(2019) 09 OHC CK 0008

In the Orissa High Court

Case No : D.B. Writ Petition (Civil) No. 17598 Of 2020

Utkal Suppliers APPELLANT

Vs

State Of Orissa And Others RESPONDENT

Date of Decision : 24-09-2019

Acts Referred:
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 09 OHC CK 0008

Hon'ble Judges : Mohammad Rafiq, CJ;B.R. Sarangi, J

Bench : Division Bench

Advocate : S.K. Dalai, P.K. Muduli, B.P. Pradhan, B.R. Sahu, V. Narasingh, S. Das, M.S. Devi, B.B. Choudhury

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, as a proprietorship firm, has filed this writ petition seeking following reliefs:

"(i) Appropriate direction shall not be given to the opposite parties more especially opposite party no.2 to award the contract in favour of the petitioner in view of the financial evaluation dated 17.07.2020 under Annexure-3 to secure ends of justice;

(ii) the action of the Opposite Parties more especially opposite party No.2 shall not be declared as illegal, arbitrary, malafide, unconstitutional and contrary to the Govt. guidelines and Tender Conditions.

If the Opposite Parties fail to show cause or show insufficient cause, to make the rule absolute;

And to pass such other order/orders, direction/directions as would deem complete relief to the petitioner;"

2. The Chief District Medical & Public Health Officer-cum- District Mission Director, NHM, Sambalpur, Rogi Kalyan Samiti, DHH, Sambalpur issued a Request for Proposal (RFP) vide RFP Reference No. 459/03/Diet/2020 dated.06.06.2020 at Annexure-1 inviting tenders for supply of diet (dry & cooked) to DHH, Sambalpur. The bid was of two parts, namely, technical bid and financial bid so as to carry on the purpose of request for proposal on outsourcing basis vide service contract with specific terms and conditions mentioned therein. The last date of submission of the tender documents was fixed to 19.06.2020 till 5 p.m. and the date of opening of technical bid was fixed on 20.06.2020 at 11 a.m. The tender inviting authority has also fixed the terms of contract as per the prevailing rules and also fixed the eligibility criteria for such tender.

2.1 The petitioner, having complied all the conditions of tender, submitted relevant documents for the purpose of consideration of its bid. The petitioner, along with opposite parties no. 3 and 4, and four others participated in the bid. The date of opening of technical bid was fixed to 20.06.2020 at 11 a.m. and accordingly, all the bidders participated in the technical bid on the date fixed. The technical bids of the four bidders were rejected, while accepting the technical bids of the petitioner along with opposite parties no. 3 and 4, and it was indicated that they are qualified for opening of the financial bid. Accordingly, vide letter dated 09.07.2020, it was intimated that the financial bid would be opened on 17.07.2020 at 11 a.m. in the office of the CDM & PHO, Sambalpur. The petitioner along with opposite parties no. 3 and 4, who qualified in technical bid, were present in the office of the CDM & PHO, Sambalpur and in their presence, the bids were opened for financial evaluation, wherefrom it is revealed that the petitioner was found to be the lowest bidder. But the financial bid of the petitioner was rejected on the ground of clause-3 of Section-3 of the Terms of Reference (TOR) and the bid was awarded in favour of opposite party no.3-Nirakar Security & Consultancy Services. The petitioner had claimed for supply of result, he was told that the same would be communicated after execution of the agreement. Hence this application.

3. Mr. S.K. Dalai, learned counsel for the petitioner specifically urged that the petitioner being lowest tenderer, instead of issuing work order in its favour, its financial bid was rejected on the ground of clause-3 of Section-3 of Terms of Reference (ToR). It is contended that the petitioner having qualified in technical bid and allowed to participate in the financial bid and having found to be the lowest bidder, invoking clause-3 its financial bid should not have been rejected. It is further contended that the change of condition stipulated in the advertisement after completion of tender process is not permissible. He also alleges mala fide against the authority concerned for selecting opposite party no.3. It is contended that by adopting the faulty procedure the petitioner, who is the lowest bidder, was ignored, whereas opposite party no.3 was selected illegally. As per clause-2.5, the EMD amount shall be returned to unsuccessful bidders within a period of four weeks from the date of announcement of the successful bidder, but till date the same has not been refunded, even though the financial bid of the

