

ORISSA HIGH COURT: CUTTACK

AFR

W.P(C) NO. 14745 OF 2022

In the matter of an application under Articles 226 and 227 of the Constitution of India.

PMR Consortium Petitioner

-Versus-

Bhubaneswar Municipal Corporation and others. Opp. Parties

For Petitioner : Mr. Lalit Kumar Maharana
Advocate.

For Opp. Parties : Mr. Pradipta Kumar Mohanty,
Senior Advocate along with
M/s. P. Mohanty, P.K. Pasayat,
S.N. Dash and A.N. Dash,
Advocates [O.P. No.1 & 2]

M/s. Surya Kanta Dash and
H.K. Moharana, Advocate
[O.P. No.3]

M/s. Pradeep Kumar Mohapatra,
J.K. Jethy, S. Mohanty and
A. Mohapatra, Advocates
[O.P.No.4]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND**

THE HONOURABLE MR JUSTICE G. SATAPATHY

Date of Hearing: 11.10.2022 :: Date of Judgment : 21.10.2022

DR. B.R. SARANGI, J. PMR Consortium, represented through its authorized representative, has filed this writ petition seeking to quash the bid of opposite party no.3-Manju Services and to declare the petitioner as successful bidder, so far as Package Nos.5 and 8 under Annexure-1 are concerned. The petitioner further seeks to direct the opposite parties to take immediate action to blacklist opposite party no.3 and to take penal action for furnishing false certificate in the public tender.

2. The factual matrix of the case, in brief, is that Bhubaneswar Municipal Corporation-Opposite Party No.1 issued Request for Proposal (RFP) for “Street Sweeping, Drain Cleaning, Conservancy Cleaning, and Bush Uprooting in respect of South West Zone: Package-5 for Ward Nos. 24, 25, 27, 37, 38, 39, 47, 48, 49, 50 and 51 and in respect of South East Zone: Package-8 for Ward Nos. 31, 32, 33, 42, 43 and 45” vide Annexure-1 through e-procurement from the intending bidders fulfilling the eligibility criteria and other qualified requirements as per the Notice Inviting Tender (NIT). The NIT consisted of two bid system. Part-I consisted of

General and Technical Bid and Part-II consisted of Financial Bid/ Price Bid. The tender contained 10 numbers of work and each work was divided into 10 packages, i.e. Package No.1 to 10 and each package was categorized as per concerned Zone and concerned Wards. The petitioner is concerned with Package Nos.5 and 8 under Bid Reference No. 01/CE/BMC/2021-22. The period for completion of the work under the package is three years. As the conditions of Package Nos. 5 and 8 are identical, therefore, he has referred to NIT so far as the Package No.8 is concerned, which has been placed on record under Annexure-1. The opposite party No.1 issued a corrigendum on 20.12.2021, whereby the pre-bid conference was amended from 26.12.2021 to 27.12.2021. Opposite party No.1 issued a clarification to the pre-bid queries received clarifying certain queries and making certain amendments vide Annexure-2. Clause-3 of the RFP provides for evaluation of bids whereas Clause-3.2 postulates the test of responsiveness. Clause-3.3.1 states about the conditions

for evaluation of technical bid, whereas Clause-3.3.2 deals with technical qualification.

2.1 The petitioner, having fulfilled the criteria, participated in the tender process by submitting its bid for different packages, including Package Nos.5 and 8. The petitioner's technical bid was declared as responsive. Consequentially, its financial bid was also accepted by the committee. The opposite party no.3, along with the petitioner, participated in the tender process by submitting its bid in respect of all the packages, including Package Nos. 3, 5 and 8. According to the petitioner, since the bid documents submitted by opposite party no.3 for both the packages, i.e., Package Nos. 5 and 8 were identical and it had furnished a certificate in Appendix-I at point No.6, which is false and incorrect, the bid of opposite party no.3 would have been rejected, reason being opposite party no.3 was debarred by the Angul Municipality from participating in all the sanitation tenders for a period of three years from 10.02.2021. This fact was suppressed in the bid document. As such the debarment of opposite party no.3

from participating in the tender was in force on the date of bid submission, i.e. 11.01.2022. The Executive Officer, Angul Municipality, vide letter No. 644 dated 10.02.2021 issued to opposite party No.3 intimated that EMD relating to the work “privatization of sanitation work for Zone-1, 2 of Angul Municipality” stood forfeited and tender for the said work was cancelled. The said letter also discloses that opposite party no.3 was debarred for three years from participating in future sanitation tender for the said Municipality. Since the said fact was not disclosed and, as such, opposite party no.3 had rendered false information, thereby, it has violated the tender condition, as envisaged under APPENDIX-I. The tender committee convened a meeting for evaluation of technical proposals. While considering the technical proposals for Package Nos. 5 and 8, the tender committee declared the bid of the petitioner and opposite party no.3 as responsive. Even the financial bids of the petitioner and opposite party no.3 were also accepted and opposite party no.3 was declared as

successful bidder for both the packages, i.e. Package Nos. 5 and 8. Hence, this writ petition.

