

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 25404 OF 2021

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

AFR

M/s. Pradeep Kumar Mishra Petitioner

-Versus-

Vice-Chancellor, Veer Surendra Opp. Parties
Sai University of Technology,
Burla & others

For Petitioner : M/s. Debaraj Mohanty,
A. Mishra, B.P. Pada
and D. Behera, Advocates

For Opp. Parties : M/s. Sanjeev Udgata,
S. Udgata and A. Mishra,
Advocates
[O.P.Nos.1 to 4]

M/s Amit Prasad Bose,
D.J. Sahoo, A. Pattnaik,
and S. Swain, Advocates
[O.P.Nos.5 to 9]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE SANJAY KUMAR MISHRA**

DECIDED ON : 14.07.2022

DR. B.R. SARANGI, J.

The Petitioner, by means of this

Writ Petition, seeks direction to the Opposite Party Nos. 1 to 4 to declare the Petitioner as L-1 bidder, in pursuance of the Tender Call Notice issued under Annexure-1, and to issue Work Order in its favour for one of the Clusters, by quashing the additional condition imposed under Annexure-5 dated 19.08.2021.

2. The factual matrix of the case, in a nutshell, is that the Opposite Party No.2-Veer Surendra Sai University of Technology, Burla, issued Tender Call Notice, vide Advertisement No.VSSUT/Registrar/DSW/2106 dated 03.06.2021, inviting Sealed Tenders, under two bid system, from intending reputed, registered, experienced and authorized Firms/Agencies for “Catering and Housekeeping at Veer Surendra Sai University and Technology (VSSUT) Hall of Residence, Burla”. The last date of receipt of such Tender was 03.08.2021, at 5.00 P.M. The Technical Bid was to be opened on 04.08.2021, at 3.00 P.M. The date of opening

of financial bid for technically qualified bidder was to be notified later. It was notified that the lowest bidder would be the successful bidder or L1 bidder. Under Clause-2 of the Tender Call Notice eligibility criteria for participating in the tender was prescribed. It was provided under Clause 5(3) that the bidder should prepare Financial Bid in the price schedule as provide in the tender document. Then the Financial Bid should be kept in a separate sealed envelope, superscripted as Financial Bid for tender number (with the name and address of the bidder). The procedure for submission of bid was provided under Clause-6, whereas the procedure of opening of bid was provided under Clause-7, and procedure of opening of Financial Bid was prescribed under Clause-10. Annexure-A to the Tender Call Notice was contained the list of 12 Nos. of Halls of Residency in 5 Clusters at VSSUT, Burla, for providing catering service, whereas Part-B of the Financial Bid contained the rates for Boys Hostel and Girls Hostel. The said rates were inclusive of fuel, cost of

procurement of rice, flour and all other provisions, vegetables, fruits, loading and unloading, transportation, storage labour, change for decent hygienic housekeeping, all Statutory Taxes including Service Tax, duties and levies etc., per student/ per square metre, and that the Institute would not pay any other charges for the catering and housekeeping services provided.

2.1 Pursuant to such Tender Call Notice, all total 17 bidders, including the Petitioner, were participated in the bid. As per the condition of the tender, the bidders were required to furnish the tender cost of Rs.5,000/- through demand draft along with Technical Bid document and Performance Security Declaration. Petitioner had submitted its demand draft and other documents for Technical Bid and had quoted the price for the Financial Bid for Boys Hostel and for Girls Hostel in two separate columns, as per the eligibility criteria in the tender. The Technical Bid was opened by Opposite Party No.2 on 04.08.2021, at 3.00 P.M., in

presence of the Petitioner and other bidders. Opposite Party No.4, through its mail dated 16.08.2021, intimated that the Petitioner was found qualified in the Technical Bid and requested to attend the Financial Bid to be held on 19.08.2021, at 3 P.M.

2.2 On 19.08.2021, on the date of opening of Financial Bid, Opposite Party No.2 imposed the additional condition for bidders before opening of the price bid, which is extracted hereunder:

“The authority/Committee likes to mention following additional conditions for the bidders before opening of price bid:

- *The bidder quoting per day meal less than **Rs.90/-** of Boys will be cancelled considering as under quoted rate.*
- *The qualified bidder bidding lowest rate for boys will be given preference to choose the any cluster of his/ her choice.*
- *Next lowest bidder for boys will be given the next cluster but as the rate of lowest bidder if he agrees. Otherwise will go to next lowest bidder and so on.*
- *Minimum per day meal rate for girls expected to be Rs.2/- to 3/- less (negotiable) than quoted minimum rate for boys.*

- *Housekeeping rate will be considered from the lowest rate quoted by selected bidders and applicable to all successful bidders, if required negotiable to fit the student budget.*
- *The Housekeeping will be provided for common spaces and corridors of Hall of Residence.*

Undertaking

I/We understand and agree with these additional terms and conditions and allow the authority to open our price bid. I/We will not also object about this in future.”

