

# ORISSA HIGH COURT: CUTTACK

## **W.P.(C). No. 15751 of 2014**

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

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Sk. Aftab Ahammad ..... Petitioner

*-versus-*

State of Odisha and others ..... Opposite Parties

For Petitioner : Mr. P.C. Nayak

For Opposite Parties : Mr. J.P. Pattnaik,  
Addl. Govt. Advocate

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P R E S E N T :

**HONOURABLE THE CHIEF JUSTICE SHRI AMITAVA ROY**

**AND**

**THE HONOURABLE DR. JUSTICE B.R.SARANGI**

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Date of hearing: 20.08.2014| Date of judgment : 26.08.2014

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**Dr. B.R.Sarangi, J.** The petitioner claiming to be the lowest tenderer has filed this application challenging the decision taken by opposite party no.2 rejecting his offer qualifying the tender bid of opposite party no.3 under Annexure-5 for the work "improvement to road from Paikamala to Nrusinghnath Road under ACA for 2014-15, vide Bid identification on-Online-03-OF-2014-15".

2. The summary of essence of fact is delineated herein below:

Opposite party no.2, on behalf of Governor of Orissa, invited public tenders for the work mentioned above with estimated cost of Rs.83.32 lakhs pursuant to which the petitioner and opposite party nos.3 and 4 submitted their tenders. In respect of tender of the petitioner, he uploaded the required documents as per the ITB (Instruction to Bidder) of the tender call notice but could not upload his financial turnover certificate as required under Clause-2.8 of the tender call notice since it had not been reflected in the ITB and he submitted the same later.

The petitioner had earlier approached this Court by filing W.P.(C) NO.13688 of 2014 to accept such turnover certificate and this Court vide order dated 30.07.2014 had directed the State Counsel to take instruction in the matter. But opposite party no.2 rejected the tender bid of the petitioner as he had not satisfied the requirement of instructions to bidder (ITB) under Clauses-2.1.8, 2.1.4, 2.1.9 of the Detailed Tender Call Notice (DTCN). The petitioner had also admitted candidly that he could not upload the financial turnover certificate as per Clause-2.1.8 and in respect of compliance with Clause 2.1.4, he had furnished the affidavit and as per Clause-2.1.9, he had furnished a list of machineries which was reflected as bid confirmation report. So far as the bid of Rupesh Aggarwal was concerned, the same had been rejected due to non-compliance with Clauses 2.1.4 and 2.1.7 of the DTCN.

Consequently, the bid of opposite party no.3 had been accepted vide Annexure-5.

3. Mr. P.C. Nayak, learned counsel for the petitioner, assails the bid submitted by opposite party no.3 stating that in the list of machineries the mention of Truck (TATA Tipper) bearing Registration No.OR-15E-2582 in Clause-2.1.9 of which claimed to be the owner, actually stood recorded in the name of Mr. Agarwal Grafite Industries. Opposite party no.4 never signed on the lease agreement in favour of opposite party no.3 and rather the said truck was in broken down and damaged condition since long and his scrap was sold to scrap dealer and the said vehicle was non-existence. It is further urged that the rate quoted by opposite party no.3 as 4.23% was less than the estimated amount whereas rate quoted by the petitioner as 9.9% was less than the estimated amount. The petitioner being the lowest bidder and there was a difference of figure of around Rs.5.0 lakhs, opposite party no.2 had shown favour to opposite party no.3 by awarding the contract in his favour.

4. Mr. J.P. Pattnaik, learned Additional Government Advocate, refuted such contentions raised by the learned counsel for the petitioner and supported the stand of State Official-opposite party no.2, who had settled the tender in favour of opposite party no.3.

5. Considering the above mentioned facts and circumstances and after going through the records and upon hearing the learned

counsel for the parties, it appears that the tender call notice for the work "improvement to road from Paikamala to Nrusinghnath Road under ACA for 2014-15, vide Bid identification on-Online-03-OF-2014-15" had been floated by opposite party no.2 inviting tenders vide Annexure-1, pursuant to which three intending bidders had submitted their bids as per the conditions stipulated in DTCN which were duly considered and scrutinized by the competent authority. It appears that the petitioner's tender could not be accepted due to non-compliance with Clauses- 2.1.8, 2.1.4 and 2.1.9 of the DTCN which fact is not controverted. Rather the petitioner has candidly admitted the said fact in paragraph-5 of the writ petition. In view of such candid admission, it is made clear that the petitioner has submitted tender papers which were incomplete. Therefore, due to non-compliance with the conditions stipulated in DTCN, opposite party no.2 was justified in rejecting his tender and in awarding the same in favour of opposite party no.3, who otherwise satisfied the requirements stipulated in DTCN.

6. Admittedly it was a Government contract and the nature and scope of judicial review should be as per the judgment of the apex Court in ***Raunaq International Ltd. v. I.V.R. Construction Ltd.***, (1999) 1 SCC 492 in which it is held that 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, the same has been dealt with in detail in

paragraphs-9 and 10 of the said judgment. In ***Air India Ltd. V. Cochin International Airport Ltd.,*** (2000) 2 SCC 617 in paragraph-7 thereof, the Apex Court held as follows:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*, *Fertilizer Corpn. Kamgar Union v. Union of India*, *CCE v. Dunlop India Ltd.*, *Tata Cellular v. Union of India*, *Ramniklal N. Bhutta v. State of Maharastra* and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* 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.*"

7. The said view was also reiterated in ***Master Marine Services (P) Ltd. V. Metcalfe & Hodgkinson (P) Ltd.***, (2005) 6 SCC 138, ***Tejas Constructions and Infrastructure (P) Ltd. V. Municipal Council, Sendhwa***, (2012) 6 SCC 464 and ***Sanjay Kumar Shukla V. Bharat Petroleum Corporation Limited and others***, (2014) 3 SCC 493.

8. Therefore, in view of the settled principles as laid down by the Apex Court (supra), which is the law of land, the grievance of the petitioner merits no consideration by this Court. The Writ Petition fails and is dismissed.

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***Dr.B.R.Sarangi, J.***

**Amitava Roy,C. J.** I agree.

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***Amitava Roy,C. J.***

Orissa High Court, Cuttack  
The 26<sup>th</sup> August, 2014/Alok/Jagdev