3. Mr. L.K. Maharana, learned counsel appearing for the petitioner vehemently contended that the technical bid submitted by opposite party no.3 was to be cancelled as the same was not supported by the materials as required under RFP and also due to non-disclosure of the material information, which amounts to fraudulent transaction. As a consequence thereof, the bid submitted by opposite party no.3 should have been rejected. But opposite party nos. 1 and 2, without considering the same and without looking into APPENDIX-I attached to the bid documents, accepted the bid submitted by opposite party no.3 and declared it as successful bidder and, thereby, the same cannot sustain in the eye of law. It is further contended that non-disclosure of the debarment of opposite party no.3 by Angul Municipality, which was made much prior to the publication of the RFP and submission of declaration form, amounts to suppression of material facts as per the conditions stipulated in the RFP. Thereby, the entire

bids of opposite party no.3 are liable to be cancelled. It is further contended that opposite parties 1 and 2 have arbitrarily selected opposite party no.3, so far as Package Nos. 5 and 8 are concerned. Therefore, in the event the bids submitted by opposite party no.3 are rejected, the petitioner, having submitted highest offer among the four qualified bidders, would have been a potential bidder, in whose favour the work should have been allotted. It is further contended that both opposite parties no.1 and 2 have admitted about the fact of debarment of opposite party no.3 for three years by Angul Municipality. The declaration at point no.6 of Appendix-I of the bid documents is a misrepresentation. Thereby, the bid of opposite party no.3 is liable to be rejected in terms of Clauses-2.6.2 and 2.6.3 of RFP. He further contended that the declaration form including Appendix-I as provided in RFP by opposite party no.3 wherein it is also prescribed for a specific declaration to be made by the bidder relating to its earlier debarment, if any, and opposite party no.3 furnished a wrong/false information therein by suppressing the fact regarding its earlier

debarment, therefore, in terms of Clause-4, such misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts amounts to fraudulent practice. As such, the bid submitted by opposite party no.3 is liable to be rejected. It is also contended that though Angul Municipality has subsequently withdrawn the said debarment order, that itself is also disputed one, in view of the documents available on record and different stands have been taken in three different letters. Therefore, it can be construed that the said document has been prepared for the purpose of declaring opposite party no.3 as a successful bidder. Consequentially, the same cannot and should not have been taken into consideration. As such, the bid of opposite party no.3 should have been rejected.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgment dated 08.12.2020 of the apex Court rendered in Civil Appeal No. 4002 of 2020 (***The State of Madhya Pradesh v. U.P. State Bridge Corporation Ltd.***); judgment dated 01.06.2022 of the High Court of Delhi

passed in WP(C) No. 10369 of 2021 (**Cjdarcl Logistics Ltd. v. Rites Ltd.**); judgment of this Court in **Umesh Chandra Chinera v. Chairman & Managing Director, Bharat Petroleum Corpn.**, 2022 (II) ILR CTC-604; and of the apex Court in **Bhaurao Dagdu Paralkar v. State of Maharashtra**, (2005) 7 SCC 605.

4. Mr. P.K. Mohanty, learned Senior Counsel appearing for the opposite party nos. 1 and 2 vehemently disputed the contentions raised by learned counsel for the petitioner and contended that the tender process has been carried on following due process of law and in compliance to the provisions laid down in the RFP. As such, no favoritism was shown towards opposite party no.3. As per the criteria stipulated in the RFP, the bidder is required to make a declaration, as required in point no.6 of Appendix-I, that “*I/ We certify that we are not barred by the Government of Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects as on [] (Bid Submission Deadline).*” Though the Executive Officer, Angul Municipality, vide letter no. 644 dated

10.02.2021 had debarred opposite party no.3 from participating in future sanitation tender for a period of three years, but the said debarment order was revoked vide letter no. 6637 dated 31.12.2021, which was prior to the last date of submission of the bid, i.e., 12.01.2022. Therefore, it is contended that there was no ground on the part of opposite party no.1 to disqualify opposite party no.3. The bids, along with all supported documents, submitted by all the bidders were sent to the Government in Housing and Urban Development Department, Odisha and the letters awarding the work in respect of package nos. 5 and 8 were issued to opposite party no.3, vide letter no. 27019 dated 27.05.2022 and letter no. 27023 dated 27.05.2022 respectively. But only after receipt of approval from the Government in Housing and Urban Development Department Odisha, vide letter no. 7400 dated 28.04.2022 and pursuant to vacation of stay by this Court, vide order dated 16.05.2022 passed in I.A. No. 5152 of 2022 arising out of W.P.(C) No. 5455 of 2022 in the matter of **OM Sai Ventures** v. **Bhubaneswar Municipal Corporation**, the tender was

finalized in favour of opposite party no.3. It is further contended that even if opposite party no.3 is excluded, the petitioner cannot be the next potential bidder to be considered for award of work. Therefore, it has no *locus standi* to challenge the decision of opposite party no.1 awarding the work in favour of opposite party no.3. It is further contended that opposite party no.1, during tender evaluation process, was never in receipt of any document officially to the effect that opposite party no.3 was debarred by Angul Municipality. On an inquiry being made by opposite party no.1, later on it came to its knowledge that the Executive Officer, Angul Municipality has communicated to opposite party no.3, vide letter no. 6637 dated 31.12.2021, that its previous letter no. 644 dated 10.02.2021 issued to opposite party no.3 regarding debarment for a period of three years has been revoked. Therefore, no such debarment order was existing against opposite party no.3, as on the date of submission of the tender, i.e. 11.01.2022 by opposite party no.3. Thereby, it is contended that the act of opposite party no.1 cannot be termed as unfair or partial towards opposite party

no.3. Consequentially, he seeks for dismissal of the writ petition. To substantiate his contention reliance has been placed on ***Tata Cellular v. Union of India***, AIR 1996 SC 11 : (1994) 6 SCC 651

