

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on 29.1.2021****Order delivered on 16.2.2021****WPC No. 3036 of 2020**

- M/s Surya Road Lines, through their authorised partner Mr. G.R. Mahobiya (Ghasi Ram Mahobiya) S/o Nanki Ram Mahobiya, aged about 68 years, R/o: Near Sharada Mandir, New Chandaniyapara, Near water Tank, Janjgeer, Tahsil Janjgeer, District Janjgeer Champa Chhattisgarh.

---- Petitioner**Versus**

1. Chhattisgarh State Co-Operative Marketing Federation Limited, through its Managing Director, CG Markfed Head Quarter, C.B.D. Commercial Complex, Tower "C", Sixth Floor, Sector-21, Atal Nagar, Raipur, Tahsil Raipur, District Raipur, Chhattisgarh 492002.
2. District Marketing Manager, Chhattisgarh State Co-operative Marketing Federation Limited, Mungeli, District Mungeli (CG)
3. Daman Mandeep Road Lines, Pendri, Rajnandgaon, through District Marketing Manager, Chhattisgarh State Co-Operative Marketing Federation Limited, Mungeli, District Mungeli (CG)
4. Sudheer Singh Transporter, Khairagarh through; District Marketing Manager, Chhattisgarh State Co-Operative Marketing Federation Limited, Mungeli, District Mungeli (CG)
5. Dileep Singh Transporter, Durg, through District Marketing Manager, Chhattisgarh State Co-Operative Marketing Federation Limited, Mungeli, District Mungeli Chhattisgarh.

---- Respondents**&****WPC No. 45 of 2021**

- Sanjay Agrawal, S/o Shri Umend Agrawal, aged about 54 years, R/o Shantivijay Apartment, Fourth Floor, Ganj Chowk Rajnandgaon, Tahsil & District Rajnandgaon (CG). Pin 491 441.

---- Petitioner**Versus**

1. Chhattisgarh State Co-Operative Marketing Federation Limited, through its Managing Director, Chhattisgarh MARKFED Head Quarter, C.B.D. Commercial Complex, Tower-C , Sixth Floor, Sector 21, Atal Nagar, Raipur, Tahsil Raipur, District Raipur (CG)
2. District Marketing Manager Chhattisgarh State Co-Operative

Marketing Federation Limited, Kawardha, District Kabirdham.

3. State of Chhattisgarh, through Secretary, Department of Food, Civil Supplies & Consumer Protection, Government of Chhattisgarh, Mantralaya, Naya Raipur Capital Complex, Tahsil Raipur, District Raipur, Chhattisgarh.
4. Nishant Jha Transporter, Kawardha, Tahsil & District Kabirdham, Chhattisgarh / Bidder, through the District Marketing Manager, Chhattisgarh State Co-Operative Marketing Federation Limited, Kawardha, District Kabirdham.
5. Manish Bindal Transporter, Than-Khamharia, Tahsil Than-Khamharia, District Bemetara, Chhattisgarh / Bidder, through the District Marketing Manager, Chhattisgarh State Co-Operative Marketing Federation Limited, Kawardha, District Kabirdham Chhattisgarh.

---- Respondents

WPC No.3036/2020

For Petitioner	:	Mr. Rajkamal Singh, Advocate
For Respondent No.1 & 2	:	Mr. Ashish Surana, Advocate
For Respondent No.3 to 5	:	None.

WPC No.45/2021

For Petitioner	:	Mr. Rajkamal Singh, Advocate
For Respondent No.1 & 2	:	Mr. Ashish Surana, Advocate
For Respondent No.3	:	Mr. Siddharth Dubey, Dy. Govt. Advocate.

Hon'ble Shri PR Ramachandra Menon, CJ

Hon'ble Shri Parth Prateem Sahu, J

CAV Order

Per Parth Prateem Sahu, J

1. Since the common issue is involved for adjudication in above two writ petitions, they were heard together and are being disposed of by this common order.
2. Challenge in both the writ petitions is to the letter/order dated 09.11.2020 passed by respondent No.1 relaxing the requirement of submission of yearly transportation certificate (mentioning turnover of transportation work) certified by a Chartered Accountant' by the transporters engaged in transportation work with the government / semi-government

institutions.

