

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**Order Reserved on 17.02.2021****Oder Delivered on 26.02.2021****Writ Petition (C) No. 3361 of 2020**

M/s Mahendra Buildcon A Partnership Firm Through The Partner, Flat No. 308, A-Block, Vasundhara Kundla City, Ambikapur, District- Surguja (CG).

---- Petitioner**Versus**

1. State of Chhattisgarh Through The Secretary Department of Urban Administration, Mantralaya, Mahanadi Bhawan, Atal Nagar, Nawa Raipur (CG).
2. Director Urban Administration and Development, Directorate, Chhattisgarh, Atal Nagar, Nava Raipur, (CG).
3. Municipal Council of Mahasamund Through The Chief Municipal Officer, Mahasamund, District- Mahasamund (CG).
4. Siddhartha Construction Through Proprietor, Sukh Sagar, Vidyut Nagar, Durg (CG).

---- Respondents

For Petitioner : Shri N. Naha Roy, Advocate
 For Respondent/State : Shri Siddharth Dubey, Dy. Govt. Advocate
 For Respondent No.3 : Shri Rahul Jha, Advocate
 For Respondent No.4 : Shri Mayank Chandrakar, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****C A V Order****Per Parth Prateem Sahu, Judge**

1. Petitioner who is unsuccessful bidder in tender proceedings initiated by respondent No.3 has filed this writ petition with following reliefs :-

“10.1 Call for the records of the matter to confirm about the following of due tender process on the touchstone of the direction of the State Government.

10.2 Issue an appropriate writ in the nature of mandamus and quash the entire tender process initiated vide e-notice inviting tender dated 23.09.2020 for the same being absolutely arbitrary and violative of the mandatory directions of the State Government.

10.3 Issue an appropriate writ in the nature of mandamus and command the respondents to follow the process of retendering as mandated by the State Government in its direction dated 28.01.2014.

10.4 Grant any other relief that the Hon'ble High Court may deem fit.”

2. Facts of the case in nutshell are that, respondent No.3 had issued e-tender notification on 23.09.2020 bearing System Tender No.67972 for installation of electric poles and street lights on NH-353 from Sheetali Nala to District Hospital Kharora, Mahasamund. Last date for submission of online bid was 14.10.2020 and last date for physical submission of envelope with earnest money and cost of tender document (cost of tender notification to be in demand draft and amount of earnest money to be in FDR) with stamp of Rs.100/- was till 15.10.2020. Petitioner submitted online bid on 13.10.2020 and sent relevant documents through speed post on the same day

i.e. 13.10.2020. Envelope containing FDR, Demand Draft and stamp paper sent through speed post by petitioner did not reach in time due to which, bid of petitioner was rejected during Part-I evaluation i.e. techno-commercial evaluation. Upon concluding tender proceedings, three bidders were shortlisted, namely, (i) Alok Sodhi, Durg, (ii) Shri Niwas Construction, Mahasamund and (iii) M/s. Siddhartha Construction, Durg (respondent No.4 herein), among whom, only Alok Sodhi was having the electric license. Other two shortlisted bidders were not possessed with electric license issued by competent authority, hence, it was a case of single bidder. Respondent No.3 in view of order dated 28.01.2014 issued by Public Works Department ('PWD') ought not to have proceeded further with tender but have floated fresh tender notification by mentioning that bids were not opened because of single tenderer. In the tender document, there is a specific clause that work should be executed by the persons who possessed with valid and proper electric license issued by competent authority. Respondent No.4 is not having the valid electric license. The object of including very specific clause of work to be done by a person holding electric license is to ensure standard quality and safeguards. The respondent No.3 rejected the bid of petitioner only on the ground that envelope with relevant documents sent by the petitioner reached to the office of respondent No.3 with some delay. The petitioner has already sent relevant documents through speed post on 13.10.2020 and delay in reaching the envelope to the office of respondent No.3 is at the most an irregularity and not illegality at all.

3. The pleadings sought to be resisted by respondents No.1 to 3 by filing reply to writ petition pleading therein that tender proceedings have been concluded strictly in accordance with terms and conditions mentioned in tender document. The petitioner has submitted online bid on 13.10.2020 and as per his statement, he might have posted envelope with relevant documents but had not reached to the office of respondent No.3 till 15.10.2020. This fact has been clarified by the Sub Engineer, Municipal Council, Mahasamund vide letter dated 09.02.2021. In the tender proceedings, 8 bidders participated including the petitioner, out of which, three bidders have qualified in techno-commercial evaluation for opening of their price bids i.e. (i) Alok Sodhi, Durg, (ii) Shri Niwas Construction, Mahasamund and (iii) M/s. Siddhartha Construction, Durg (respondent No.4 herein). Before issuance of tender notification, proper approval has been taken from the competent authority by sending format of tender notification. The said format was approved by the Superintendent Engineer and only thereafter, Notice Inviting Tender ('NIT') was issued. The work of tender notification can be carried out by civil contractor with the conditions that it has to be done through a person having valid electric license issued by competent authority. This requirement has been specifically mentioned in tender notification in Clause 1.2. Upon considering tender documents submitted by eligible bidders, respondent No.4 has been found to be most suitable. The work order was issued on 25.11.2020. Agreement has been entered into between respondent No.3 and respondent No.4, in the agreement,

