ORISSA HIGH COURT: CUTTACK

W.P(C) NO. 36367 OF 2021

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

AFR M/s Sabyasachi Mahakul ..... Petitioner

-Versus-

State of Odisha & Ors. ..... Opp. Parties

For Petitioner : Mr. G. Mishra, Sr. Advocate along with M/s. A. Dash, J.R. Deo, S. Jena & A.K. Dash, Advocates

For Opp. Parties : Mr. P.P. Mohanty, Addl. Govt. Advocate [O.Ps.No.1-4]

M/s. B.P. Das, J. Maharana & D.K. Panda, Advocates [O.P. No. 5]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE G. SATAPATHY

DECIDED ON : 26.09.2022

DR. B.R. SARANGI,J. The petitioner, which is a proprietorship firm, by way of this writ petition, seeks direction to opposite party no.5 to declare it as L1 in the tender process, pursuant to the Notice Inviting Tender (NIT) dated 07.10.2021 under Annexure-1, since the price quoted by the petitioner, i.e. Rs.9,56,071/- per month, is the lowest amongst all bidders and the same is substantially lower than the bid price of opposite party no.6, and to issue work order in favour of the petitioner.

2. The factual matrix of the case, in a nutshell, is that opposite party no.5 issued notice dated 07.10.2021 under Annexure-1 inviting tenders from intending registered firms/contractors for execution of cleaning, sanitation and waste disposal services at Ward Nos.1 to 10, 12 to 15 and Marathiguda area of Gunupur Municipality for a period of one year. The bid was of two parts, i.e., technical bid and financial bid. In the said NIT, a tentative estimation of the monthly expenditure for engaging the requisite number of sweepers and supervisors for carrying out the tender work was given. As per the estimation of the authorities of Gunupur

Municipality, the tentative cost for hiring of the requisite number of sweepers and supervisors would come to Rs.9,51,573/- per month. Though the amount was only a tentative figure, it is given to understand that the tender selection authorities had treated the same to be the base price.

2.1 Pursuant to the NIT, the petitioner firm submitted its tender in the prescribed format along with all the requisite documents and fees/deposits. All total 11 nos. of firms and individuals had participated in the tender process, out of which only four, including the petitioner, qualified in the technical bid stage, namely, opposite party no.6-Asish Kumar Pattanaik, M/s. Manju Services and M/s. Winners Security & Labour Services. Subsequently, the financial bids of the aforesaid four bidders were opened and it was found that the bid price of the petitioner was Rs.9,56,071/- per month, whereas bid price of opposite party no.6, M/s. Manju Services and M/s Winners Security & Labour Services were Rs.9,61,188/-, Rs.9,75,604.46/- and Rs.9,98,131/-

respectively. Therefore, the bid price of the petitioner was the lowest amongst all other bidders.

2.2 Since the entire tender process had taken place in the offline mode, none of the bid documents were uploaded online and therefore, the petitioner is unable to produce the tender documents of the other three bidders. Despite having quoted lowest price, the petitioner was not declared as L1, but the authorities of Gunupur Municipality declared opposite party no.6, who is the second lowest bidder, as the successful bidder. The petitioner ascertained the reason for non-awarding of work in its favour that even though it quoted lowest price, but the same was not accepted, since upon deduction of TDS (Tax Deducted at Source) @ 1% of the bid value, the figure quoted by the petitioner would go below the base price. Since opposite party no.5 considered the TDS deducted price to be the bid value of the petitioner, the bid of the petitioner was disqualified. Hence, this writ petition.

3. Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel for the petitioner vehemently contended that the petitioner having undisputedly quoted lowest price amongst all the bidders, it should have been declared as L1. Since the TDS is the issue between the petitioner and the Income Tax Department, opposite party no.5 has no role to play. It is further contended that by going into the issue of TDS, opposite party no.5 has arbitrarily ousted the petitioner, as the bid of the petitioner is nowhere linked to the I.T. slabs of the individuals and the opposite parties do not have any information regarding the I.T. slabs of the other bidders, including opposite party no.6. Even though, in the meantime, one year is going to expire by 31.10.2022, but the petitioner should be compensated by allowing to discharge its work being L1 bidder, as nowhere in the tender document it was indicated that bid should be submitted inclusive of 1% TDS. In absence of such condition, rejection of the bid of the petitioner cannot sustain in the eye of law. Therefore, the action of opposite party no.5 is liable to be