5. Mr. S.K. Dash, learned counsel appearing on behalf of opposite party no.3 vehemently contended that the petitioner, after being unsuccessful, has made an attempt at the behest of OM Sai Ventures, who is petitioner in W.P.(C) No. 5455 of 2022, to curve the selection of present opposite party no.3 in respect of package nos. 5 and 8. It is further contended that the relief sought to declare opposite party no.3 as blacklisted is beyond the scope of the writ jurisdiction, as it is inferred that by remaining in unholy combination with rival group, the petitioner approached this Court by filing the present writ petition to achieve their motto to deprive of opposite party no.3 from executing the work of similar nature. Admittedly, opposite party no.3, having remained as successful bidder in respect of package nos. 5 and 8, attempt has been made by filing this writ petition just to deprive it of undertaking the work. Therefore, he

contended that the writ petition should be dismissed as the same is highly confusing and evasive and seemed to be the outcome of copy and paste of the averments made in W.P.(C) No. 5455 of 2022. The claim made by the petitioner to declare bid of opposite party no.3 as non-responsive is nothing but to tarnish its mercantile image at the competitive era of the trade. It is also contended that since the petitioner has made an attempt to debar opposite party no.3 from getting the work done, so far as package nos. 5 and 8 are concerned, the writ petition cannot sustain and consequentially the same is liable to be dismissed. To substantiate his contention, he has relied upon **Tata Cellular** (supra).

6. Mr. P.K. Mohapatra, learned counsel appearing for opposite party no.4-Angul Municipality contended that opposite party no.3 had participated in the tender process floated by Angul Municipality in respect of sanitation work of Zone-1 and 2 and being a successful bidder was directed to deposit the APS and ST money, vide letter dated 03.02.2021, on or before 09.02.2021. As opposite party no.3 was failed to deposit

the said amount, the EMD relating to the said work was forfeited and tender of the above work was also cancelled. Simultaneously, opposite party no.3 was debarred for three years from participating in future tender process of opposite party no.4, vide letter dated 10.02.2021. Aggrieved by the same, opposite party no.3 filed a writ petition bearing W.P.(C) No. 6020 of 2021 before this Court and the matter was taken up on 19.02.2021 and notice was issued to the opposite parties to file counter within six weeks. Subsequently, the said writ petition was disposed of on 11.08.2021 as infructuous with a liberty to the petitioner, opposite party no.3 herein, to file an application for modification/recalling of that order if any cause of action survives. As such, opposite party no.3 did not prefer any fresh application and approached opposite party no.4 with a request to revoke the order of debarment. Consequentially, the order of debarment issued in favour of opposite party no.3 was revoked, vide letter/order dated 31.12.2021. Again, on his request, another letter was issued to opposite party no.3 on 07.02.2022

permitting it to participate in the future tender process of Angul Municipality, as the order of debarment has already been revoked. Therefore, no illegality or irregularity has been committed by opposite party no.4 in revoking the debarment order passed in favour of opposite party no.3. Accordingly, the writ petition should be dismissed on that score only.

7. This Court heard Mr. L.K. Maharana, learned counsel appearing for the petitioner, Mr. P.K. Mohanty, learned Senior Counsel appearing for opposite parties no.1 and 2, Mr. S.K. Dash, learned counsel appearing for opposite party no.3 and Mr. P.K. Mohapatra, learned counsel appearing for opposite party no.4 in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission, taking into consideration the urgency involved in the matter and that the petitioner is enjoying the interim order dated 13.06.2022 passed in I.A. No. 7836 of 2022.

8. On the basis of the factual matrix, as discussed above, the sole question falls for consideration before this Court is whether the bid submitted by opposite party no.3 is liable to be rejected, on the basis of alleged misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, which amounts to fraudulent practice in terms of the RFP, so as to disentitle opposite party no.3 to get the benefit of award of contract in its favour.

9. Before answering the above question effectively, it is worthwhile to delve into the relevant provisions of the RFP for just and proper adjudication of the case.

"2. INSTRUCTIONS TO BIDDERS

(A) GENERAL

xxx

xxx

xxx

2.6.2 Without prejudice, BMC reserves the right to reject any Bid and appropriate the Performance Security if: a. at any time, a material misrepresentation is made or uncovered; or b. the Bidder does not provide, within the time specified by BMC the supplemental information sought by BMC for evaluation of the Bid.

2.6.3 Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member shall be disqualified/ rejected. If such disqualification/ rejection occurs after the Bids have been opened and the Successful Bidder gets disqualified/ rejected, then BMC reserves the right to

select the Bidder which proposed the second lowest quote as Successful Bidder or cancel the Bidding Process.

3. EVALUATION OF BIDS

xxx xxx xxx

3.2 Test of responsiveness

3.2.1 Prior to evaluating the Bids, BMC shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:

a. xxx xxx xxx

c. it is received as per the format at Appendix I and Appendix XI;

xxx xxx xxx

BMC reserves the right to reject any Bid which is non-responsive. If necessary, BMC may ask the Bidders for clarifications. In this case, BMC will make a request for supplementary information or documentation from the Bidder, provided that this request may only be made to clarify information already provided by a Bidder or to request a document that should have been included. Whenever a supplementary request is made, the Bidder must respond to BMC within the time period set by BMC in its request. If the Bidder does not respond to a supplementary request within such time period or does not provide the information or documentation requested, BMC may consider the Bid non-responsive and reject it. Requests for clarifications shall be made by email. Responses to requests shall be made by email, except where BMC expressly requests otherwise in the request for clarification.

