

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

LPA OW No. 112/2013,
CMA No. 132/2013

Date of order: 24.12.2013

M/s Nayak Infrastructure Pvt. Ltd v State of J&K and ors.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Hon'ble Mr. Justice Hasnain Massodi, Judge

Appearing counsel:

For the Appellant(s):	Mr. R. K. Gupta, Sr. Advocate with Mr. Prem Sadotra, Advocate.
For the Respondent(s) :	Ms. Seema Shekhar, AAG. Mr. R. K. Jain, Advocate.

i) Whether approved for reporting in Law journals etc.:	Yes
ii) Whether approved for publication in press:	Yes

M. M. Kumar, CJ

Caveat Nos. 2190, 2190 and 2217 of 2013.

Discharged.

APLPA No. 109/2013

For the reasons stated, application is allowed and the requirement of filing certified copy of the judgment is dispensed with.

1. This order shall dispose of two appeals* emerging from the judgment and order dated 13.12.2013 rendered by the Writ Court in OWP Nos. 1169/2012 and 1170/2012. The learned Single Judge has taken the view that before the last date fixed in the notice inviting tender, appellant-writ petitioner did not furnish the requisite documents. It is appropriate to mention that there was no authorization letter in favour of a person authorizing him to submit the tender documents. Hence the

respondents have rejected the application as nonresponsive at the stage of Technical Bid Evaluation Summary.

2. A tender was floated by the respondents. In the general conditions of N.I.e-T dated 29.02.2012, it was specifically mentioned in Clause 8.2 that the bidder has to carefully examine all the instructions and failure to comply with the requirement of bid documents was to be at the bidder's own risk. In pursuance to Clause 25, it was further provided that the bids, which are not substantially responsive to the requirement of the bid documents, were to be rejected. Clause 25 contemplates detailed evaluation of the technical bids and determination whether bid is substantially responsive to the requirement of bidding documents. Substantially responsive bid is considered to be the one which conforms to all the terms, conditions and specifications of the bidding documents without material deviation on reservation.

3. The learned Writ Court extracted various tests laid down in the celebrated judgment of Hon'ble the Supreme Court rendered in the case of **Tata Cedlular v. Union of India, (1994) 6 SCC 651** and proceeded to hold that the terms and conditions of the invitation to tender would not ordinarily be open to judicial scrutiny because the invitation to tender is in the realm of contract and decision to award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The

decision is required to be tested by the application of principles of reasonableness and it must be free from arbitrariness, not actuated by mala fides. The Government must be given freedom of contract. The learned Writ Court also placed reliance on another judgment of Hon'ble Supreme Court rendered in the case of **Tejas Constructions and Infrastructure Private limited v. Municipal Council, Sendhwa and another, (2012) 6 SCC 464**, which reiterated the principles laid down in Tata Cellular case (supra). Consequently, learned Writ Court found that the omission to submit authorization letter in favour of a person submitting the tender documents on behalf of company or firm has to be considered as a violation of a primary term of contract. The argument that it may be regarded as ancillary or subsidiary condition of contract was rejected. The view of the learned Single Judge is discernible from paras 16, 17 & 18 of the judgment which read thus:

“16.....The condition aforesaid cannot be said to be ancillary and subsidiary condition of contract. I am in agreement with the respondents that in absence of authorization letter in favour of the signatory of the tender documents submitted on behalf of the firm or company, tender documents are deemed to be downloaded and submitted by an anonymous private person without any authorization from the company or firm on whose credential tender documents have been submitted. If the proposition propounded by the learned counsel for the petitioner is accepted, then it would be very difficult to check the tendency of busybody/strangers, who would be downloading tender documents and submitting the bids on behalf of a reputed qualified company/firm without having any authorization and without knowledge of such construction company/contractor. The condition, therefore, is vital and essential condition of the contract and non-compliance thereof makes the tender documents submitted by a non-entity.

17.I, therefore, hold that the condition, which has not been complied with by the petitioner is the basic condition of eligibility and cannot be termed as a mere ancillary and subsidiary condition of contract. The rejection of bid by the respondents on this score cannot be said to be arbitrary or unfair. It is not the case of the petitioner that respondents have acted with any bias or that the decision is actuated by *mala fides*. In absence of allegations of bias or mala fides, the decision which is otherwise in consonance with the terms and conditions of the contract, cannot be termed to be unfair, arbitrary or violative of Article 14 of the Constitution of India.

18. Since the condition, which was not complied with by the petitioner company at the time of submission of tender documents, is held to be a vital and essential condition of the contract, the public interest element sought to be projected by the petitioner may not have any relevance in the matter. Rather, public interest requires that only those bidders should be allowed to participate in the financial bid and/ or award of the contract, whose technical bids are found to be valid and responsive.”

4. Mr. R. K. Gupta, learned senior counsel has made valiant efforts to persuade us to take a view different than the one taken by the learned Writ Court by arguing that after the last date of submitting the tender documents which was 17.04.2012, the respondents themselves had sought clarification from the appellant vide letter dated 26.5.2012. According to learned counsel, once clarification has been sought then response given to the clarification providing authorization on 12.06.2012, authorizing Sanjeev Singh Jasrotia, should have been considered sufficient compliance. In support of his submission learned counsel has placed reliance on the discussion regarding the case of M/s Hutchison Max India Limited in Tata Cellular's case (*supra*) and has referred to para No. 116(i). According to learned counsel, Hon'ble the Supreme Court has observed that in their bid documents, M/s

Hutchison Max India Limited had not given a declaration of proper and full compliance which clearly showed that they did not comply with some of the important conditions which form the basis of the bid. According to the learned counsel, filing of the proper compliance statement on a later date was considered to be a peripheral or collateral matter and submission of compliance form a month before the date of evaluation was considered sufficient compliance because the mistake was not relatable to a non-essential matter.

5. We are not impressed with the submission for the reason that after complying with the terms and conditions and submitting the bid documents complete in all respects, non submission of statement of compliance might be regarded a peripheral issue. We are, however, dealing with a case which is entirely different on material facts because the person who was to submit the tender documents did not have any authorization. Such a submission of the tender documents by the appellant can lead to serious consequences. In case the respondents proceed to accept such an application then there is possibility of the applicant disowning terms and conditions of the tender. The submission of authorization after the last date cannot be regarded as an act approving ex-post facto what was required to be done on or before 17.04.2012. The letter dated 25.5.2012 (annexure-P10), on which Mr. Gupta has placed reliance, cannot be considered to have extended the last date of

submitting the tender application because it only sent an intimation to the appellant with regard to the various lacunas. The letter does not amount to condoning those lacunas by extending the date of submission of tender documents. The matter was to be considered eventually by the Technical Bid Evaluation Committee on 19.08.2012. By no stretch of imagination the condition concerning submission of letter of authorization could be regarded as a peripheral condition. We find no merit in the aforesaid submission of Mr. R. K. Gupta, learned counsel for the appellant.

6. Accordingly we are of the view that the appeals do not merit admission and are thus liable to be dismissed.

7. As a sequel of the above discussions, these appeals fail and the same are dismissed along with connected CMAs.

(Hasnain Massodi)
Judge

(M. M. Kumar)
Chief Justice

Jammu,
24.12.2013
Anil Raina, Secy
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Sr. No.	Case no. & Year	Title
1.	LPAOW no. 112/2013 CMA no. 132/2013	M/S Nayak Infrastructure v. State of J&K and others
2.	LPAOW 113/2013 CMA 133/2013	M/S Nayak Infrastructure v. State of J&K and others

(Hasnain Massodi)
Judge

(M. M. Kumar)
Chief Justice

Jammu,
24.12.2013