petitioner was rejected on 17.07.2020. It is further contended that the corrigendum dated 12.06.2020 has been issued behind the back of the petitioner just to disqualify the petitioner, who is the lowest bidder in the bid process. Therefore, seeks for interference of this Court.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for opposite party no.2 contended that the writ petition is premature one. As a matter fact, the decision of the financial bid evaluation dated 17.07.2020 was not approved by the Chairperson of the Executive Committee, District Headquarters Hospital, Sambalpur, which is still awaited, for which the same has not yet been published and, as such, at this stage, the petitioner cannot challenge the same by way of this writ petition. It is further contended that the petitioner has relied upon Annexure-3, the financial evaluation report which is an incomplete document, but the source of obtaining such document has not been pleaded in the writ petition, therefore, the writ petition cannot sustain in the eye of law. It is contended that admittedly request for proposal was issued under Annexure-1 inviting tender from the intending bidders for supply of Diet (Dry and Cooked) to DHH, Sambalpur, and as per the tender call notice, "any party submitting tender should not quote price less than 3% of the approved rate fixed by the Govt. of Odisha as contained in Form No.F2. The petitioner having violated the said terms, there was valid reason for the authority not to accept the tender submitted by the petitioner, even though the petitioner had quoted lowest price. It is further contended that after the advertisement was issued, subsequently some terms and conditions have been changed by virtue of the corrigendum issued on 12.06.2020 by opposite party no.2 on the basis of the pre-bid meeting held on 12.06.2020 and, as such, the same was done in presence of all the participants including the petitioner. Thereby, the petitioner is aware of the position and subsequently he cannot turn around and say that for the first time he came to know that such a corrigendum was issued on 12.06.2020. More so, the petitioner had participated in the process of financial bid and the same was opened in presence of the bidders who qualified in technical bid, including the petitioner, and accordingly evaluation was concluded in writing regarding the successful bidder-opposite party no.3 for the reasons mentioned in the proceeding itself. As the petitioner had quoted price in violation of clause-3 of the terms of reference read with Form-F2, the bid of the petitioner was rejected. It is further contended that the bid of opposite party no.4 was also rejected on the ground that he does not come under evaluation of financial criteria. It is contended that having participated in the process of tender and being unsuccessful, the petitioner cannot turn around and challenge the same by way of this writ petition. Therefore, the writ petition should be dismissed.

5. Mr. B.P. Pradhan, learned counsel appearing for opposite party no.3 argued with vehemence and contended that though the petitioner has annexed Annexure-3, the financial bid comparative statement for Diet Services, DHH, Sambalpur, but he has not assailed the financial bid evaluation done on 17.07.2020 and as such the petitioner has provided incomplete documents in

Annexure-3 suppressing the material facts that he has been disqualified on the ground that his quoted price is less than 3% of price fixed in Form- F2. As such, the petitioner was disqualified as it has quoted the price in violation of clause-3 of the terms of reference. It is further contended that the petitioner having not come to the Court with clean hands and its case is based on falsehood, it has no right to approach this Court. It is further contended that the petitioner having participated in the process of bid and having not come out successful, it cannot turn around and challenge the same by way of the present writ petition. It is further contended that supply of quality of food material being paramount consideration, clause-3 has been incorporated in the terms of reference so that minimum price of food should be maintained and not below that. The petitioner having violated clause-3 of the terms of reference, which is the essential condition, the tender submitted by the petitioner was rejected. It is further contended that as per clause-4.14 of terms of condition, the District Authority reserves the right to accept or reject any proposal at any point of time without explaining any liability or obligation for such rejection and without assigning any reason whatsoever. As such, the decision of the financial bid evaluation committee dated 17.07.2020 has not yet been approved by the Chairperson of the Executive Committee, District Headquarter Hospital, Sambalpur. Thereby, the writ petition so filed by the petitioner is premature one and the same should be dismissed. It is further contended that in exercise of power under judicial review, the apex court has laid down certain principles and in touchstone of such principles, if the facts of the present case are examined, the writ petition shall merit no consideration. Thereby, the same should be dismissed.

To substantiate his contention, he has relied upon the judgments of the apex Court as well as of this Court in S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853; Jagruti Welfare Organization v. State of Odisha, 2018 (I) ILR CUT 873; Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Air India Limited v. Cochin International Airport Ltd., (2000) 2 SCC 617; Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216; Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited, (2014) 3 SCC 493; Maa Binda Express Carrier v. North East Frontier Railway, (2014) 3 SCC 760; and Whilpool Corporation v. State of Bihar, AIR 1999 SC 74.