there was a clause specifying that civil work to be done under the supervision of experienced and trained civil engineers and all the electrical works to be done under the supervision of experienced and trained electrical engineers. Certificate for engaging experienced and trained civil engineers and electrical engineers is to be submitted immediately after issuance of work order. Respondent No.4 has fulfilled the said requirements and work has already been commenced. The work is in its mids and likely to be completed within stipulated period. The petitioner who became unsuccessful upon rejection of his bid, is estopped to challenge the clauses of tender notification. The petitioner is not having locus standi to question the legality and propriety of awarding tender work to respondent No.4.

4. Respondent No.4 in its reply while repeating the submissions made by learned counsel for respondents No.1 to 3 with regard to sequence of dates and events under tender notification, its requirement and cause of rejection of bid of petitioner, further pleaded that respondent No.4 being eligible in all respects as per terms and conditions of tender notification, had submitted his bid. Upon scrutinizing the bid submitted by respondent No.4 along with others, respondent No.4 was found to be eligible, became successful. Petitioner is holding Clause-B license of civil contractor, he is having experience of installation of electricity appliances. The work order was issued on 25.11.2020 whereas writ petition has been filed with much delay only on 16.12.2020. Respondent No.4 fulfills all the requirements as per tender conditions and writ petition

has been filed only to harass respondent No.4.

5. Shri N. Naha Roy, learned counsel for the petitioner submitted that action on the part of respondent No.3 while opening of tender and not considering bid of petitioner is unreasonable and with ill-motive. Among all the three shortlisted bidders in techno-commercial evaluation, only one bidder was having electric license, hence, it is a case of single bidder. Respondent No.3 could not have further proceeded with tender notification and ought to have re-tendered the same based on order dated 28.01.2014 (Annexure P/8) issued by the PWD. There is specific stipulation made in Rule 46 of the Indian Electricity Rules, 1956 (hereinafter referred to as 'Rules, 1956') that the work of electrical installation including additions, alterations, repairs to be under the direct supervision of a person having electric license. Respondent No.3 has also made stipulation in this regard under Clause 1.2 of tender notification, but that has been given go by and respondent No.4 has been declared to be successful bidder ignoring that respondent No.4 is only a civil contractor and not having electric license. He places his reliance on the verdict passed by Hon'ble Supreme Court in case of **Municipal Corporation, Ujjain and Another v. BVG India Limited and Others** reported in **(2018) 5 SCC 462** to buttress his submission.

6. Per contra, Shri Rahul Jha, learned counsel for respondent No.3 submits that entire tender proceedings have been concluded strictly in accordance with terms and conditions mentioned in tender document. As per eligibility criteria mentioned in tender notification,

particularity Clause 1.2, it is not the bidder to possess electric license, but even a civil contractor can participate in tender proceedings and he has to execute the work by engaging persons who are having valid electric license issued by competent authority. Respondent No.4 has engaged the persons having degree of electrical engineering and also electric license issued by competent authority. The said electrical engineer has also issued a letter of confirmation of working with respondent No.4 after issuing the work order and these documents have been placed as per requirement of the agreement with respondent No.3. The petitioner who became unsuccessful bidder has no locus standi to challenge the tender proceedings in a writ petition as no right has been infringed of petitioner. The work order has been issued much prior on 25.11.2020. The petitioner has challenged the tender proceedings and award of work to respondent No.4 only on 16.12.2020 with much delay and by now more than 50% of tendered work has been completed by respondent No.4. The period of completion of work is only of four months. Looking to the work progress, respondent No.4 might be in position to complete the entire tendered work within the stipulated period.

7. Shri Siddharth Dubey, learned counsel for respondents No.1 and 2/State makes his submissions on similar lines. He submits that the petition in its form is not maintainable. Petitioner has not sought any relief for himself but for the relief of re-tendering. It is pointed out that challenge to tender notification in individual capacity will not be maintainable unless and until his individual right is infringed in any

manner.

8. Shri Mayank Chandrakar, learned counsel for respondent No.4 submits that respondent No.4 fulfills all the terms and conditions as forming part of tender notification. Respondent No.3 after evaluating eligibility documents enclosed with tender document has found respondent No.4 to be suitable and upon opening of price bid, he became successful. The work order was issued on 25.11.2020, thereafter, respondent No.4 has already commenced the work. The work is at full swing and more than 50% of the tendered work has been completed. Respondent No.4 shall complete entire tendered work within stipulated period of four months. As per requirement of terms and conditions of tender proceedings, the work is to be executed by engaging persons possessed with proper valid electric license. The name and certificate of persons engaged by successful bidder/contractor having valid electric license is to be furnished only after entering into agreement and that has been submitted before respondent No.3. There is no tenable ground for interfering with the award of work to respondent No.4.