4. FRAUD AND CORRUPT PRACTICES

4.1 The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LoA and during the subsistence of the Contract Agreement. Notwithstanding anything to the contrary contained herein, in the LoA or the Contract Agreement, BMC may reject a Bid, withdraw the LoA, or terminate the Contract Agreement, as the case may be, without being liable in any manner whatsoever to the Bidder

or Contract, as the case may be, if it determines that the Bidder or Operator, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, BMC shall be entitled to forfeit and appropriate the Performance Security, as the case may be, without prejudice to any other right or remedy that may be available to BMC under the Bidding Documents and/or the Contract Agreement or otherwise.

4.3 For the purposes of this Clause 4, the following terms shall have the meaning hereinafter respectively assigned to them:

"corrupt practice" means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence directly or indirectly the actions of any person connected with the Bidding Process (for the avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of BMC who is or has been associated in any manner, directly or indirectly with the Bidding Process or the LoA or has dealt with matters concerning the Contract Agreement or arising therefrom, before or after the execution thereof, at any time prior to the expiry of Five year from the date such official resigns or retires from or otherwise ceases to be in the service of BMC shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) acting contrary to applicable anti-bribery or anti-corruption laws;

a. **"fraudulent practice"** means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;

xxx

xxx

xxx

APPENDIX I- LETTER FOR THE BID

[On the letter head of the Bidder/Lead Member]

Original or copy No: Dated:
To, The Commissioner,
Bhubaneswar Municipal Corporation
Bhubaneswar-751014, Odisha

Sub: **Bid for a [Street Sweeping, Drain de silting, Bush Uprooting , Conservancy Cleaning & De weeding in South East zone - Package-VIII of Bhubaneswar Municipal Corporation]**

Dear Sir,

xxx xxx xxx

5. I/We certify that in the last three years, I/we/any of the Members have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach by [us/any of the Members].
6. I/ We certify that we are not barred by the Government of Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects as on [] (Bid Submission Deadline).

xxx xxx xxx

APPENDIX I -ANNEX I: DETAILS OF BIDDER

[On the letter head of the Bidding Company/
Members of Consortium]

Original or copy No: Dated:

xxx xxx xxx

5. In case of a Consortium

xxx xxx xxx

(c) The following information shall also be provided by the Bidder/for each Member:

Name of Bidder/ member of Consortium:

No.	Criteria	Yes	No
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1.	<i>Has the Bidder/Member of the Consortium been barred by the Central/ any State Government, or any entity controlled by them, from participating in any project (BOT or otherwise)?</i>		
2.	<i>If the answer to 1 is yes, does the bar still subsist?</i>		

10. In view of the aforementioned clauses of the RFP, it is made clear that under Clause-2.6.2 the BMC reserves the right to reject any bid and appropriate the performance security, if at any time, a material misrepresentation is made or uncovered or the bidder does not provide within the time specified by BMC the supplemental information sought by BMC for evaluation of the bid. Under Clause-2.6.3, such misrepresentation/ improper response shall lead to the disqualification of the bidder. If the bidder is a consortium, then the entire consortium and each member shall be disqualified/ rejected. If such disqualification/ rejection occurs, after the bids have been opened and the successful bidder gets disqualified rejected, then BMC reserves the right to select the bidder which proposed the second lowest

quote as successful bidder or cancel the bidding process. Thereby, the BMC has got absolute right to cancel the bid for misrepresentation/ improper response, which leads to the disqualification of the bidder.

11. Clause-3 provides the process for evaluation of bids. Clause-3.2 envisages the test of responsiveness. As per Clause-3.2.1, prior to evaluating the bids, BMC shall determine whether each bid is responsive to the requirements of the RFP and that the bid shall be considered to be responsive one, only if it is received as per the format at Appendix I and Appendix XI, and that the BMC also reserves the right to reject any bid which is non-responsive. If necessary, BMC may ask the bidders for clarifications. In that case, BMC will make a request for supplementary information or documentation from the bidder, provided that the request may only be made to clarify information already provided by the bidder. Mode of clarification has also been prescribed indicating that requests for clarifications shall be made by email and responses to requests shall be made by

email, except where BMC expressly requests otherwise in the request for clarification.

12. Clause-4 deals with fraud and corrupt practice. Under Clause 4.1 a caution has been prescribed that the bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the bidding process and subsequent to the issue of the LoA and during the subsistence of the contract agreement. Even power has been vested with BMC, which may reject a bid, withdraw the LoA, or terminate the contract agreement, as the case may be, without being liable in any manner whatsoever to the bidder or contractor, as the case may be, if it determines that the bidder or operator, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the bidding process. Under Clause-4.3 the corrupt practice has been prescribed and under Clause-4.3 (a) while elaborating the “corrupt practice” it has prescribed “fraudulent practice”, which means a

misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the bidding process. In that case, the BMC shall reject the bid.

13. In view of the above, it is contended by learned counsel for the petitioner that opposite party no.3, having been indulged in fraud and corrupt practice, more specifically fraudulent practice by suppression of facts or disclosure of incomplete facts, its bid should have been rejected or the LoA, if at all issued, should have been withdrawn. To substantiate such contention, reliance has been placed on Appendix-I- Letter for the Bid, which is required to be received from the bidders. Under Clause-5 of such Appendix, the bidder has to certify that for the last three years the bidder or any of its members had neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor had any contract terminated by any public authority for

breach by it/any of the members. Obligation has also been cast under Clause-6 to certify that they are not barred by the Government of Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects as on bid submission deadline. Even Appendix-I- Annexure I, requires details of the bidder. Under Sub-clause (c) of Clause-5 certain information was required to be provided by the bidder/for each member. At sl. no.1, the bidder has to give reply in 'Yes' or 'No' to the information, "has the bidder/member of the consortium been barred by the Central/any State Government, or any entity controlled by them, from participating in any project (BOT or otherwise)?" Similarly at sl. no.2, if the answer to sl. no.1 is 'Yes', then the bidder has to give information, whether the bar still subsists or not, either in 'Yes' or 'No'. Thereby, detailed information was required to be provided by the bidder with regard to his debarment by Central/ any State Government, or any entity controlled by them, from participating in any project. Consequently, the bidder owes a responsibility

to make correct disclosure of his position before the authority while submitting the tender.