6. Though Mr. V. Narasingh, learned counsel and associates have entered appearance on behalf of opposite party no.4 and filed a preliminary counter affidavit contending that the writ petition as against opposite party no.4 is not maintainable as opposite party no.4 is a private limited company and always represented through its Board of Directors, thereby, there is no proper representation of opposite party no.4. Therefore, due to non-joinder of proper parties, the writ petition should be dismissed. It is further contended therein that the decision taken by the tender committee has not attained its finality pending approval by the District Authority, as per clause-4.14 of the terms and conditions of Request for Proposal. As such, the petitioner has pre-judged the issue and the writ petition being speculative in nature, the same should be dismissed. Further,

the petitioner having participated in the process of bid and having not come out successful, it cannot turn around and challenge the decision of the tender committee when it has not reached its finality. It is further contended therein that opposite party no.3 has been adjudged most suitable than opposite party no.4. Therefore, at the behest of the petitioner, the present writ petition cannot sustain in the eye of law.

7. This Court heard Mr. S.K. Dalai, learned counsel appearing for the petitioner; Mr. P.K. Muduli, learned Addl. Government Advocate appearing for opposite party nos.1 and 2; and Mr. B.P. Pradhan, learned counsel appearing for opposite party no.3 in virtual mode. Pleadings having been exchanged, since it is a tender relating to supply of Diet (Dry and Cooked) to DHH, Sambalpur and the matter is urgent in nature, with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

8. On the basis of the undisputed facts narrated above, admittedly request for proposal for supply of Diet (Dry & Cooked) to DHH, Sambalpur was issued by opposite party no.2 vide RFP Reference No. 459/03/Diet/2020 dated.06.06.2020. On perusal of such request for proposal, it appears that it contains five sections, such as, Section-1: notice inviting proposal, Section-2 : Instruction to the bidders, Section-3: terms of reference (TOR), Section -4 : terms and conditions, Section-5 : criteria for evaluation, which contains evaluation of technical proposal and evaluation of financial proposal. The technical proposal contains Check List (Technical Proposal), Form-T1, Form-T2, Form-T3, Form-T4, Form-T5, Form-T6, Form-T7, whereas the financial proposal contains Form F-1, Form F-2, Annexure-1: Format For Agreement, Schedule-1. For just and proper adjudication of the case, the relevant provisions of request for proposal are being extracted below:-

"SECTION - 1: NOTICE INVITING PROPOSAL

1.1 Proposals are invited from eligible Bidders (Firm/ Agency) interested to Supply of Diet (Dry & Cooked) to DHH, Sambalpur on outsourcing basis vide a service contract with specific terms and conditions. The contract shall be initially for a period of Two years, which may be renewed for another 3 years with the mutual consent of both the parties subject to evaluation of performances.

xx xx xx

1.3 The proposals (both technical and financial) by eligible Bidders shall reach the Office of the under signed within due date and time (i.e. 19.06.2020 till 5 P.M) in the prescribed format and manner. Proposals received after due date and time shall be rejected. There is no system of receipt of proposal through drop box or by hand. Proposals shall be received only through registered post/ speed post or courier service.

1.4 Key Information:

S. No.

Particulars

Information

1

Start Date of availability of RFP document in the official website of Sambalpur district

06.06.2020

2

Pre bid discussion

12.06.2020 at 11 PM

3

Closing Date of availability of RFP document in the official website & Last date and time for receipt of proposal

19.06.2020(till 5 P.M)

4

Cost of RFP Document (Non-refundable)

Rs. 2,000.00

5

Opening of Technical Bid

20.06.2020 at 11 AM

6

EMD in form of demand draft / fixed deposit receipt in favour of RKS, DHH, SAMBALPUR

Rs.20,000.00

7

Address for submission of RFP

CDM &PHO, Sambalpur

8

Address for opening of RFP

O/O-CDM &PHO, Sambalpur

Note: In case the closing date / last date for receipt of proposal happens to be a holiday for any reason, the activity will be held on the immediate next working day at the same time & place and as a consequence any change/s in the date/s of the subsequent activities will be informed through suitable media to all concerned.

The Authority reserves the right to reject any or all tenders without assigning any reason thereof.

SECTION -2: INSTRUCTION TO THE BIDDERS

2.1 Scope of Proposal

(a) Interested bidders fulfilling the eligibility criteria may submit their bid along with all documents.

(b) Detailed descriptions of the requirements relating to "Supply of Diet (Dry & Cooked) at DHH, Sambalpur" are specified in this RFP. The manner in which the Proposal is required to be submitted, evaluated and accepted is explained in this RFP.