3. Facts of the case, in brief, are that the petitioners in both writ petitions are engaged in the business of transportation. On 1.10.2020 respondent No.1 floated e-tender Notification inviting bids from the eligible transporters for the work of transportation of paddy / food-grains for the Khariff Marketing Year 2020-21. Bid start date was 01.10.2020, bid due date was 30.10.2020 upto 5.00 p.m. and bid open date was 31.10.2020 at 12.00 noon. The tenderers were required to submit their bids in two envelopes, one containing 'technical bid' and the other 'financial bid'. As per Clause 1.3. of the tender document, a tenderer is required to online submit notarized copies of documents along with tender document. As per Clause 1.3.4, a tenderer is required to submit certificate showing experience of transportation of two years in last five years. Further, under the Note appended to Clause 1.3.4, it is mentioned that yearly certificate of transport to be certified by CA (showing the turnover of transportation work). On 9.11.2020 respondent No.1 addressed a letter to all its District Marketing Officers/ Managers mentioning that the tenderers, who have submitted experience certificate showing experience of transportation work with the government / semi-government institutions, are not required to submit CA Certificate. This made the petitioner to approach this Court seeking for following reliefs:-

“10.1. This hon'ble Court may please be kind enough

in calling entire records of the subject Tender (Annexure P-2).

10.2 This hon'ble court may please be kind enough in quashing and setting aside the impugned modification (Annexure P-1) and thereby directing the respondent No.1 & 2 to consider the bid of petitioner keeping aside the bid of respondent No.5.

10.3 This hon'ble Court may please be kind enough in granting any other relief & the cost of petition."

Similar reliefs have been sought for by the petitioner in WPC No.45/2021.

4. Mr. Rajkamal Singh, learned counsel representing petitioners in both writ petitions submits that all the tenderers have submitted the bid documents as per the time schedule mentioned in the tender document (Annexure P-2), which was further extended till 3.11.2020. Technical bids were opened on 4.11.2020 and thereafter respondent No.1 has issued letter Annexure P-1 on 9.11.2020 relaxing an important eligibility condition/ clause of tender notification i.e. part of Clause 1.3.4. By the letter Annexure P-1, respondent No.1 has relaxed the condition of submission of CA certified copy of yearly transportation certificate (mentioning turnover of transportation work), which amounts to arbitrary exercise on the part of respondent No.1 with intent to extend undue benefit and favour to some of the bidders who have submitted their bids without complying the original condition of tender notification, particularly part of Clause 1.3.4. He further contended that tender conditions and requirements cannot be changed by issuing a letter after expiry of bid date and after opening of

technical bids. Bid of respondent No.5 was initially found to be ineligible in view of specific condition contained in Clause 1.3.4 of the tender notification, but only after issuance of letter Annexure P-1 relaxing said condition, respondent No.5 has become eligible and upon opening of financial bid, he has been held to be L1. Due to arbitrary and unreasonable action of respondent No.1, petitioner's right has been adversely affected and if respondent No.5 has been held to be disqualified, the petitioner is having better chance to get the work under the tender in question. He further submits that contract has not yet been awarded to respondent No.5. In support of his contention, he places reliance on **Monnet Power Company Ltd. vs. Union of India** reported in **2017 SCC Online Del. 739** and **Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala** reported in **2019 SCC Online SC 89**.

5. Mr. Surana, learned counsel representing respondents No.1 & 2 in both writ petitions submits that submissions made by learned counsel for the petitioner are not correct. Respondent No.1 has not relaxed any essential condition incorporated under the tender notification. In fact, in response to the letter dated 9.11.2020 written by the District Marketing Officer, Kabirdham seeking clarification with regard to the requirement of submission of CA certified document along with tender document, the letter Annexure P-1 has been issued, which is clarificatory in nature. He points out that in earlier tender

notification for the year 2017-18 & 2018-19, there was specific mention with regard to the nature of certificate of experience wherein distinction has been made between experience certificate issued by the Government/semi-government institutions and other institutions, as is evident from Annexure R1-2. Only this distinction, which was existing in earlier tender notifications, has been clarified vide letter Annexure P-1. The petitioner has not challenged declaration of respondent No.5 to be qualified on technical evaluation on 4.11.2020, which was finalized on 12.11.2020. Hence, now the petitioner cannot be permitted to challenge technical evaluation of respondent No.5 based on clarificatory letter dated 9.11.2020. He submits that clarificatory letter issued on 9.11.2020 by respondent No.1 is for all the interested bidders and not for any particular bidder. In alternate, he submits that if this Court reaches to conclusion that technical evaluation cannot be considered in the light of letter dated 9.11.2020 (Annexure P-1) and if the petitioner comes within the zone of consideration as L1 as per the eligibility conditions of original tender notification, then the contract to be entered with the petitioner would be prospective in nature.