14. Admittedly, opposite party no.3, while submitting the bid, had provided a check list of technical proposal at Annexure-3, which has been placed at page-244 of the brief and also submitted Appendix I- Letter for the Bid, which reads as follows:-

“MANJU SERVICES
H.O.: Kalyani Nagar
Cuttack-753013, Odisha
Mobile :9437033473

APPENDIX I
LETTER FOR THE BID

Original or copy No: 1 (D)

Dated:09.01.2022

To,
**The Commissioner,
Bhubaneswar Municipal
Corporation Bhubaneswar-
751014, Odisha**

Sub: Bid for a [Street Street Sweeping, Drain Cleaning, Bush uprooting & Conservancy Cleaning- South West Zone- Package-5 for Ward No 24, 25, 27, 37, 38, 39, 47, 48, 49, 50, 51 of Bhubaneswar Municipal Corporation]

**RFP No-01/CE/BMC/2021-22 dated 14.12.2021
NO-90361 DATE : 14.12.2021.**

Dear Sir,
With reference to your **RFP No-01/CE/BMC/2021-22 dated: 14.12.2021**, I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.

1. *I/We acknowledge that BMC will be relying on the information provided in the Bid and the documents accompanying such Bid to select a Bidder for the aforesaid Project and I/we certify that all information provided in the Bid are true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying such Bid are true copies of their respective originals.*
2. *The Bid is being submitted for the express purpose of qualifying as a Successful Bidder for the aforesaid Project.*
3. *I/We shall make available to BMC any additional information it may find necessary or require to supplement or authenticate the submissions.*
4. *I/We acknowledge the right of BMC to reject our Bid without assigning any reason or otherwise and hereby waive my/our right to challenge the same on any account whatsoever.*
5. *I/We certify that in the last three years, I/we/any of the Members have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach by [us/any of the Members].*
6. *I/ We certify that we are not barred by the Government of Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects as on **12.01.2022**/Bid Submission Deadline.*

I/We declare that:

- (a) *I/We have examined and have no reservations to the Project Documents, including any addendum issued by BMC;*
- (b) *I/We do not have any Conflict of Interest;*
- (c) *I/We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or*

restrictive practice, as defined in Clause 4 of the RFP, in respect of any tender or request for proposal issued by or any agreement entered into with BMC or any other public sector enterprise or any government, Central or State;

- (d) I/We hereby certify that I/we have taken steps to ensure that in conformity with the provisions of Clause 4 of the RFP, no person acting for me/ us or on my/our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice; and*
- 8. I/We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive, without incurring any liability to the Bidders.*
 - 9. I/We believe that I/we/our Consortium satisfy(s) and meet(s) all the requirements as specified in the RFP and are/is qualified to submit a Bid.*
 - 10. I/We declare that I/we/any Member, am/are not as a member of a/any other Consortium or as an individual applying for the Project.*
 - 11. I/We certify that I/we or any Member have not been convicted by a court of law or blacklisted by a regulatory authority.*
 - 12. I/We further certify that in regard to matters relating to security and integrity of the country, I/we have not been charged by any government agency or convicted by a court of law.*
 - 13. The Statement of Legal Capacity as per format provided at Annex IV in Appendix I of the RFP, duly signed, is enclosed. The Power of Attorney for signing of Bid and the Power of Attorney for Lead Member of Consortium, as per format provided at Appendix III and IV respectively of the RFP, are also enclosed.*
 - 14. I/We hereby irrevocably waive any right, which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by BMC in connection with the selection of Bidders or in*

connection with the Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.

15. I/We agree and undertake to abide by all the terms and conditions of the RFP.

16. I/We agree and undertake to be jointly and severally liable for all our obligations under the Contract Agreement as per the provisions set out therein

In witness thereof, I/We submit this Bid under and in accordance with the terms of the RFP.

Yours faithfully,

Manju Services

Date: 09.01.2022

Place: Cuttack

authorized signatory

Devi Dash (Authorized Signatory)”

15. A bare reading of the above letter, it is made clear that opposite party no.3 has made a solemn declaration stating that BMC will be relying on the information provided in the bid and the documents accompanying such bid to select a bidder for the aforesaid project and, as such, all information provided in the bid are true and correct and nothing has been omitted, which renders such information misleading; and all documents accompanying such bid are true copies of their respective originals. Simultaneously, under Sub- clause (5), opposite party no.3 has certified that in the last three years, neither the opposite party

no.3 nor its members have failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach by opposite party no.3 or its Members. Under Sub-Clause (6), it has certified that it has not barred by the Government of Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects as on 12.01.2022 (Bid Submission Deadline). Therefore, an obligation was cast on opposite party no.3 to make a solemn declaration and, as such, vide letter dated 09.01.2022, opposite party no.3 did so. But under Appendix I – Annexure I : Details of Bidder, in Sub-Clause 5 (c), opposite party no.3 stated as follows:-