The Opposite Party No.2 also compelled the parties to furnish an undertaking, pursuant to which the Petitioner and other bidders, under coercion, signed such undertaking before opening of the Financial Bid. On receipt of the undertakings, Opposite Party No.2 opened the Financial Bid, wherein Opposite Party Nos. 5 to 9 were declared L1 to L5 respectively, for 12 number of Residences in 5 Clusters, though they had quoted higher price than that of the Petitioner. Opposite Party Nos. 5 to 9, who were selected as L1 to L5 bidders, had quoted Rs.96/-, Rs.95.50, Rs.102.00, Rs.102.20 and Rs.107.00 respectively for girls students,

including sanitation, and Rs.99/-, Rs.101.50, Rs.102.20, Rs.102.50, Rs.109.00 for boys students, including sanitation, whereas the Petitioner had quoted Rs.91/- for Boys Hostel and Rs.89/- for Girls Hostel, including sanitation. Due to imposition of additional condition, before the price bid was opened, the Petitioner was debarred to get Work Order, even though it was L1 in the process of bid. Hence, this Writ Petition.

3. Mr. Debaraj Mohanty, learned Counsel appearing for the Petitioner, vehemently contended that imposition of additional condition, after the Technical Bid was opened and before the Financial Bid was opened, cannot be sustained in the eye of law. As per the terms and conditions of the Tender Call Notice, the Petitioner participated in the tender and submitted his Technical Bid and Financial Bid and, as such, the Technical Bid was opened on 04.08.2021 and the Petitioner, having qualified in Technical bid, was called upon by e-mail dated 16.08.2021 to attend the Financial Bid to be held on 19.08.2021. On the very

same day, before opening of Financial Bid, additional condition was imposed vide Annexure-5, which cannot be sustained in the eye of law.

To substantiate his contention, he has relied upon ***M/s. Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation***, AIR 2000 SC 2272.

4. Mr. Sanjeev Udgata, learned Counsel appearing for Opposite Party Nos.1 to 4 contended that it is within the domain of the tendering Authority to put any condition at any stage and, as such, additional condition was imposed before opening of the price bid. It is further contended that as per the tender condition, the validity period of bid was 180 days and the contract was for a period of one year. Referring to Clause-33 of the Tender Call Notice at Annexure-1, which states that “the University reserves the right to add/delete/change any of the terms and conditions stipulated in the tender document”, it is contended that imposition of additional

condition is within the complete domain of the tendering Authority and, as such, the Petitioner had given an undertaking before price bid was open on 19.08.2021. Therefore, he is precluded from raising such objections subsequently, reason being, 17 bidders, including the Petitioner, had participated in the tender and after opening of the Technical Bid on 04.08.2021, only 14 bidders, including Opposite Party Nos. 5 to 9, became successful to attend the Financial Bid, which was fixed to 19.08.2021 at 3 P.M., as per the Tender Committee Meeting held on 13.08.2021. But the Tender Committee decided to fix the benchmark value at Rs.90/- and the bidders quoting less than Rs.90/- per day for boys were to be cancelled. The Tender Committee had taken into various factors, such as, the price of the material, quality of food, service etc. Therefore, imposition of such condition is well justified and, as such, the Petitioner should not have approached this Court by filing the present Writ Petition. Thereby, he seeks for dismissal of the Writ

Petition. Though he has given a memo of citations containing several judgments of the apex Court, as well as this Court, but relied upon the judgments of the apex Court in the cases of ***M/s. Michigan Rubber (India) Ltd. v. State of Karnataka and others***, AIR 2012 SC 2915 and ***Yogesh Yadav v. Union of India and others***, AIR 2013 SC 3372.

5. Mr. A.P. Bose, learned Counsel appearing for Opposite Party Nos. 5 to 9, contended that they had become bidders being L1 to L5, after the price bid was opened by the tendering Authority. Since the Petitioner had quoted lesser price, he was not found qualified, as per the terms and conditions imposed by the Tendering Authority. It is contended that the Petitioner, having furnished an undertaking, should not have challenged the action of the Tendering Authority by filing the present Writ Petition, which cannot be sustained in the eye of law. Therefore, he seeks for dismissal of the Writ Petition.

