

ORISSA HIGH COURT: CUTTACK

W.P(C) NO. 22291 OF 2022

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

AFR

AF Enterprises Limited,
New Delhi

.....

Petitioner

-Versus-

The State of Odisha & Ors.

Opp. Parties

For Petitioner : M/s. Pami Rath, J. Mohanty,
S. Gumansingh, B. Thakur
and S. Mohanty, Advocates

For Opp. Parties : Mr. P.P. Mohanty,
Addl. Govt. Advocate
[O.Ps.No.1 & 3]

M/s. B.P. Tripathy, R. Achary
and N. Barik, Advocates
[O.P.No.2]

Mr. J. Sahoo, Sr. Advocate along
with M/s. K. Sahoo, R. Ghosh
and C. Das, Advocates
[O.Ps.4 & 5]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE B.P. SATAPATHY**

DECIDED ON : 12.12.2022

DR. B.R. SARANGI, J. AF Enterprises Limited, New Delhi, a company registered under the Companies Act, 1956, has filed this writ petition seeking to quash the order dated 25.08.2022 under Annexure-8, by which the Director, Horticulture-cum-Ex-Officio Additional Secretary to Govt., Agriculture & F.E. Department has directed the tender committee to entertain opposite party no.4 as regards consideration of its bid, which was otherwise denied on the strength of clause-2(h) of the tender bid identification no.MD/OAIC-5(A&I)/2022-23, in compliance of the order dated 15.07.2022 passed by this Court in W.P.(C) No.17557 of 2022, and further to issue direction the opposite party-authorities not to consider the bid of opposite party no.4 in pursuance of the tender call notice dated 20.06.2022 under Annexure-1.

2. Briefly stated, the facts of the case are as follows:-

2.1 Opposite party no.2-Odisha Agro Industries Corporation (OAIC) issued a tender call notice on

20.06.2022 inviting bids from the eligible and approved manufacturers for “Supply of Plastic Crates (Fruits and Vegetables Crates)” of approximate 5 lakhs quantity, vide Bid Identification No.MD/OAIC-3(E&I)/2020-21, on the basis of e-tender procurement in two cover system. As per the tender call notice, the bidder should have the necessary portal enrolment with his own digital signature certificate of Class-II or Class-III from any authorized certifying authorities. The bid documents were to be available in the latest active tender section of the website from 10 AM of 21.06.2022 to 5 PM of 11.07.2022 for online bidding only. For information regarding operation of e-tendering procedure mode was prescribed therein.

2.2 Under clause-9 of the Instruction to Bidder, it was specifically stipulated that bids cannot be submitted after due date and time. The materials to be supplied had specific criteria to be met as regards to capacity, size density and toleration requirement. Thus sample submission becomes the most important determining factor in the technical evaluation of the bidders. Under

the Notes to the tender call notice, clause (f) provides that certain tests are to be conducted for quality assurance before delivering the stock to farmers. Keeping that in view, sample of the product proposed to be supplied by each of bidders was to be scrutinized in the technical bid process. Clause-2(h) of the bid documents requires that each bidder has to submit 2 crates as sample. The sample was to reach the office of opposite party no.2 on or before 12.07.2022 by 2 PM, as because the technical bid opening process was scheduled to 3 PM of 12.07.2022. The manner of submission of sample was through Indian Postal Service, courier and special messenger. In compliance of the tender call notice, the petitioner submitted its technical bid and financial bid, so also its sample as per clause-2(h) of the bid documents, along with a covering letter, which were received on 11.07.2022.

2.3 Pursuant to the tender call notice under Annexure-1, six bidders, including the petitioner, submitted their technical and financial bids. The last date and time of sample submission was 12.07.2022 by

2 PM. However, opposite party no.4 could not submit its sample in due time, which was objected to by the petitioner by making a complaint through e-mail, wherein it was clearly stated that opposite party no.4 had not submitted the sample within due time and thus its sample should not be accepted. The said complaint was received at 2.36 PM of 12.07.2022. At 3 PM when technical committee sat for opening of technical bid, it took a decision that the bid of opposite party no.4 cannot be considered due to non-submission of sample in time as per clause-2(h). The said proceeding is also accompanied with an attendance sheet containing the name of the bidders from which it is evident that no representative of opposite party was present.

