slippi Constructions Contractors vs. Union of India & ors** reported in (2020) 16 SCC 489.

10. We have heard learned counsel for the parties and perused the record.
11. Petitioner in writ petition has very categorically pleaded the grounds of objection as also placed on record the objections raised before respondent No.2 on 9.11.2020 i.e. immediately after opening of financial bid. Petitioner has raised as many as eight grounds/objections stating that respondent No.4 does not fulfill eligibility criteria and terms & conditions of tender document. Perusal of reply of respondents No.2 & 3 would show that the Tender Evaluation Committee upon going through technical bids submitted by all the bidders, has sought for clarification on certain points after 06.10.2020 i.e. after opening of technical bid. Respondent No.4

submitted clarification along with documents on the basis of which respondent No.4 has been held to be eligible. In the course of arguments, Mr. Sudeep Agrawal, learned counsel for respondent Corporation has admitted that clarification has been sought for, based upon which respondent No.4 has submitted some documents and the Tender Evaluation Committee considering the explanation/clarification and documents submitted in support thereof, declared respondent No.4 to be eligible and that is how the price bid of respondent No.4 came to be opened along with other bidders.

12. Mr. Manoj Paranjpe, learned counsel for petitioner has raised important grounds and submissions that there is specific mention in the tender notification that bids and all supporting documents are to be submitted on-line only, except hard copies of EMD and tender document fee. In view of submission made by learned counsel for respondents No.2 & 3 that clarification along with supportive documents was submitted, we find it appropriate to extract some of the important clauses relevant for disposal of this writ petition. The Note appended to the checklist for on-line submission, which is part of tender document, clearly envisages that all the bid documents are submitted through on-line mode only. No hard copy submission is required except EMD & Tender document fee in the form of FDR/DD and affidavit. Clause 2.7 of tender document mentions about the information and documents to be submitted by bidders along with their bids. Clause 2.7. (f) envisages as under:-

“(f) Reports on the financial standing of the bidder, such as profit and loss statements and auditor's reports for the past five years.”

13. Clause 3 of the tender document deals with pre-qualification criteria and Clause 3.2 deals with technical criteria: similar work criteria. Clause 3.4 specifically provides for disqualification of bidders if they do not fulfill any of the conditions enumerated under Clause 3.1. even if they meet the qualifying criteria. Clause 3.4 (iv) is relevant and the same is extracted below for ready reference:-

“(iv) Bidder has to submit all the mandatory documents, if the mandatory documents not submitted by bidder then bid will be disqualified.”

14. Clause 11 deals with 'Bid Opening and Evaluation' which reads as under:-

“11. Bid Opening and Evaluation

11.1. Online Opening of BIDs

The Municipal Corporation Raipur shall on-line open Technical BIDs on date as mentioned in NIT/IDS, in the presence of the authorized representatives of the Bidders, who choose to attend. Technical BID of only those bidders shall be on-line opened whose documents listed in checklist has been received. The Municipal Corporation Raipur will subsequently examine the bids in the following manner:-

- i. Bids are examined to contain all the documents in Envelope A as specified in the checklist, submitted with proper seal and signature of the authority. If found not satisfying the criteria will be rejected and Envelope B will remain unopened.
- ii. Envelope B of only those bids satisfying the requirements of Envelope A will be opened and considered further for technical evaluation.
- iii. The Municipal Corporation Raipur will subsequently examine and evaluate the BIDs in accordance with the Checklist mentioned in the NIT, Clause 3, Pre-qualification Criteria of Qualification document & Determination of Responsiveness of Technical & Financial bids respectively.”