6. Mr. Siddharth Dubey, learned Deputy Government Advocate for respondent No.3-State in WPC No.45/2021 submits that respondent No.3 has been arrayed as a party but respondent No.3 has no say in the dispute raised by the petitioner and the dispute is against respondent No.1 & 2 only.

7. Notices were served upon private respondents, but there is no representation on their behalf.
8. We have heard learned counsel for the parties and perused records of respective writ petitions.
9. Respondent No.1 has issued tender notification on 1.10.2020 and in the tender notification, bid start date has been mentioned as 1.10.2020 and bid due date as 30.10.2020. Subsequently, as per submission made by learned counsel for the parties, the bid submission date has been extended upto 3.11.2020 and bid opening date has been fixed on 4.11.2020. On the scheduled date, technical bids submitted by the bidders were opened and evaluated. For understanding the dispute raised by the petitioner, we find it appropriate to extract relevant clause of the tender notification i.e. Clause 1.3.4, as under:-

“4. शासकीय अथवा अर्द्धशासकीय एवं अन्य संस्थानों में विगत पांच वर्षों में से किन्ही दो वर्षों का (प्रत्येक वित्तीय वर्ष में) निम्नानुसार परिवहन कार्य का अनुभव संबंधित प्रमाण-पत्र/दस्तावेज निविदा के साथ प्रस्तुत करें।

संबंधित संस्थानों से परिवहन कार्य से संबंधित वार्षिक प्रमाण-पत्र हेतु निविदाकर्ता को सी.ए. द्वारा प्रमाणित (परिवहन कार्य का वार्षिक टर्न ओवर दर्शाते हुए प्रमाण-पत्र)।”

10. From perusal of aforementioned essential clause/condition of tender notification, it is clear that there is requirement of submission of any two years' experience certificate of

transportation in preceding five years. This experience certificate is to be submitted online along with tender document. The Note appended to Clause 1.3.4 very specifically mentions that yearly certificate issued by the government/semi government or other institutions is to be CA certified showing annual turnover. Respondent No.1 issued the impugned letter on 9.11.2020 i.e. after opening of technical bids, mentioning therein that the bidders who have submitted experience certificate issued by the government / semi-government institutions are not required to submit CA certificate documents separately. Under the tender notification there is no such distinction specifically made between the government/ semi-government and other institutions. As per original clause of tender notification, all the bidders are required to submit certificate of transportation of concerned institutions showing annual turnover certified by CA. Respondent No.1 by issuing the impugned letter Annexure P-1, after opening of technical bid, has relaxed one of the essential conditions to be considered for technical evaluation of the bidders.

11. Submission made by learned counsel for respondent Nos.1 & 2 that letter Annexure P-1 is clarificatory in nature clarifying the contents of Clause 1.3.4 of the tender notification, does not appeal to us. Perusal of Clause 1.3.4 of the tender notification would show that there is no ambiguity in any manner in the contents contained under Clause 1.3.4 which

requires any clarification. A clarification can be made only with regard to any ambiguity in any of the clauses/ conditions contained in the tender notification. Under the garb of clarification, there cannot be any relaxation of the essential terms and conditions of tender notification, as made by respondent No.1 in this case vide letter dated 9.11.2020 (Annexure P-1).

Further taking into consideration the submissions made by learned counsel for respondents No.1 & 2 that in earlier tender notifications of the year 2017-18 & 2018-19 there was distinction between the government/semi-government and other institutions with regard to the requirement of experience certificate, we have perused the document Annexure R1-2 wherein respondent No.1 has created distinction of submission of experience certificate by the bidders who have submitted the certificate issued by the government / semi-government institutions and other institutions. Even having the clause of different requirement for the transporters/ bidders engaged with government, semi-government and other institutions in earlier tender notifications, respondent No.1 has taken prudent and conscious decision to include all the institutions i.e. government, semi-government and other institutions under one head and common requirement of submission of documents with regard to certificate of transportation experience and turnover certificate. Issuance of letter Annexure P-1 is only in the nature of amendment

amending essential condition of tender notification which cannot be permitted in the manner it is done and at the stage in which respondent No.1 has done. The action of respondent No.1 in issuing letter dated 9.11.2020 relaxing one of the essential conditions enumerated in tender notification is based on letter written by only one of the District Marketing Managers amongst all of the entire State, mentioning about the objection raised by one bidder against another that he does not fulfil the eligibility condition of CA certified document. This action of respondent No.1 at the stage when it is done is denial of equality of opportunity to others who may not have participated due to that very condition. The action on the part of the respondent is unreasonable. Change of terms and conditions after opening of technical bid amounts to changing the rule of game, which is not permissible under the law. The Hon'ble Supreme Court in case of **Raman Dayaram Shetty vs. International Airport Authority of India and others** reported in **(1979) 3 SCC 489** has held thus:-