2.4 Challenging the above decision of the technical committee, opposite party no.4 approached this Court by filing W.P.(C) No.17557 of 2022 with a prayer to quash the decision of the technical committee in rejecting its bid and allow it to participate in the tender process and this Court, on 15.07.2022, disposed

of the said writ petition by passing order to the following effect:-

“After advancing some arguments, it is contended that Clause-14 of the tender document provides for redressal of this type of dispute through Dispute Redressal Forum and, therefore, the Petitioner may be permitted to approach the Director, Horticulture in accordance with law. As such, it is contended that the Petitioner has already approached the said Authority on 12.07.2022 by filing representation, which is at page-38 of the Writ Petition. Therefore, direction may be given to consider the same and pass appropriate Order in accordance with law.

5. Having heard learned Counsel for the Petitioner and after going through the records, this Writ Petition stands disposed of directing Director, Horticulture, to dispose of the representation filed by the Petitioner adhering to the condition stipulated in the tender document and pass appropriate Order, as expeditiously as possible, preferably within a period of six weeks from the date of production of certified copy of this Order”.

In compliance of the said order, opposite party no.3 considered the representation of the petitioner and passed impugned order dated 25.08.2022 directing the tender committee to consider the bid of opposite party no.4. Hence, this writ petition.

3. Mrs. Pami Rath, learned counsel appearing for the petitioner vehemently contended that opposite party no.4, having not adhered to the conditions stipulated in

the tender documents, by not submitting the sample within the time specified, i.e. before 2 PM of 12.07.2022, its bid was rightly rejected by the technical evaluation committee. But, without bringing this fact to the notice of this Court, opposite party no.4 filed W.P.(C) No.17557 of 2022 and made an innocuous prayer for disposal of its representation, which was allowed. Since opposite party no.4 had not approached this Court with clean hands and had suppressed the material facts, it was not entitled to get the relief, as granted by this Court. It is further contended that the impugned order dated 25.08.2022 passed by opposite party no.3, in pursuance of order dated 15.07.2022 passed in W.P.(C) No.17557 of 2022, suffers from gross material irregularities, in view of the fact that though opposite party no.3 has recorded the deposition of the officers of opposite party no.2, namely, Manas Moharana (Junior Accountant-cum-DEO), Aradhana Mohanty (JEE) and Satyabrata Sahoo (Project Manager), but none of the materials and depositions have been discussed in the said order, which amounts to non-application of mind. It is further

contended that there is no evidence on record to show that opposite party no.4 had actually made any representation on 12.07.2022, as averred in earlier W.P.(C) No. 17557 of 2022. It is further contended that time being the essence of the contract, if clause-2(h) of the bid documents clearly indicates that 2 crates as samples should be placed before the authority by 2 PM of 12.07.2022 and if the same was not adhered to by opposite party no.4, the authority was well justified in rejecting the technical bid of opposite party no.4 and, therefore, no fault can be found with authority. Thereby, the order impugned dated 25.08.2022 suffers from gross material irregularities which requires interference of this Court at this stage.

3.1 To substantiate her contentions, learned counsel for the petitioner has relied upon ***Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and others***, (2016) 8 SCC 446; ***Durgawati Devi v. Union of India through its Secretary, Ministry & Ors.***, Special Leave to Appeal (C) No.37479 of 2016 disposed of on

04.10.2019; **Radhamohan Patra v. State of Orissa & Ors**, AIR 1992 Orissa 221 and **Sorath Builders v. Shreejikrupa Buildcon Limited and another**, (2009) 11 SCC 9.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties no.1 & 3 contended that the representative officer of OAIC, namely, Miss Aradhana Mohanty, JE, who was looking after collection of sample, vide her deposition dated 22.08.2022, had specifically stated that opposite party no.4-LM Plastic Pvt. Ltd. had provided the sample at 2.40 PM of 12.07.2022. Since opposite party no.4 had submitted the sample beyond the time stipulated in the tender documents, the same was not accepted. It is further contended that the order dated 25.08.2022 has been passed by opposite party no.3 in compliance of the order dated 15.07.2022 passed in W.P.(C) No. 17557 of 2022. Thereby, no illegality or irregularity has been committed by the authority.