quashed. In support of his contentions, he has relied upon the judgment of this Court in ***Bhupendra Kumar Dash v. State of Odisha***, 2016 SCC Online Ori 1041 : AIR 2016 Ori 167 and ***Hemogenomics Private Limited v. State of Odisha***, 2016 SCC Online Ori 1043 : AIR 2016 Ori 178.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties contended that since the matter is between the petitioner and Gunupur Municipality, the State has no role to play.

5. Mr. B.P. Das, learned counsel appearing for opposite party no.5 specifically contended that the period of tender awarded in favour of opposite party no.6 is going to expire by 31.10.2022 and there is hardly a month left out. It is further contended that even though the petitioner had quoted the lowest price, but because of deduction of 1% as TDS, the quoted price was further lowered down from the base price. Thereby, opposite party no.5 is well justified in rejecting the bid of the

petitioner. It is contended that the bid submitted by the petitioner was found to be non-responsive, as after deduction of TDS it was Rs.9,46,510/-, which was abnormally lower than the offset price of Rs.9,51,573/- and in response to Clasue-29 of the General Terms and Conditions of the DTCN, its bid was not accepted. Therefore, even though the petitioner was L1 bidder, the bid submitted by opposite party no.6, being the second lowest, was accepted. Thereby, no illegality or irregularity has been committed by the authority in accepting the bid of opposite party no.6.

6. This Court heard Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties; and Mr. B.P. Das, learned counsel appearing for opposite party no.5 in hybrid mode. Even though Mr. Suryakanta Dash had entered appearance for private opposite party no.6 by filing vakalatnama on 07.01.2021 and a copy of the writ petition was served on him, pursuant to order dated

23.11.2021, and the same was acknowledged, he has not filed counter affidavit and at the time of call, he was not present. Since the tender period is going to expire by 31.10.2022, because of the urgency involved, the writ petition is being disposed of finally at the stage of admission.

7. Undisputedly, in pursuance of Annexure-1, the NIT issued by opposite party no.5, the petitioner opposite party no.6 and nine others participated in the process of tender. Even though the petitioner had quoted lowest price of Rs.9,56,071/-, its bid was not accepted contending that after deduction of tax @ 1%, the bid amount came to Rs.9,46,510, which was much less than the offset price of Rs.9,51,573/-. Therefore, the bid of the petitioner was non-responsive, in view of Clause-29 of the General Terms and Conditions of the DTCN, which reads as follows:

> *"29. The Tenderer should not quote abnormal rate which is less than estimated value including all statutory dues. Bids with 'Nil' or very low Service Charge shall be treated as non-responsive bids, which are liable to be rejected and the authority is not liable to explain the tenderer".*

The aforementioned clause clearly indicates that the tenderer should not quote abnormal rate, which is less than estimated value including all statutory dues. As a matter of fact, the petitioner had quoted Rs. 9,56,071/-, which is inclusive of all statutory dues. But opposite party no.5 found that after deduction of TDS @ 1%, its bid comes down to Rs.9,46,510/-, which is less than the offset price, ie., Rs.9,51,573/-. On perusal of the General Terms and Conditions of the DTCN, nowhere it is indicated that 1% of TDS shall be deducted from the quoted price of the bidders, rather TDS is a matter between the petitioner and the Income Tax Department and that has nothing to do with opposite party no.5. In absence of any condition stipulated in the DTCN with regard to deduction of 1% towards income tax, the subsequent determination of the bid, by deducting TDS, amounts to unreasonable exercise of power of the authority, which violates Article 14 of the Constitution of India.