“(c) The following information shall also be provided by the Bidder/for each Member:

Name of Bidder/ member of Consortium:

No.	Criteria	Yes	No
1.	Has the Bidder/Member of the Consortium been barred by the Central/ any		No

	<i>State Government, or any entity controlled by them, from participating in any project (BOT or otherwise)?</i>		
2.	<i>If the answer to 1 is yes, does the bar still subsist?</i>		No

This clearly indicates that opposite party no.3 had made a solemn declaration by putting 'No' to the information under sl. no.1 to the extent "Has the bidder/member of the consortium been barred by the Central/ any State Government, or any entity controlled by them, from participating in any project (BOT or otherwise)?" Similarly, under sl. no.2, opposite party no.3 put "No" to the information that "if the answer to 1 is 'yes', does the bar still subsist?". By furnishing such information, opposite party no.3 has emphatically denied that neither opposite party no.3 nor member of the consortium has been barred by the Central/ any State Government, or any entity controlled by them, from participating in any project.

16. Under Sub-Clause 6 of Appendix I, the bidder was to certify that by the bid submission deadline, the bidder had not been barred by the Government of

Odisha, any other State Government in India or the Government of India, or any public agencies from participating in similar projects. Opposite party no.3 had emphatically submitted that it has not been debarred as on 12.01.2022. That means, opposite party no.3 has adopted fraudulent practice by suppression of facts and disclosure of incomplete facts in order to influence the bidding process as per Clause 4.3 (a), so as to come within the meaning of fraud and corrupt practice under Clause 4 of RFP and accordingly the bid should have been rejected by the BMC. To substantiate such fact, reliance has been placed by the petitioner on the letter of the Angul Municipality which has been annexed as Annexure-4, and placed on record at page 260 dated 10.02.2021 with regard to the cancellation of the tender for the work privatization of sanitation work for Zone 1, 2 of Angul Municipality, which reads as follows:-

"Letter No. 644

Date 10/02/21

To

*Sri Geeti Ranjan Mohanty, prop.
M/s Manju Service, Kalyan Nagar
Cuttack, 753013, Odisha.*

*Sub: Cancellation of tender for the work
privatization of sanitation work for Zone-1,
2 of Angul Municipality.*

Ref:- This office L. No.=576/dt-03.02.21.

Sir,

With reference to the letter cited above, it is to inform you that you have been asked to deposit the APS & JSD money vide this office L. No.-576/dt-03.02.21 on or before dt-09.02.21. But, you have not deposited the said money in the stipulated date which shows your disinterest for the execution of agreement. Also you remain silent without intimating the undersigned. You are aware of the fact that sanitation is an exigency service and the old contract has already been exhausted.

Hence, the EMD relating to the above work is forfeited and the tender for the above work is also cancelled. You are debarred for three years in participating in future sanitation tender of this Municipality.

Yours faithfully,

Executive Officer,
Angul Municipality
date

Memo no. 645
10/2/21

Copy submitted to Collector & District Magistrate,
Angul for favour of kind information and necessary
action.

Executive Officer,
Angul Municipality”

It is relevance to note, by the bid submission deadline, i.e., 12.01.2022, the letter dated 10.02.2021 of the Angul Municipality was subsisting with regard to the cancellation of tender for the work privatization of sanitation work for Zone-1, 2 of Angul Municipality. The proceeding of the meeting of the tender committee, which has been placed on record in Annexure-5 at page

261 of the brief, so far as package no.5 is concerned, in respect of opposite party no.3 at page 273 of the brief, the endorsement is that “The bid submitted by the Agency is fulfilling all the eligibility criteria. Hence, the committee decided that the bid is responsive for 2 packages.” Such a decision has been taken due to suppression of facts and as such opposite party no.3 has made solemn declaration in Appendix I of Letter for Bid at page 245 of the brief that under Clause 6 and also in Clause 5 (c) of Appendix I- Annex I, Details of Bidder, when the letter dated 10.02.2021 in Annexure-4 clearly indicates about the cancellation of tender of opposite party no.3. As such, opposite party no.3 owes a responsibility to disclose such facts before the tendering authority vide Appendix I and Appendix I- Annex I of tender documents. Both the documents mentioned above run contrary to what is required to be done as per the condition.

17. Similarly, for Package-8 at page 278 of the brief if the tender committee, in respect of opposite party no.3 at page 278 of brief, endorsed that “*The bid*

submitted by the Agency is fulfilling all the eligibility criteria. Hence, the committee decided that the bid is responsive for 2 packages.”, and such decision has been taken by the committee as because opposite party no.3 suppressed the fact, while furnishing the information in Appendix I and Appendix I- Annex I, with regard to cancellation of tender in its case done by Angul Municipality. It may be noted that the tender summary report, which has been placed on record in Annexure-6 at page 285 of the brief shows that the technical bids of the petitioner as well as opposite party no.3 were accepted on 17.02.2022 at 12.30 P.M. But Angul Municipality, vide Annexure-8 which has been placed on record at page 293, provided the information under the RTI Act, on 03.03.2022, to the following effect:-

<i>Sl. No</i>	<i>Question</i>	<i>Answer</i>
<i>1.</i>	<i>Sir In the above Tender which Party/Agency was lowest one</i>	<i>(1) Maju Services (2) Bharat Security.</i>
<i>2</i>		
<i>3.</i>	<i>If Yes have you given the work order or not ? Please supply the Xerox copy of work order</i>	<i>does not arise</i>
<i>4.</i>	<i>Whether the selected</i>	<i>No</i>