(c) The selection of the Agency shall be on the basis of an evaluation by the tender committee through the Selection Process specified in this RFP. Bidders shall be deemed to have understood and agreed that no explanation or justification for any aspect of the Selection Process will be given and that the decision of CDM & PHO is without any right of appeal whatsoever.

(d) The bidder shall submit its Proposal in the form and manner specified in this RFP. The Financial Proposal shall be submitted in the format specified in F1& F2. Upon selection, the agency shall be required to enter into an Agreement with the DMO (MS) cum Superintendent, DHH.

2.2 Eligibility Criteria

The bidder should fulfil the following Eligibility Criteria:

I. The bidder should have a registered / operating office with staff strength not less than 10 members. Women Self Help Group/ SHG federation can also apply.

II. Should have an average Annual Turnover of Rs. 30 lakhs or more during the last three financial years (2017-18,2018-19 & 2019-20)

III. Should have minimum 3 years of working experience in diet preparation and supply /services in public or private health institutions

IV. The Bidder must not have been blacklisted either by the tender inviting authority or by any State Govt. or Govt. of India organization. The agency shall submit undertaking regarding the same on NonJudicial Stamp paper of Rs. 20/- as per Format T6.

V. Must be registered under EPF

VI. Must be registered under ESI

VII. Must have a PAN

VIII. Must have GST registration number.

IX. Must have valid food licence

X. Must have Labour Licence.

XI. In case of Women SHGs, the Hospital Administration/Tender Committee is free to take suitable decision and may consider relaxation in the overall eligibility criteria.

XII. Solvency certificate minimum for an amount of Rs. 50,00,000/- in the name of the agency from Revenue Department as a proof that, the agency can execute the work by itself in case there is any interruption in funds flow through treasury

2.3 Proposal Submission

The proposal shall be submitted in two parts:

(1) Part A - Bid Security & Technical Proposal as per format set out in RFP.

(2) Part B - Financial Proposal as per the format set out in RFP.

(i) The Proposal shall be typed or written legibly in indelible ink and shall be signed the authorized representative of the bidder.

(ii) Power of Attorney for signing of bid: The bidder should submit a Power of Attorney as per the Form T5, authorizing the signatory of the bid to commit the bidder.

(iii) Any interlineations, erasures or overwriting shall be valid only if the person or persons signing the Proposal have put his/their initial prior to submission of the same.

xx xx xx

2.5 Earnest Money Deposit (EMD) The bidder along with the technical proposal shall have to furnish Earnest Money Deposit (EMD) amounting to Rs. 20,000/- (refundable) in the shape of Banker's cheques / Demand Draft in favor of RKS, DHH, Sambalpur payable at Sambalpur.

In the absence of the EMD, technical proposal of the bidder shall be rejected. However, as per the Finance Department, Govt. of Odisha office memorandum no. 21926 dated 12.8.2015, the local MSEs registered with respective DICs, Khadi, Village, Cottage & Handicraft Industries, OSIC and NSIC are exempted from submission of EMD while participating in tenders of Govt. Departments and Agencies under its control. It is further clarified that the above exemption is applicable to local MSEs registered in Odisha only. This exemption to the local MSEs shall be applicable if the kind of service as required under this tender enquiry is clearly specified against the details of the service to be provided in their DIC / NSIC registration certificate (to be furnished in the technical bid.

The EMD shall be returned to unsuccessful bidders within a period of 4 weeks from the date of announcement of the successful bidder.

The EMD shall be forfeited if the bidder withdraws its proposal during the interval between the proposal due date and expiration of the proposal validity period or on in case of successful bidder, if does not execute the agreement.

2.6 Packing, Sealing and Marking of Proposal

(a) The Technical Proposal (Cover A) and Financial Proposal (Cover B) must be inserted in separate sealed envelopes, along with applicant's name and address in the left-hand corner of the envelope and super scribed in the following manner.

? Cover-A - Technical Proposal for "Supply of Diet (Dry & Cooked) at DHH, Sambalpur".

? Cover-B - Financial Proposal for "Supply of Diet (Dry & Cooked) at DHH, Sambalpur".

(b) The two envelopes, i.e. envelope for Part-A, Part-B must be packed in a separate sealed outer cover and clearly super scribed with the following:

? Proposal for "Supply of Diet (Dry & Cooked) at DHH, Sambalpur".

? The bidder's Name & address shall be mentioned in the left hand corner of the outer envelope.

(c) The inner and outer envelopes shall be addressed to the Chief District Medical & Public Health Officer, Sambalpur.