8. The petitioner has pleaded in the writ petition that deduction of TDS is a matter between the petitioner and the Income Tax Department, which has nothing to do with opposite party no.5, but no specific reply has been given to such pleading of the petitioner. More so, in absence of any such condition stipulated in the General Terms and Conditions of the DTCN with regard to deduction of 1% as income tax from the price quoted by the bidders, the action taken by opposite party no.5 is not justified. In the counter affidavit, opposite party no.5 has specifically pleaded that the petitioner had quoted Rs. 9,56,071/- and after deduction of income tax, the bid amount was found to be Rs.9,46,510/-, which was abnormally lower than the offset price of Rs.9,51,573/-. Since the bid submitted by the petitioner was found to be non-responsive, in view of Clause-29 of the General Terms and Conditions of the DTCN, the same was not accepted.

9. On perusal of Clasue-29 of the General Terms and Conditions of the DTCN, it is made clear that bids with 'Nil' or very low service charge shall be treated as

non-responsive and shall be liable to be rejected, for which the authority shall not be liable to explain the tenderer. None of the conditions of Clause-29 is applied in the case of the petitioner, rather it is the admitted case that since deduction of tax @ 1% has been made, the price quoted by the petitioner, i.e. Rs.9,56,071/- came down to Rs.9,46,510/-, which is lower than the offset price of Rs.9,51,573/-.

10. Except Clause-17, no other clause is available under the General Terms and Conditions of the DTCN for determination of TDS. For better appreciation, Clause-17 is extracted hereunder:

> *"17. TDS will be deducted at source from monthly bill of the successful tenderer, as per rules/instructions made applicable from time to time by Government".*

It is made clear from the aforementioned clause that TDS will be deducted at source from the monthly bill of the successful tenderer as per rules/instructions, but nowhere any such condition has been imposed that TDS will be deducted from the price quoted by the tenderer. Thereby, the authority has acted arbitrarily and unreasonably to deprive the petitioner of undertaking the work, even though it had quoted lowest price, as has been admitted in the counter affidavit filed by opposite party no.5. Thereby, the action of the opposite party no.5, in depriving of the petitioner from discharging its responsibility to do the work in question, is arbitrary, unreasonable and contrary to the provisions of law and thus cannot be allowed to withstand.

11. In ***Bhupendra Kumar Dash*** (supra), a Division Bench this Court, of which one of us (Dr. B.R.Sarangi, J) was a member, had directed the opposite party-Corporation to accord the benefit of the recommendation made by the District Tender Committee in its report dated 23.04.2015 and award the contract in favour of the petitioner for the remaining period within two weeks from the date of filing of certified copy of the order. Meaning thereby, this Court, while allowing the application filed by the petitioner therein, directed to allow the petitioner to do the work for the remaining period.

12. In ***Hemogenomics Private Limited*** (supra), this Court directed the authorities to reconsider the tender documents submitted by the petitioner therein vis-à-vis opposite party no.3 afresh and allow the petitioner to participate in the financial bid and taking into consideration the latest version of the petitioner's equipment by affording opportunity to re-assess the tender documents both technical and financial bids in conformity with the conditions stipulated in tender documents, and the entire exercise shall be completed as expeditiously as possible, but not later than October, 2016.

13. Mr. G. Mishra, learned Senior Counsel appearing for the petitioner vehemently contended that since 31.10.2022 is the last date for completion of the period of tender work by opposite party no.6, still there remains one month period. The petitioner should be allowed to continue for the said remaining period of one month and his case should be considered by the authority to do the work for balance period of 11 (eleven) months, as per the tender call notice, in view of the

ratios decided by the Division Benches of this Court in the aforementioned judgments.

14. In view of such position, this Court is of the considered view that since one month is left out for completion of the period of tender work and the petitioner has been arbitrarily and unreasonably deprived of performing its part of contract because of wrong assessment made by opposite party no.5 in awarding tender by deducting 1% of TDS of the tender amount, which is not the requirement in the terms and conditions of the DTCN and it is the admitted case that the petitioner was the L1 bidder, therefore, in the interest of justice, equity and fair play, this Court directs opposite party no.5 to allow the petitioner to perform its contract for the remaining period one month and also consider its case for balance period of 11 (eleven) months, out of one year, in terms of notice inviting tender issued by him in Annexure-1. Needless to say, the entire exercise shall be done within a period of seven days from the date of receipt of this judgment.

15. The writ petition is thus 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 26th September, 2022, Alok