5. Mr. B.P. Tripathy, learned counsel appearing for opposite party no.2 admitted the fact that the OAIC had floated e-tender on behalf of the Government of Odisha on 21.06.2022 for supply of five lakh numbers of plastic crates for fruits and vegetables in two cover system from eligible manufacturers. The last date of submission of online bid was 11.07.2022 at 5.00 PM and the technical bid of the tender was opened on 12.07.2022 at 3.00 PM. It is further contended that clause-2(h) of the tender documents clearly states that each bidder has to submit 2 crates as samples (as per the specifications given in Detailed Tender Call Notice (DTCN) by post of Indian Postal Service or courier or through special messenger in the office of the OAIC on or before 12.07.2022 at 2.00 PM. It is also contended that OAIC is not to be responsible for any postal or through special messenger delay whatsoever for receipt of plastic crates. The tender evaluation committee met on 12.07.2022 at 3.00 PM for opening of technical bid for procurement of plastic crates. It was found that 6 nos. of manufacturers had submitted their bids by

online mode, out of which 5 bidders were qualified after opening of their technical bid. Amongst 6 bidders, opposite party no.4-L.M. Plastics had not submitted 2 nos. of sample crate within the stipulated time period as per clause-2(h) of bid documents, for which its bid was not considered by the tender evaluation committee. Therefore, opposite party no.4 approached this Court by filing W.P.(C) No.17557 of 2022 challenging the rejection of its bid and this Court, vide order dated 15.07.2022, disposed of the said writ petition directing opposite party no.3 to dispose of the representation. In compliance of the same, opposite party no.3, vide letter/order dated 25.08.2022, directed the tender committee to entertain opposite party no.4 as regards consideration of its bid, which was otherwise denied on the strength of clause-2(h) of the tender Bid Identification No.MD/OAIC-5(A&I)/2022-23, and communicated to opposite party no.4. Challenging the said order, the petitioner has approached this Court by filing this writ petition.

6. Mr. J. Sahoo, learned Senior Counsel appearing along with Ms. Kajal Sahoo, learned counsel

for opposite parties no.4 & 5, while reiterating the contentions raised by other opposite parties, admitted that opposite party no.4 had not submitted sample crates, as required under clause-2(h) of the tender documents. Therefore, it made representation to the authority and the same having not been considered, it approached this Court by filing W.P.(C) No.17557 of 2022. This Court considered its grievance and directed opposite party no.3 to consider the representation of opposite party no.4. As a consequence thereof, opposite party no.3 passed the impugned order dated 25.08.2022. Thereby, no illegality or irregularity has been committed by the authority so as to cause interference of this Court.

7. This Court heard Mrs. Pami Rath, learned counsel appearing for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties no.1 & 3; Mr. B.P. Tripathy, learned counsel appearing for opposite party no.2 and Mr. J. Sahoo, learned Senior Counsel appearing along with Ms. Kajal Sahoo, learned counsel for opposite

parties no.4 & 5 in hybrid mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties the writ petition is being disposed of finally at the stage of admission.

8. For just and proper adjudication of the case, the relevant clauses of tender documents are quoted below:-

“8. Bidders are to submit only the original BoQ (in .XIS format) uploaded by Officer Inviting Tender after entering the relevant fields without any alteration/ deletion / modification. Multiple BoQ submission by bidder shall lead to cancellation of bid. In case of item rate tender, bidders shall fill in their rates other than zero value in the specified cells without keeping it blank.