“34.It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least S years' experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by the 1st respondent was discriminatory having no just or reasonable relation to the object of inviting tenders namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd

class restaurant at the airport. Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. When the 1st respondent entertained the tender of the 4th respondents even though they did not have 5 years' experience of running a IInd Class restaurant or hotel, denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other person similarly situate from tendering for the contract and it was plainly arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

12. Hon'ble Supreme Court in case of **K. Manjushree vs. State of Andhra Pradesh** reported in **(2008) 3 SCC 512** has held that the rule of game cannot be changed after its commencement. In case at hand, not only the last date of submission of bid ended but the technical bid was also evaluated.
13. If the facts of present case are considered in the light of

aforementioned dictum of the Hon'ble Supreme Court, based on the letter written by one of the Marketing Officers on 9.11.2020, respondent No.1 had issued the letter Annexure P-1 relaxing the condition of tender notification. Reason mentioned for issuance of letter dated 9.11.2020 is that objection has been received with regard to non-submission of required documents, CA certified document, by one Manish Bindal and the Objector has stated in his objection that bidder Manish Bindal had not fulfilled the terms and conditions of tender notification, therefore, his bid be rejected. In subsequent paragraph, the Marketing Officer concerned sought clarification whether the annual turnover certificate submitted by bidder Manish Bindal satisfies the condition of submission of certificate issued by a government/semi-government institution or not, as contained in Clause 1.3.4 of the tender notification. Clause 1.3.4 of the tender notification is very specific and clear. The Marketing Officer, Kabirdham has not considered the non-fulfilling of conditions by the said contractor on the date of technical evaluation, instead of rejecting the bid on bringing to his knowledge the mistake committed by him by accepting his technical bid, he wrote a letter to respondent No.1.

14. This Court is aware with regard to the scope of interference in tender proceedings in exercise of jurisdiction of judicial review. Hon'ble Supreme Court in its various decisions has observed that interference by the Court in tender proceedings can be

made only if the decision making process is vitiated either by arbitrariness, rationality, malafides or favoritism.

15. In the light of principles laid down by Hon'ble Supreme Court for exercising jurisdiction of judicial review in tender matters, if the facts of present case are examined, it is apparent that on objection being made by one of the participants that technical bid of one of the bidders, who had submitted his bid without complying with essential condition of tender notification i.e. of submitting CA certified experience certificate showing yearly turnover, has been accepted, the Marketing Officer, Kabirdham wrote a letter to respondent No.1 seeking clarification and then letter of Annexure P-1 came to be issued. Another aspect of the case is that respondent No.1 is having jurisdiction to fix terms and conditions as per requirement and need of the institution/ department for the work mentioned in the tender notification issued, but when once the terms and conditions are fixed, tender notification is floated, the respondents cannot, by issuing a letter, relax or amend any of the essential conditions with regard to eligibility of bidders in manner and stage it has been done. This could be done by issuing proper corrigendum and after giving opportunity to participate in the tender process to the bidders who could not have participated in tender process on account of unamended terms and conditions of tender notification. In the case at hand, the letter relaxing essential eligibility condition has been issued only after opening of technical bid. Considering the manner in which and the stage when letter

Annexure P-1 has been issued amending/relaxing essential eligibility condition of tender notification, we are of the view that letter dated 9.11.2020 (Annexure P-1) is not sustainable in law and is liable to be quashed. Any contract awarded by respondent Federation for District Mungeli & Kabirdham considering eligibility based on letter dated 9.11.2020 also stands quashed.

16. Consequently, writ petitions are allowed. Impugned letter dated 9.11.2020 (Annexure P-1) is hereby quashed. Respondent authorities are directed to proceed with the subject tender of transportation for District Mungeli and Kabirdham considering the original terms and conditions as mentioned in the tender notification issued for transportation of paddy/ food grains for Khariff Marketing Year 2020-21 and to identify the eligible transporters. This exercise of identifying successful bidders, based on original terms and conditions of tender notification, shall be completed within a period of 15 days from the date of receipt of copy of this order. It is made clear that fresh contract to be made with the successful bidder shall be prospective i.e. from the date of entering into agreement between the parties. However, this order will not affect other tenders already finalized by respondents even if considering the letter dated 9.11.2020 as those proceedings are not under challenge.

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

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-