6. This Court Heard Mr. Debaraj Mohanty, learned Counsel for the Petitioner, Mr. Sanjeev Udgata learned Counsel appearing for Opposite Party Nos. 1 to 4 and Mr. A.P. Bose, learned Counsel appearing for Opposite Party Nos.5 to 9 by virtual mode. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties, the matter is being disposed of finally at the stage of admission.

7. On the basis of the factual matrix, as delineated above, the only question to be decided by this Court is as to whether the Tendering Authority can impose an additional condition, after the Technical Bid was opened and before opening of Financial Bid.

8. Undisputedly, including the Petitioner 17 bidders had submitted their bids pursuant to Tender Call Notice under Annexure-1, invited by Opposite Party Nos. 1 to 4. The Technical Bid was opened on 04.08.2021, in which the Petitioner participated. On being intimated by email dated 16.08.2021, with regard

to its qualifying in the Technical Bid, the Petitioner was called upon to participate in the Financial Bid, which was to be opened on 19.08.2021. On the very same day, the additional condition was imposed by the Tendering Authority and all the bidders were directed to give undertakings, pursuant to which under compelling situation, all the bidders, including the Petitioner, gave undertakings. Needless to say, once the tender process had already been started, by opening the Technical Bid on 14.08.2021, additional condition, before opening of Financial Bid, should not have been imposed by the Authority, as by that the Opposite Party Nos.1 to 4 have tried to change the rules of game after the game was started, as by then the bidders had already submitted their Technical Bids and Financial Bids by quoting their respective prices. It is relevant to note that as per the conditions stipulated in the tender documents, the bidder quoting lesser price was to be considered as L-1 and the work was to be awarded in his favour. In terms of the same, the bidders having quoted their price and

submitted their bids, due to imposition of additional condition, after opening of the Technical Bid, some of the bidders were excluded, which is contrary to the settled position of law. Furthermore, by imposing additional condition, the undertakings taken from the bidders to the effect that they would be abided by the additional terms and conditions of the Tendering Authority, would amount to coercing the bidders, which is not permissible under law.

9. In **M/s. Monarch Infrastructure (P) Ltd.**, (supra), at Paragraph-12 of the Judgment, the apex Court held as follows:

“12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of M/s Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of M/s. Monarch Infrastructure (P) Ltd. in regard to allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to M/s Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are

insignificant because the High Court had set aside the award made in favour of M/s Monarch Infrastructure (P) Ltd.”

Thus, if a term of the tender is deleted or included, after the players entered into the arena, it is likely to changing the rules of the game after it had began. Therefore, if Technical Bid was opened, by imposing an additional condition before the price bid was opened, such a course, which was adopted by the Tendering Authority, cannot sustain in the eye of law.

10. Reliance was placed on the case of **M/s. Michigan Rubber (India) Ltd.**, (supra) by the learned Counsel appearing for the Opposite Party Nos. 1 to 4 and reference in particular was made to Paragraph-19 of the said Judgment. But on perusal of the said judgment, it is evident that the situation arises here was not the same as of the said case. As a matter of fact, the scope of judicial review in contractual matters was the subject-matter of consideration in the said case and, as such, it has got no assistance to Opposite Party

Nos. 1 to 4. Rather, it has got assistance to the case of the Petitioner, reason being it has been decided in the said case that 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. The action is 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. No doubt, fixation of a value of a tender is entirely within the purview of the Executive and Courts hardly have any role to play in the process, except for striking down such action of the Executive, if the same 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. Therefore, if the State or its instrumentality acts reasonably, fairly and

in public interest in awarding contracts, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government. These laudable principles have been laid by the apex Court and if with the touchstone of the said principles the present case is examined, before interfering in tender or contractual matters in exercise of power of judicial review, the Court should pose to itself the following questions; (i) Whether the process adopted or decision made by the Authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say the decision is such that no responsible Authority acting reasonably and in accordance with relevant law could have reached; and (ii) whether the public interest is affected? If the answer to the above questions is in negative, then there should be no interference under Article 226.

11. Applying the said principles to the case at hand, once the Petitioner participated in the process of

tender, as per the stipulation in the tender notice, and was technically qualified, insertion of additional condition to the stipulation already made in the tender documents putting a restriction and fixing the price at a particular level, at the stage of opening of Financial Bid, cannot be sustained in the eye of law.