	<i>agency has been continuing the work or not</i>	
5.	<i>If No, what course of action has been exercised by Angul Municipality against the Party. Please Supply the Xerox copy of action order</i>	<i>Copy enclosed.</i>

At sl. no.4 above it has been clearly indicated that the selected agency is not continuing the work and to the question at sl. no.5 it has been indicated that Angul Municipality has supplied the action order. The said action order has been annexed at page 295 of brief, which is a letter bearing no.644 dated 10.02.2021, as quoted above. Therefore, prior to the declaration in Appendix I and Appendix I- Annex I dated 11.01.2022, the aforesaid letter was in existence. In such circumstance, due to fraudulent practice adopted by opposite party no.3, its bid should have been rejected. Opposite party no.3 has filed a document, vide letter no. 6637 dated 31.12.2021, on the subject revocation of letter no.644/10.02.2021, which has been annexed as Annexure-4 and part of Annexure-8, the documents supplied under the RTI Act, indicating therein that

Angul Municipality has revoked the order of debarment and opposite party no.3 is free to participate in future tender of that municipality. It was contended by opposite party no.3 that since revocation of the order of debarment dated 10.02.2021 had already been made, vide letter dated 31.12.2021, prior to the submission of the bid document, i.e. on 11.01.2022, therefore, no non-disclosure was made to that extent in the bid submitted by opposite party no.3. But that is not the requirement of Appendix I and Appendix I- Annex I of the RFP. Under Clause 5 (c) of Appendix I- Annex I of RFP specific question was posed, which was to be answered by opposite party no.3 with all fairness. When opposite party no.3 answered against the said question by stating “No”, certainly that is a non-disclosure of complete fact and suppression of fact, which comes under the concept “fraudulent practice” as envisaged in the RFP.

18. In the counter affidavit filed by opposite party no.4 the revocation letter dated 31.12.2021 has been placed on record as Annexure-4/C at Page 454 of the brief and furthermore vide letter dated 07.02.2022 under

Annexure-4/D at page 455, referring to letter dated 31.12.2021, it has been clarified that the letter of debarment dated 10.02.2021 has been revoked and opposite party no.3 is free to participate in future tender of the Municipality. Such letter was issued on 07.02.2022, which is much after the bid submission deadline, i.e., 12.01.2022, as per Clause 6 of Appendix I. Any subsequent correspondence made cannot be taken into consideration. Even if such correspondence is taken into consideration that will not change the position, because the petitioner has already made a declaration by suppressing the correct fact, thereby comes within the meaning of “fraudulent practice”. Accordingly under Clause 4 of RFP for fraud and corrupt practice, the bid of opposite party no.3 should have been rejected by the BMC.

19. In **S.J.S. Business Enterprises (P) Ltd v. State of Bihar**, (2004) 7 SCC 166, the apex Court at paragraph-13 of the judgment observed that as a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The

suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken.

20. In ***Pushpam Pharmaceuticals Co. v. Collector of Central Excise***, 1995 Supp(3) SCC 462, while considering the provision of Section 11-A of Central Excise & Salt Act, the apex Court held that the expression 'suppression of fact' is to be construed strictly because it has been used in company of such strong words as fraud, collusion or willful default. It does not mean omission. The act may be deliberate.

21. In ***Collector of Customs v. Tin Plate Co. of India Ltd.***, (1997) 10 SCC 538, while considering Section 28 (1) of Customs Act, the apex Court held that the expression 'suppression of facts' would mean a deliberate or conscious omission to state a fact with the intention of deriving wrongful gain.

22. While considering the provisions of Section 12 (1) (c) of the Hindu Marriage Act, the apex Court in the case of **Sunderlal Soni v. Namita Jain**, AIR 2006 MP 51, held that non-disclosure of age and having major children by the husband at the time of marriage is suppression of material fact for the purpose of marriage as far as it relates to the wife.

23. In **Satwant Kaur Sandhu v. New India Assurance Co. Ltd.**, (2009) 8 SCC 316, the apex Court held that since the statement made by the insured in the proposal form of insurance as to the state of his health was palpably untrue to his knowledge, it was held to be 'suppression of material fact' in regard to the health of the insured and the insurer was justified to repudiate the insurance contract.

24. Therefore, to get a wrongful gain, opposite party no.3 has made suppression of fact by disclosing incomplete fact, which comes under the meaning of 'fraudulent practice' as stipulated under Clause 4.3 of the RFP. Thereby, the bids so submitted by opposite party no.3 should not have been considered by the BMC

and, as such, the disclosure of fact so made subsequently also shall lead to disqualification of opposite party no.3, in view Clause 2.6.3 of the RFP, wherein it has been provided that such misrepresentation/improper response shall lead to disqualification of the bidder and if the bidder is a consortium, then the entire consortium and each member shall be disqualified/ rejected and that if such disqualification/ rejection occurs after the bids have been opened and the successful bidder gets disqualified/ rejected, then BMC reserves the right to select the bidder which proposed the second lowest quote as successful bidder or cancel the bidding process. Therefore, selection of opposite party no.3 on the basis of the fraudulent practice, i.e. misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, should have been rejected, even though in the meantime opposite party no.1 is going to execute the contract so far as package no.5 and 8 are concerned.