9. We have heard learned counsel for the respective parties and also perused the pleadings and documents placed on record by the respective parties.

10. Perusal of pleadings of writ petition, particularity relief clause would show that petitioner has not sought any relief for himself, particularity for considering his bid, direction of opening of his bid and if found to be competitive to consider him to be successful

bidder and to award work. The entire thrust of petitioner is for an order of this Court directing respondent No.3 to re-tender the subject work. The petitioner has made a ground that as per requirement under the terms and conditions, the contractor should be possessed with valid electric license and out of three shortlisted bidders, only one by name, Alok Sodhi was possessed with valid electric license, but two other bidders have been illegally or arbitrarily shortlisted. In absence of having valid electric license with two other bidders, bid of only Alok Sodhi was eligible and responsive, therefore, there will be only one eligible bidder, which will attract the guideline/circular issued by the State Government with regard to single tenderer.

11. We find it difficult to accept the said proposition made by learned counsel for the petitioner in view of Clause 1.2 of tender notification, which is extracted below for ready reference :

“1.2 The electrical work shall be executed by civil contractor by engaging the person(s) only who possess proper valid electric license issued by the competent authority of the State Government. He shall also attach a copy of the license before starting electrical items of work.”

12. From bare perusal of Clause 1.2 of tender notification would show that tender document in very specific terms mentions that electrical work shall be executed by civil contractor by engaging the persons only who possess proper valid electric license issued by the competent authority. The work appears to include both civil and electrical work. The clause is very specific that civil contractor is eligible to execute electrical work but the work should be done by

him by engaging the persons having electric license.

13. In view of this specific clause, at the time of technical evaluation, there was no reason for respondent No.3 for declaring other two shortlisted bidders to be ineligible, who fulfills other essential conditions. The submission made by learned counsel for the petitioner that respondent No.3 ought to have cancelled the tender proceedings by mentioning it to be a single tenderer is not sustainable and it is hereby repelled.

14. The other ground raised by learned counsel for the petitioner that as per the Rules, 1956, the electric work is to be done by persons possessing electric license, respondent No.3 has taken care of that stipulation by formulating a clause that though work can be awarded to civil contractor, but electrical work has to be executed only by engaging persons possessing valid electric license. There is stipulation in the agreement entered between respondent No.3 and respondent No.4 that electric license of a person engaged for execution of tendered work to be submitted immediately after issuance of work order. Learned counsel for respondent No.3 made a very specific submission that respondent No.4 has complied with said requirement and submitted the relevant documents of engagement of one Anil Nathani (Electrical Engineer) possessed with license issued by the competent authority and engagement of Anil Nathani has also been ratified by him by issuing a 'Letter of Confirmation'.

15. Fixing of terms and conditions are exclusively under the

domain of the awardee of the work. They formulate the terms and conditions based on the opinion of their experts. Hon'ble Supreme Court in case of **Michigan Rubber (India) Limited v. State of Karnataka and others** reported in **(2012) 8 SCC 216** has 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 conformity 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.”

16. Further, Hon'ble Supreme Court while considering the other judgments in case of **Consortium of Titagarh Firema Alder S.P.A.- Titagarh Wagons Ltd., through Authorised Signatory v. Nagpur Metro Rail Corporation Limited (NMRCL) through its General Manager (Procurement) and Another** reported in **(2017) 7 SCC 486**, has held thus :-

“30.....The Court quoted a passage from *Afcons Infrastructure Ltd.*

v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818, wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.....”

17. In view of aforementioned specific provisions under the tender notification as well as in agreement and the rulings of Hon'ble Supreme Court on the issue, submission of learned counsel for the petitioner that respondent No.3 is violating the Rules, 1956 in awarding contract to respondent No.4 is also not sustainable and it is hereby repelled.

18. The petitioner in view of relief sought is having no locus standi to challenge the award of contract by respondent No.3 to respondent No.4 because he has not sought for any relief for himself against rejection of his bid. The writ petition can be filed by a private person in individual capacity only when any of his right has been infringed. The case law relied upon by the learned counsel for the petitioner is entirely on different facts. Hon'ble Supreme Court has

delivered the judgment considering the terms and conditions of tender notification which is subject matter under challenge.

19. For the foregoing reasons, we do not find any merit in the writ petition. The petition is liable to be and is hereby dismissed.

(P. R. Ramachandra Menon)
Chief Justice

(Parth Prateem Sahu)
Judge

Yogesh

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.3361 of 2020

M/s. Mahendra Buildcon

Versus

State of Chhattisgarh & Others

CAV Order

For Consideration

Judge

.2021

Hon'ble The Chief Justice

Chief Justice

.2021

Post for CAV Order on2021

Judge

.2021