12. So far as the case of **Yogesh Yadav** (supra) is concerned, there is no doubt that the principle decided therein is applicable to the case at hand, but in that case there was no rider. In the said case, there was change in selection criteria and the candidates were selected, as per the norms fixed for written test and interview, and were given appointment by short listing them by fixing benchmark for appointment. Thereby, the apex Court held that the procedure adopted was not a midway change in selection criteria. Therefore, the said case is not in any way helpful to the Opposite Party Nos.1 to 4.

13. In **Secretary, A.P. Public Service Commission v. B. Swapna**, 2005 (2) Supreme 615, the Andhra Pradesh Public Service Commission had initially advertised for recruitment to eight posts of Asst. Public Relation Officers. Subsequently, seven more vacancies were advertised. Therefore, the recruitment was made for fifteen vacancies. The selection was finalized on 02.07.1996. During the currency of the waiting list, the Competent Authority again notified 14 more vacancies on 14.4.1997 to be filled up by the candidates from the waiting list. In that case, the apex Court held that there were two principles in service laws, which were indisputable. Firstly, there could not have been appointment beyond the advertised number and secondly, the norms of selection could not have been altered after the selection process had started. In paragraph-16 of the said judgment, the apex Court held as follows:-

“The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No.1 it was unamended rule,

which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only.”

14. Similar question had come up for consideration before this Court in ***Mrs. Madhumita Das v. State of Orissa***, 100 (2005) CLT 465, wherein the question before this Court was not that the modalities fixed by the Committee/Full Court were illegal, but the question was that once norms were published in the advertisement for notice of all, whether it could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum to the Advertisement in question. In the said case, the Court held that once an

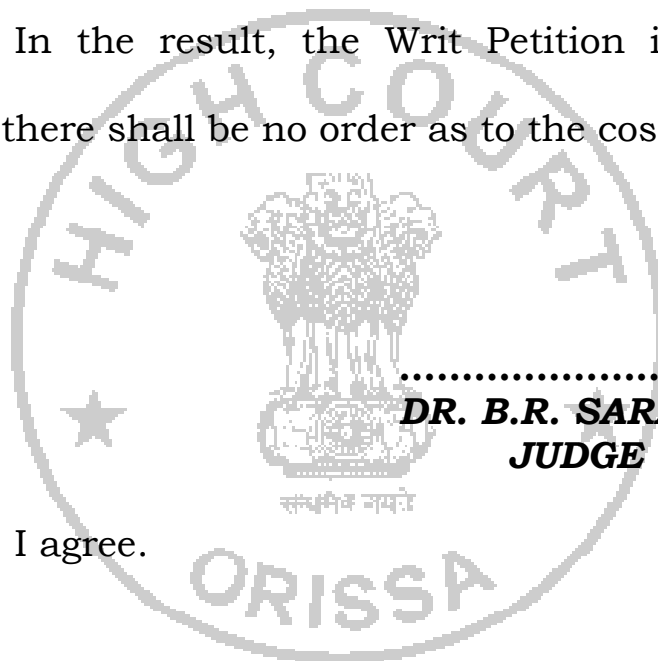
advertisement was issued to fill up a post in any office under the State, it is the duty of the Recruiting Authority to give necessary information to all in a precise and clear manner, and relying upon the judgment in **Secretary, A.P. Public Service Commission** (supra), the Court came to the following conclusion:-

“Once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law.”

15. In view of the facts and law, as discussed above, this Court is of the considered view that imposition of additional condition by the Tendering Authority, after the Technical Bid was opened and before price bid was take into consideration, cannot be sustained in the eye of law. Therefore, the selection of Opposite Party Nos. 5 to 9 as L-1 to L-5, pursuant to Tender Call Notice under Annexure-1, also cannot be

sustained. Consequentially, the Tender Call Notice issued by the Authority under Annexure-1 and the selection made pursuant thereto are liable to be quashed and are hereby quashed. Opposite Party Nos. 1 to 4 are directed to go for a fresh tender in accordance with law as expeditiously as possible.

16. In the result, the Writ Petition is allowed. However, there shall be no order as to the costs.



.....
DR. B.R. SARANGI,
JUDGE

S.K. MISHRA, J.

I agree.

.....
S.K. MISHRA,
JUDGE

Orissa High Court, Cuttack
The 14th July, 2022, Ashok/Padma/GDS