25. Much argument was advanced that even though opposite party no.3 had incurred a

disqualification for the present tender, due to his debarment in connection with the tender for “privatization of sanitation work for Zone-1, 2 of Angul Municipality, vide letter dated 10.02.2021, but the same having been revoked on 31.12.2021, which was much before the bid submission deadline, i.e., 12.01.2022, therefore, the so called disqualification has been waived. The same is not the purpose of the declaration to be made in Appendix I and Appendix I-Annex I of the RFP. Even under Clause 5 (c) of Appendix I-Annex I, on the basis of information sought, if the same has not been provided, the bid should not have been accepted by opposite party no.1.

26. A similar question had come up for consideration before the apex Court in the case of **U.P. State Bridge Corporation Ltd.** (supra) where similar tender conditions were the subject-matter of issue. In the said judgment, reference to the judgments of **Montecarlo Ltd v. NTPC Ltd**, (2016) 15 SCC 272 and **Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.**, (2019) 14 SCC 81 has also been made. In **Caretel**

Infotech (supra), the apex Court observed that for the proposition that where a tender was in a particular format, nothing beyond the information that is required by that format need be given, and since no investigation was in fact pending against the party, clause 7(b) of Annex I should not have been invoked to non-suit the said party. In **Montecarlo** (supra), reference was also made to **Caretel Infotech** (supra), more particularly paragraphs 22 and 23 of the judgment, which reads as follows:-

“22. It is no doubt true that Clause 20 does provide for four eventualities, as submitted by the learned counsel for Respondent 3. The present case is not one where on the date of submission of the tender the appellant had been banned, blacklisted or put on holiday list. The question before us, thus, would be the effect of an action for blacklisting and holiday listing being initiated. The declaration to be given by the bidder is specified in Clause 20(ii), which deals with the first three aspects. The format enclosed with the tender documents also refers only to these three eventualities. It is not a case where no specific format is provided, where possibly it could have been contended that the disclosure has to be in respect of all the four aspects. The format having been provided, if initiation of blacklisting was to be specified, then that ought to have been included in the format. It cannot be said that the undertaking by the appellant made it the bounden duty of the appellant to disclose the aspect of a show-cause notice for blacklisting. We say so as there is a specific clause with the specific format provided for, requiring disclosures, as per the same.

23. It may be possible to contend that the format is not correctly made. But then, that is the problem of

the framing of the format by Respondent 1. It appears that Respondent 1 also, faced with the factual situation, took a considered view that since Clause 20(i) provided for the four eventualities, while the format did not provide for it, the appellant could not be penalised. May be, for future the format would require an appropriate modification.”

27. Referring to the aforementioned judgment in

U.P. State Bridge Corporation (supra), at paragraph-

19, the apex Court held as follows:-

“It is clear that Shri Dhruv Mehta is right when he refers to and relies upon the aforesaid judgment for the proposition that where there is a format which had to be strictly complied with, his client was justified in going by the literal reading of the aforesaid format, which only required a disclosure of pending investigations under clause 7(b) of Annex I of the N.I.T. However, as has correctly been pointed out by Shri Saurabh Mishra and Shri Puneet Jain, clause 7(b) of Annex I, which is in terms similar to paragraph 13 of Appendix IA, must be read together with paragraph 11 thereof, which, as has been pointed out hereinabove, requires the bidder to certify that in regard to matters other than security and integrity of the country, the bidder has not been convicted by a court of law or indicted. Clearly in the facts of the present case, though the investigation is no longer pending and though there is no conviction by a court of law, UPSBC has certainly been “indicted”, in that, a charge sheet has been filed against it relatable to the FIR dated 15.05.2018 in which a trial is pending, though stayed by the High Court. Also, Shri Saurabh Mishra is correct in stating that “fraudulent practice”, as defined in clause 4.3(b) of the N.I.T., would include an omission of facts or disclosure of incomplete facts in order to influence the bidding process. In the facts of the present case, there is clearly an omission of a most relevant fact and suppression of the same fact, namely that an FIR had been lodged against UPSBC in respect of the construction of a bridge by it, which had collapsed, and in which a charge sheet had been lodged.”

Therefore, non-disclosure of facts or suppression of facts leads to “fraudulent practice” as has been envisaged in the RFP.

28. In **Ram Chandra Singh v. Savitri Devi**, (2003) 8 SCC 319, the apex Court held as follows:-

“Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.”

The said principle has also been referred to by this Court in the case of **Umesh Chandra Chinera** (supra). The said view has also been taken by the apex Court in **Bhaurao Dagdu Parlakar** (supra). The

elaborate discussion has been made with regard to the meaning of fraud in ***Shrisht Dhawan v. Shaw Bros***, (1992 1 SCC 534, which has also been referred to in ***Roshan Deen v. Preeti Lal***, (2002) 1 SCC 100, ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education***, (2003) 8 SCC 311 and ***Ashok Leyland Ltd v State of T.N.***, (2004) 3 SCC 1.

29. Taking into the factual and legal aspects, as discussed above, this Court is of the considered view that the bids submitted by opposite party no.3 suffer from fraud and corrupt practice, as mentioned in Clause 4 of the RFP, read with fraudulent practice, as mentioned in Clause 4.3(a), which envisages with regard misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts in order to influence the bidding process, so as to be benefited. Thereby, selection of opposite party no.3 cannot be sustained in the eye of law and the same is hereby quashed. As a consequence thereof, opposite party nos. 1 and 2 are directed to take follow up action immediately

so far as package nos. 5 and 8 are concerned in accordance with law.

30. In the result, the writ petition is allowed.
However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

G. SATAPATHY, J. I agree.

(G. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 21st October, 2022, Arun/GDS नयते