If the outer envelope is not sealed and marked as mentioned above, then the O/ o the CDM& PHO will assume no responsibility for the tender's misplacement or premature opening.

(d) Content of the Proposal

I. Cover A (Technical Proposal)

The bidders are requested to summit a detailed technical proposal with respect to the outsourcing of Biomedical Waste Management services at health institutions during the proposed contract period in conformity with the Terms of Reference forming part of this RFP.

1. EMD of Rs.20,000/- (Rupees Twenty Thousand) in the shape of a Demand Draft in favor of RKS, DHH, Sambalpur payable at Sambalpur

2. Bid document cost of Rs.2,000/- (Rupees Two Thousand) in the shape of a Demand Draft in favor of RKS, DHH, Sambalpur payable at Sambalpur

3. Form T1

4. Form T2

5. Photocopy of the Registration Certificate of the Agency

6. Photocopy of PAN

7. Photocopy of GST, EPF, ESI, Food License & Labour Registration certificate

8. Form T3 (Turnover Certificate from the Chartered Accountant)

9. Photocopy of the audited Profit & Loss Statement in the last three financial years in support of the turnover certificate [2017-18,2018-19 & 2019-2020]. In case of non finalization of Balance sheet of 2019- 2020, provisional financial statement should be produced.

10. Form T4 - Experience Details in in the field of Supply of Diet (Dry& Cooked)in Public / Private Hospital] on the stipulated date of bid submission

11. Photocopies of work orders / contracts executed in support of the information furnished in Form T4

12. Form T5 - Power of Attorney authorizing the signatory for signing the proposal on behalf of the proposer/Bidder

13. Form T6 - Affidavit certifying that the Entity/Promoter(s)/Directors/Partner(s) of Entity are not blacklisted.

14. Form T7 - Letter of Declaration (Anti Collusion Certificate) mentioning that the bidder will not collude with the other bidders.

15. Any other details, the bidder like to include in the proposal.

II. Cover B (Financial Proposal)

1. The bidder must submit the Financial Proposal using Form specified in Form F1& F2 with proper signature and seal of the bidder.

2. In case of any discrepancy between figures and words in the financial proposal, the one described in words shall be taken into consideration.

3. The same person signing the RFP shall sign the financial part also.

2.7 Validity of Proposals

The Proposal shall remain valid for 120 days after the date of bid opening. Any Proposal, which is valid for a shorter period, shall be rejected as non-responsive.

xx xx xx

2.11 RFP Opening

(a) The proposals will be opened in the presence of bidders or their authorized representatives who choose to attend, at the location, date and time mentioned in section 1 of this RFP

(b) The bidder/their authorized representatives who will be present shall sign attendance sheet evidencing their attendance.

(c) In the event of the specified RFP opening date being declared a holiday, the RFPs shall be opened at the stipulated time and location on the next working day.

SECTION -3: TERMS OF REFERENCE (TOR)

The scope of work will broadly include setting up and maintaining a kitchen and proving food to the in-patients, as directed by the facility In-Charge. Detailed scope of work is given below.

1. The Agency shall set up, operate and maintain a hygienic kitchen in the area provided by the Authority in the hospital premises.

2. The Agency shall provide 3 meals (breakfast, lunch and dinner) to all the indoor patients according to the diet-chart attached in SCHEDULE-I, or any special meals as instructed by the Hospital authority.

3. The quoted price should not be less than 3 % of the price given in the form F2.

xx xx xx

5. The cost includes all cost of food, fuel charge, cooking charge, cleaning & distribution charge. If the quoted price.

xx xx xx

SECTION 4 - TERMS & CONDITIONS

4.1 Period of Engagement

a) The engagement shall be for a period of Two years from the date of actual operation (beginning of service) or signing of contract whichever is later.

b) The contract may be extended for a maximum of another three years (one year at a time) in existing terms and conditions with mutual consent of both the parties if performance is found satisfactory as per due assessment.

c) The agency shall sign the contract (in the given Format at Annexure-I) within 15 days of issue of Letter of Award / Intimation.

4.2 Award of Contract

On evaluation of technical and financial parts of RFP and decision thereon, the selected bidder shall have to execute a contract with the In charge of the health facility within 15 days from the date of acceptance of their bid is communicated to them. The terms and condition, terms of reference of this RFP along with documents and information provided by the selected bidder shall be deemed to be an integral part of the contract. Before execution of the contract, the selected bidder shall have to deposit the performance security deposit as per clause 4.4 mentioned below.