15. In the aforementioned relevant clauses of the tender document, it is made mandatory that all the bid documents are to be submitted through on-line mode only. There is specific mention with regard to non-acceptance of hard copies except EMD and tender document fee. Under Clause 11 of the tender document it is specifically mentioned that bids to contain all documents in Envelope-A as specified in the checklist, if not found satisfying the criteria will be rejected and Envelope-B will remain unopened. Envelope 'B' of only those bids satisfying requirement of Envelope 'A' will be opened further for technical evaluation. The tender process is a 'three envelopes system'. Envelope-'A' to contain primary documents mentioned therein; Envelope 'B' to contain copies of all authenticated documents- 'Technical Eligibility' in prescribed format. Financial Bid in Envelope-C. Documents to be submitted for fulfilling technical eligibility should be as prescribed under the Qualification Criteria.
16. In case of **WB State Electricity Board vs. Patel Engineering Company** reported in **(2001) 2 SCC 451** the Hon'ble Supreme Court has held as under:-

“24. ... In a work of this nature and magnitude where bidders who fulfill pre qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty... .”

In the case of **Central Coalfields limited and another v. SLL-SML (Joint Venture Consortium) and others** reported in (2016) 8

SCC 622 the Hon'ble Supreme Court has held thus;-

“52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in *Nazir Ahmad v. King Emperor* 1, namely: (SCC OnLine PC)

“... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.” There is no valid reason to give up this salutary principle or not to apply it *mutatis mutandis* to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad* 1 that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.”

17. Learned counsel for respondents could not be able to point out any clause in the tender document which gives liberty to the awarder of contract to call for any explanation and further documents which were not submitted on-line. If once terms and conditions have been formulated and mentioned in the tender document by the awarder of contract, then the tender proceedings are to be concluded strictly in accordance with terms and conditions mentioned therein. The awarder of contract cannot be permitted to deviate from terms and conditions of tender and to accept documents submitted later on that too after opening of financial bids. Documents enclosed by respondents No.2 & 3 in their reply as Annexure R2-3 i.e. financial information and chart

showing available bid capacity of respondent No.4 mentions the date under seal as '12.10.2020'. Annexure R2-4 is 'Appendix 10', which is list of plant & equipments to be deployed on contract work, and it contains a note that ownership proof of above equipment is to attach. Annexure R2-4 also contains letter dated 14.10.2020 written by one Sandeep Jain to the Commissioner, Municipal Corporation Raipur under the letter head of Sundeep Forwarding Agency, Raipur stating that he is ready to give his plant & machineries on rent to respondent No.4 if he gets contract/tender. Respondent Nos.2 & 3 along with their reply have submitted documents which were taken into consideration to be dated 14.10.2020 i.e. after opening of technical bid, and upon considering aforementioned documents respondent No.4 has been held to be eligible. From the aforementioned documents which are forming part of reply of respondent No.2 & 3, it is clear that respondents No.2 & 3 have considered documents which are prepared after the last date of submission of documents. There is specific mention in tender document under the checklist that all the documents are to be submitted on-line only. Thus, it is apparent that respondent Corporation has acted contrary to terms and conditions of tender document.

18. During the course of arguments, Shri Sudeep Agrawal, learned counsel for respondent Corporation admitted that the objection raised by the petitioner on 9.11.2020 have not been decided till date. The petitioner has raised very specific objection on eight

points which appears germane to this Court to consider eligibility of a tenderer in view of clauses mentioned under eligibility.

19. Since no decision on the objection of petitioner is taken till date, we find it appropriate to direct respondent No.2 & 3 to consider the objection dated 9.11.2020 submitted by the petitioner and to decide the same in accordance with law, considering the terms and conditions of tender document. We further direct respondents No.2 & 3 to consider and decide the objection raised by the petitioner considering the tender document and supporting documents submitted by bidders on-line on the last date of submission of their bids. Respondent shall not consider the documents supplied with clarification by any of the bidders subsequent to 6.10.2020. Respondents No.2 & 3 are directed to decide the objection dated 9.11.2020 pending consideration within a period of two weeks from the date of receipt of copy of this order. Respondents after deciding objection of petitioner, shall take further steps with regard to subject tender notification strictly in accordance with law. The decision taken by the respondent Corporation on the objection of petitioner shall be informed to the petitioner immediately. Till the objection of petitioner is decided, the order of *Status Quo* passed by this Court on 02.12.2020 shall remain in force.
20. Writ petition is allowed and disposed off with aforementioned observations.

Sd/-

(PR Ramchandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

roshan/-