9. Bids cannot be submitted after due date and time. The Bidder should ensure correctness of the bid prior to uploading and take print out of the system generated summary of submission to confirm successful uploading of bid. -The bids cannot be opened even by the OIT or the Procurement Officer Publisher/ opener before the due date and time of opening.”

8.1 Sub-clause (h) of Clause-2 of the Instructions to Bidders, which provides the eligibility criteria to qualify for award of the contract, reads as follows:-

“2(h) Each bidder has to be submit 2 crates as samples (as per the specifications given in detailed Tender Call Notice (DTCN by post of Indian Postal Service or courier or through special Manager in the office of the Odisha agro Industries Corporation Ltd., 95-Satyanagar, Bhubaneswar, 751007 on or before dt. 12.07.2022 at 2.00 Pm. The OAIC office shall not be responsible for any postal or through special messenger delay whatsoever for receipt of plastic crates”.

8.2 The e-mail dated 12.07.2022 sent by the petitioner, being relevant for the purpose of the case, is extracted hereunder:-

*“Dear Sir/Madam,
Refer to Corrigendum vide No. M.D./OAIC-5(A&1)/2022-23, as per Tender conditions OEM as bidder must have to furnish BIS certified sample before 2 pm on 12th of July 2022.
However as we observed till 2.10.P.M no sample was being furnished by one of the Bidder by name M/S L.M Plastics.”*

8.3 The proceedings of opening of technical bids for procurement of plastic crates dated 12.07.2022, being relevant for an effective adjudication of the case, are extracted here-in-below:-

“As per the schedule, the meeting of internal purchase committee is held on dated 12.07.2022 at 3.P.M. in Conference Hall of the Head Office for opening of technical bid for procurement of plastic crates. The members present in the meeting is at Annexure-A.

It is found that 6 manufacturers (Annexure-B) have submitted bidding documents in online, out of which 5 bids are qualified to be opened. The bid of M/S LM plastic is not considered due to non-submission of samples in time n per clause 2(h) of the tender bid identification No- M.D/OAIC-5(A&I)/2022-23.”

9. In view of the rival contentions raised by learned counsel for the parties, this Court is not inclined to enter into the controversy as to whether or not opposite party no.4 had filed representation before opposite party no.3, as because the same has become academic, in view of the fact that if opposite party no.4 has not adhered to the terms and conditions of the bid documents, then question of allowing opposite party no.4 to participate in the bid on the strength of representation does not arise.

10. Learned counsel appearing for the parties unequivocally contended that opposite party no.4 had not submitted the sample crates as per clause-2(h) of the tender documents by 2.00 PM of 12.07.2022. On the basis of admission of all the parties, that opposite party no.4 had not adhered to the conditions stipulated in the tender documents, the subsequent direction given by the

Director, Horticulture, vide order dated 25.08.2022, to frustrate the conditions of the bid documents, cannot sustain. It is well settled by the apex Court time and again that "time is essence of a contract" and if the same is not adhered to, then the contract cannot be sustained in the eye of law. When clause-2(h) of the Instructions to Bidders specifically requires that to qualify for award of the contract a bidder has to submit 2 crates as samples, as per the specifications given in the Detailed Tender Call Notice (DTCN), by post of Indian Postal Service or courier or through special messenger in the office of the OAIC on or before 12.07.2022 at 2.00 PM, the opposite party no.4, having failed to do so, has violated such condition and, as such, it was not technically qualified. As a consequence thereof, in the proceedings of the opening of the technical bid for procurement of plastic crates dated 12.07.2022, the tender committee recorded that six manufacturers had submitted their bids through online basis, out of which five bidders were qualified for opening of their technical bids, but the technical bid of opposite party no.4 was rejected due to

non-submission of sample in time. Thereby, the reasons assigned for rejection of technical bid of opposite party no.4 is well justified, which cannot be interfered with, as conditions stipulated in the bid documents are sacrosanct and non-compliance thereof cannot entitle opposite party no.4 to participate in the bid process. Therefore, the impugned order dated 25.08.2022 under Annexure-8 passed by opposite party no.3-Director of Horticulture cannot be sustained in the eye of law, as the same is arbitrary, unreasonable and contrary to the provisions of law and also suffers from complete non-application of mind.