4.3 Performance Security

The selected service provider has to furnish a performance security deposit of Rs.1, 00,000/- (for three years) in the shape of DD / BG from a National / Scheduled Bank in India. The amount of Earnest money deposit of the selected bidder can be adjusted against the performance security deposit. The performance security deposit is for due performance of the contract. The performance security can be forfeited on the following circumstances

1) When any terms or the condition of the contract is infringed.

2) When the service provider fails in providing the required services satisfactorily.

4.5 Commencement of Service

The selected agency is required to start supply of Diet in the hospital within 15 days of signing the contract.

xx xx xx

4.10 Modifications

Modifications in terms of reference including scope of the services can only be made by the district authority / institution with written consent of both parties. However, basic conditions of the contract shall not be modified.

xx xx xx

4.12 Settlement of Dispute

If any dispute with regard to the interpretation, difference or objection whatsoever arises in connection with or arises out of the agreement, or the meaning of any part thereof, or on the rights, duties or liabilities of any party, the same shall be referred to Committee constituted at the District level for decision.

4.13 Jurisdiction of Court

Legal proceedings if any shall be subject to the concerned District jurisdiction only.

SECTION 5 - CRITERIA FOR EVALUATION

5.1 Evaluation of Technical Proposals

In the first stage, the Technical Proposal will be evaluated on the basis of bidder's fulfillment of eligibility criteria. Only those bidders whose Technical Proposals becomes responsive based on the eligibility criteria, shall qualify for opening of financial Bid

Financial proposal shall be opened after the technical evaluation is completed. In the financial bid, the bidder with the lowest price shall be awarded the contract.

5.2 Evaluation of Financial Proposal

The total price (exclusive of GST) as per price format F2 shall be considered for price evaluation. However, in case two bidders quote the same lowest price, then the agency with the highest turnover shall be awarded the contract. However, if their turnover also becomes equal, then in that case, the bidder having the higher experience shall be awarded the contract."

9. The petitioner along with six others had submitted their bids for supply of Diet (Dry and Cooked) to DHH, Sambalpur pursuant to Request For Proposal under Annexure-1 dated 06.06.2020. The closing date of availability of RFP documents in the website was fixed to 19.06.2020 till 5 P.M. But between 06.06.2020 to 19.06.2020, a pre-bid discussion was held on 12.06.2020 and on the basis of pre-bid discussion, a corrigendum was issued on 12.06.2020 with a modification of the tender call notice dated 06.06.2020. Thereafter, on receipt of the bids from the intending bidders, the technical bid was fixed to open on 20.06.2020 at 11 am. As such the technical bid was opened and subsequently vide letter dated 09.07.2020 it was informed to all the participants regarding evaluation of technical bid in rejecting the same against four bidders and accepting the bid of the petitioner along with opposite parties no.3 and 4 and, as such, while accepting the technical bid, the committee mentioned in remarks column that "qualified for opening of financial bid". In the said communication dated 09.07.2020, it was also directed to the successful bidders in technical bid, namely, the petitioner and opposite parties no.3 and 4 that the financial bid will be opened on 17.07.2020 at 11 am in the office of opposite party no.2. The petitioner and opposite parties no.3 and 4 appeared on 17.07.2020 in the office of the opposite party no.2 and in their presence the financial bids were opened and evaluation was made and though it was found that the petitioner was the lowest bidder, but his financial bid does not satisfy the requirement of clause-3 of Section-3 of the terms of reference, which requires that the quoted price should not be less than 3% of the price given in the form F2. As the petitioner has not complied with the condition stipulated under clause-3, its bid was rejected and the bid of opposite party no.3 was recommended for approval of the competent authority and, as such, the financial bid has not yet approved by the District Authority in terms of the clause-4.14 of the Request for Proposal. Therefore, since the decision of the financial bid has not yet been published, the writ petition is premature one.