11. In **Bakshi Security and Personnel Services Private Limited** (supra), the apex Court in paragraphs-14 & 15 of the judgment held as follow:-

*"14.The law is settled that an essential condition of a tender has to be strictly complied with. In **Poddar Steel Corpn, v. Ganesh Engg. Works**, (1991) 3 SCC 273, this Court held as under: (SCC p. 276, para 6)*

"6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the

first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in **B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd.**, (2006) 11 SCC 548 this Court held as under: (SCC pp. 571-72, para 66)

"(i)if there are essential conditions, the same must be adhered to.

xxx xxx xxx"

12. In **Durgawati Devi** (supra), the apex Court vide order dated 04.10.2019 passed in Special Leave Petition (C) No. 37479 of 2016 observed as follows:-

"Admittedly, as on the last date for submission of applications in terms of the advertisement referred to above, the petitioner did not own land as required. The petitioner only had an agreement for sale in her favour. It is well-settled that execution of a sale agreement does not transfer ownership/title. Ownership can only be acquired by a registered deed of conveyance. The petitioner was not eligible as on the last date for submission of applications.

Counsel appearing on behalf of the petitioner strenuously contended that a deed of conveyance has since been executed and the petitioner is now the owner of the land. However, it is not disputed that as on the relevant date, that is the last date for submission of applications, the petitioner was not the owner of the land.

The High Court cannot, and rightly did not, in exercise of power under Article 226 of the

Constitution of India, relax the terms and conditions of a tender notice”.

13. In **Radhamohan Patra** (supra), this Court in paragraph-7 of the judgment held as follows:

“7. xxxxx The object of calling for tender is giving an opportunity to the rival competitors in the trade to give their offer in respect of the work in question, one not knowing the offer of the other so that the competent authority will take a final decision with regard to the acceptance of any one of them. In this view of the matter, to consider the offer of a tenderer who did not give the offer of a tenderer who did not give the offer within the time on the ground that the said offer is lower than the rate accepted by the competent authority would obviously frustrate the sanctity and object of the tender call system”.

14. In **Sorath Builders** (supra), the apex Court in paragraph-27 of the judgment held as follows:

“27. Following the aforesaid legal Principles laid down by this Court, we are of the considered opinion that Respondent 1 was negligent and was not sincere in submitting his pre-qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within the stipulated date. Pre-qualification documents were received by Respondent 2 University only after the time schedule was over. The terms and conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, Respondent 2 University was justified in not opening the tender submitted by Respondent 1 on 1-12-2008, which was late by three days. According to us no grievance could also be made by Respondent 1 as lapse was due to his own fault”.

15. Therefore, submission of sample crates as per clause-2(h) of the tender documents by 2 PM of 12.07.2022, being an essential condition, the same must be adhered to. Consequentially, the authority issuing tender is required to enforce it rigidly. The terms and conditions of tender are required to be adhered to strictly, resultantly the bid of opposite party no.4 cannot be opened.

16. It is of relevance to note that opposite party no.4, by filing W.P.(C) No.17557 of 2022, had not approached this Court with clean hands. In the said writ petition, though opposite party no.4 sought for quashing of the order of rejection of its bid and permission to participate in the tender process, but did not disclose the fact that it had not submitted the sample crates within the time stipulated and, on the contrary, in paragraph-9 of the said writ petition it had pleaded that even though its representative was sitting in the office of opposite party no.1 since 12.30 PM on 12.07.2022, as per the tender conditions, but opposite party no.3, who is not an authority as per the bid documents, denied to

collect opposite party no.4's samples, whereas the samples of various other bidders were collected in front of the representative of opposite party no.4. Such a stand is hardly believable and cannot be accepted by any prudent person, as because in terms of the tender notice the sample was to be submitted by 2 PM and, as such, it is not understood why representative of opposite party no.4 was sitting with samples in the office of opposite party no.1 from 12.30 PM without producing the same before the authority concerned.

17. Be that as it may, in pursuance of order dated 15.07.2022 passed by this Court in W.P.(C) No.17557 of 2022, opposite party no.3 considered the representation of opposite party no.4 and passed the impugned order dated 25.08.2022. While passing the order impugned, the materials which were produced before the Director of Horticulture-opposite party no.3, as is revealed from the order impugned, were to the following effect:-

“And whereas, MD, OAIC has provided the photo copies of tender call notice and tender document, photo copies of sample receipts of 5 manufacturers except the receipt of the - petitioner's sample and the proceeding of the

tender committee dated 12.8.2022 against the array of document / information asked for as mentioned herein above.”

Though the Director of Horticulture-opposite party no.3 recorded, as above, but assigned the reasons that the substance of material evidences procured during deposition is not just enough to stand with the principle of fair play, and the procedure and process practiced for receipt and verification of sample does provide sufficient trigger for sprouting of doubt. This clearly indicates that the Director of Horticulture-opposite party no.3 has not applied his mind properly and, more so, has not examined the grievance of opposite party no.4 with reference to the tender conditions and passed such order arbitrarily and unreasonably. Since opposite party no.4 had not approached this Court with clean hands and suppressed the material facts, it is not entitled to get any relief.

18. In **R. v. Kensington, Income Tax Commissioner**, (1917) 1 KB 486 at page 506, it was held as follows:-

“The prerogative writ is not a matter of course; the applicant must come in the manner prescribed and must be perfectly frank and open with the Court.”

19. In **State of Haryana v. Karnal Distillery**, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the applicant had misled the Court.

20. In **Chancellor v. Bijayananda Kar**, AIR 1994 SC 579, the apex Court held that a writ petition is liable to be dismissed on the ground that the petitioner did not approach the Court with clean hands.

21. In the judgment rendered in **Netrananda Mishra v. State of Orissa**, 2018 (II) OLR 436, in which one of us (Dr. Justice B.R. Sarangi) was a Member, this Court, at paragraph-26 of the said judgment, held as under:-

“..... For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view.”

In view of the above, as opposite party no.4 had not approached this Court with clean hands, the writ petition at its behest ought not to have been entertained.

22. In view of the facts and law, as discussed above, it is made clear that since essential conditions of the tender documents are to be complied with and opposite party no.4 has not adhered to clause-2(h) of the bid documents, subsequently, on consideration of its representation, in pursuance of the orders of this Court, by virtue of the impugned order dated 25.08.2022, cannot take the advantage of inclusion of its bid to participate in the tender process and, as such, the order impugned so passed on 25.08.2022 by the Director of Horticulture-opposite party no.3, being in gross violation of the conditions stipulated in the tender conditions, cannot sustain in the eye of law. As such, the Director of Horticulture-opposite party no.3 has acted in excess of his jurisdiction in order to show favour to opposite party no.4.

23. In view of the aforesaid facts and circumstances, this Court is of the considered view that the order dated 25.08.2022 passed by the Director of Horticulture-opposite party no.3 in allowing opposite party no.4 to participate in the tender process cannot be sustained in the eye of law, as in terms of the tender conditions, which are sacrosanct, opposite party no.4 was the defaulter, due to non-compliance of clause-2(h) of the DTCN, in not submitting the samples by 2 PM of 12.07.2022. Thereby, without considering the same, the direction so given by the Director of Horticulture-opposite party no.3 in the impugned order dated 25.08.2022 under Annexure-8 is liable to be quashed and is hereby quashed. Consequentially, the bid has to be finalized amongst the remaining bidders, without taking into consideration the bid of opposite party no.4.

24. While parting with the case, this Court deems it proper to observe that henceforth while dealing with the tender matter, the Director of Horticulture-opposite party no.3 shall see that any of the tender conditions is not lost sight of.

25. In the result, this writ petition is allowed.

However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

B.P. SATAPATHY, J. I agree.

(B.P. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 12th December, 2022, Alok