10. Admittedly, seven bidders have submitted their bids, pursuant to Request for Proposal (RFP) under Annexure-1, and four bidders were disqualified during technical bid evaluation. Therefore, the petitioner and opposite parties no.3 and 4, those who qualified in technical evaluation, were participated in the financial bid which was held on 17.07.2020. Due to violation of clause- 3 of the terms of reference, which provides "the quoted price should not be less than 3% of the price given in the form F2", the bid submitted by the petitioner was rejected even though he has quoted lowest price. Thereafter, evaluation of financial bid was conducted between two bidders, namely opposite parties no.3 and 4, and, opposite party no.3 declared L-1 subject to approval of competent authority and

such decision is still awaited. Therefore, the present writ petition cannot sustain in the eye of law, particularly when the petitioner has not challenged the decision of the tender committee (financial bid evaluation dated 17.07.2020). The proceeding of the tender committee meeting, District Headquarter Hospital, Rogi Kalyan Samiti, Sambalpur held on 17.07.2020 clearly states as follows:-

" The sealed Financial bid was opened in front of the qualified bidders. The comparative statement was prepared & the same has been attached in Annexure-C. As per the Section 3 : Term of Reference (TOR) point no. 3. The Quoted price should not be less than 3% of the price given in the form F2. Out of three bidders Utkal Suppliers, Berhampur-8, Ganjam is disqualified as the bidder's quoted price is more than 3% less as per the clause. The other two bidder's are qualified as they have quoted not less than equal to 3%. As per the comparative statement the two bidders M/S NISCHINT MULTISERVICE PVT. LTD Bhubaneswar & M/S.- NIRAKAR SECURITY & CONSULTANCY SERVICES PVT. LTD. Cuttack have quoted at same price. So as per the Criteria for Evaluation, Section-5, point no. 5.1 & 5.2 the highest average turnover of last three year audited report (format-T3) as follows:

ANNUAL AVERAGE TURN OVER STATEMENT

Sl. No.

Financial Year

M/S. NISCHINT MULTISERVICE PVT. LTD. Bhubaneswar Turnover in Rs.

M/S. NIRAKAR SECURITY & CONSULTANCY SERVICES PVT. TD.,

Cuttack Turnover in Rs.

1

2017-18

Rs.8,49,559.00

Rs.4,07,86,146.00

2

2018-19

Rs/24,42,411.00

Rs.5,58,11,163.00

3

2019-20

Rs.3,09,00,000.00

Rs.7,15,09,875.00

Average Annual Turnover in Rs.

Rs.1,13,97,323,33

Rs.5,60,35,728.00

Remarks

L-2

L-1

As per the above comparative statement of annual average turnover, M/S. NIRAKAR SECURITY & CONSULTANCY SERVICES PVT. LTD., Cuttack is having highest average annual turnover i.e. Rs.5,60,35,728.00. So the committee decided M/S. NIRAKAR SECURITY & CONSULTANCY SERVICES PVT. LTD., Cuttack as L1 bidder. Further the committee decided to communicate the qualified bidder M/S. NIRAKAR SECURITY, Cuttack for signing the agreement within 7 days & execute the work with 15 days of the work order."

11. It is worthwhile to mention here that the petitioner is signatory to the attendance sheet of the tender opening (financial bid) for outsourcing of Diet supply services at DHH, Sambalpur dated 17.07.2020, which has been placed on record as Annexure-B at page no.113 to the writ petition. As such, nothing has been placed on record to indicate that at the time of financial evaluation the petitioner has ever raised any objection with regard to the rejection of its bid. Thereby, the petitioner has participated in the process of bid without any objection and having not come out successful challenged the same by way of the present writ petition, which cannot sustain in the eye of law. The contention raised that communication was made to the petitioner orally with regard to rejection of its financial bid, is fallacious one in view of the fact that the petitioner having participated in the financial bid and being a signatory to the attendance sheet, it cannot take such plea that the authority has communicated the fact orally. Therefore, the petitioner is aware of the fact that it was not selected due to non-compliance of clause-3 of Section-3 of terms of reference.

12. Form- F1 of RFP meant for financial proposal, which prescribes that all the bidders are to submit Form-F1 and F2 and as such the bidders are bound to declare that "having carefully examined all the parts of the RFP documents and having obtained all the requisite information affecting this proposal and being aware of all conditions and difficulties likely to affect the execution of the contract, I/We hereby propose to offer the services as described in the RFP document in conformity with the conditions of contract, technical aspects and the sums indicated in this financial proposal". Further, they were required to declare that they read and understood and accept all clauses, conditions and descriptions of the RFP document without any change, reservations and conditions. Accordingly, the petitioner furnished that it is bound by the terms and conditions of the RFP and, as such, terms of reference is part of the RFP and the petitioner had submitted the financial bid along with Form-F1. After going through all

clauses, the petitioner has submitted its financial bid, therefore clause-3 of Section -3 of terms of reference is applicable to all the bidders. As such, all the bidders were requested to go through the clause-3 of Section-3 of terms of reference. Consequentially, clause-3 is a mandatory clause to all the bidders. But from Annexure-3, the financial bid comparative statement for Diet Services, DHH, Sambalpur filed by the petitioner it would be evident that it has quoted the price which is less than 3% given in Form-F2. Therefore, the tender committee is well justified in disqualifying the petitioner, which has not complied the terms and conditions in accordance with law.

13. On perusal of form-F1, which is a part of RFP and is in the shape of declaration by the petitioner submitted along with the financial bid in form-F2, specifically indicates that after going through all the conditions of RFP, it has quoted price in his financial bid. Therefore, at this juncture, it cannot take a plea that violation of clause-3 of TOR is not a ground to disqualify it rather it is a misnomer on its part to raise this question at this point of time. As per clause-5.2 of criteria for evaluation, the total price (exclusive of GST) as per price format F2 shall be considered for price evaluation. However, in case two bidders quote the same lowest price, then the agency with the highest turnover shall be awarded with the contract. However, if their turnover also becomes equal, then in that case, the bidder having the higher experience shall be awarded with the contract. In view of such clause-5.2, the tender committee has evaluated the financial bid of the petitioner along with opposite parties no. 3 and 4 and the opposite party no.3 bid having found to be workable, he was selected and recommended for approval by the Chairman. In this factual backdrop of the case, in hands, it is now to be examined whether the petitioner has come to this Court with clean hand or not. On the basis of the factual discussion made above, it is evident that the petitioner has resorted to falsehood meaning thereby, it having participated in the process of final evaluation and having disqualified in the said process, it cannot turn around and file this writ petition before this Court for consideration.

14. In S.P. Chengalvarya Naidu (supra) the apex Court held that the person whose case is based on falsehood, has no right to approach the Court. and he can be summarily thrown out at any stage of the litigation.

15. It is well settled law laid down by the apex Court, which has been agitated by this Court that the petitioner having participated in the process of bid, being disqualified, cannot turn around and challenge the same by way of this writ petition.

16. In Om Prakash Shukla v. Akhilesh Kumar Shukla, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of apex Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

17. In Madan Lal v. State of Jammu and Kashnir, AIR 1995 SC 1088, the apex Court held that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was not fair. In view of the law laid down by the apex Court, it is no more res integra that if the petitioner had participated in the tender process, without any objection to the eligibility criteria mentioned in the tender call notice, after become unsuccessful in the tender process, he cannot turn around and challenge the same in this writ application. Therefore, at the behest of the petitioner the writ application is not maintainable.

Similar view has also been taken in Manas Kumar Sahu v. State of Orissa, (W.P.(C) No. 5529 of 2016 disposed of on 19.07.2016). The same has been reiterated in Jagruti Welfare Organization (supra). Thereby, the petitioner having participated in the process of bid, cannot turn around by filing this writ petition, thereby, the same cannot sustain in the eye of law.

18. Coming to the power of judicial review in the matters relating to tenders or award of contracts, it is to be borne in mind some special features. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains, out of molehills of some technical/ procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences either interim or final, may hold up public works for years, or delay relief of succour to thousand and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review may very cautious and as such, the scope of judicial review to award of contract has been considered by the apex Court in various judgments.

19. In Sterling Computers Ltd. v. M & N Publications Ltd. (1993) 1 SCC 445, the apex Court observed as under:-

"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. ... the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

20. In Tata Cellular v. Union of India, (1994) 6 SCC 651 : AIR 1996 SC 11, this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts to the following effect:-

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ... More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

The apex Court also noted that there are inherent limitations in the exercise of power of judicial review in contractual matter. As such, it is observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. It is further held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

21. In Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492, the apex Court held as under:-

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial

ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work- thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court

should not intervene under Article 226 in disputes between two rival tenderers."

22. In Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617, the apex Court while summarizing the scope of interference as enunciated in several earlier decisions held as follows:-

"7. ... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

(emphasis supplied)

23. In Assn. of Registration Plates v. Union of India (2005) 1 SCC 679, the apex Court held:-

"43. ... Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest."

24. In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548 : (2006) 11 Scale 526, the apex Court observed:

"56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

25. The scope of judicial review has also been taken into consideration elaborately in Jagdish Mandal (supra). In paragraph-22 of the said judgment, the apex Court held as follows:-

".............Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, 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";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

Similar view has also been reiterated in Michigan Rubber (India) Limited (supra) and Maa Binda Express Carrier (supra).

26. Taking into consideration the factual and legal aspects, as discussed above, this Court is of the considered view that the writ petition merits no consideration and the same is accordingly dismissed. No order to costs.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

