

(2016) 04 RAJ CK 0109

RAJASTHAN HIGH COURT

Case No: Civil Writ Petition No. 6613 of 2015

M/s. Geo Miller & Co.

APPELLANT

Vs

The State of Rajasthan Pvt.
Limited

RESPONDENT

Date of Decision: April 5, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2016) 4 WLC 749

Hon'ble Judges: Miss Jaishree Thakur, J.

Bench: Single Bench

Advocate: Mr. Manoj Bhandari, Advocate, for the Applicant; Mr. P.R. Singh, AAG assisted by Mr. Dinesh Ojha, Advocate, for the Respondents; Mr. S.D. Singh with Mr. Ravi Bhansali, Advocates, for the Petitioner

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Miss Jaishree Thakur, J. - The challenge in the present writ petition is to the impugned order dated 15.6.2015 (Annex.10), by which respondent no. 2 has held the petitioner-M/s Geo Miller & Company Private Limited not qualified for opening their price bid as the technical proposal has been considered to be nonresponsive, with a further prayer for issuance of a writ of mandamus directing the respondents to open price bid of the petitioner and in case the petitioner is found to be the lowest bidder, the contract be awarded to it.

2. Briefly stated, respondent no. 1-State of Rajasthan invited tenders to construct and establish a plant known as "UWSS Jodhpur, Takhat Sagar Based Water Supply Works viz. Improvement of New Intake, RW PUMP House, RW PIPELINE, WIP, CWR and related work("the facilities") on single responsibility basis turnkey job contract including necessary design, build and operation and maintenance for ten years."

The respondents provided the bid documents running into four parts. Having necessary experience, the petitioner participated and submitted all required documents with the bid. The Chief Engineer, by an order dated 15.6.2015 (Annex. 10), ordered that the technical bid submitted by the petitioner as nonresponsive and thus, did not qualify for opening of their price bid. The Chief Engineer held as under:-

"2. Technical Proposals of following Participating Bidders are considered non-responsive on account of reasons mentioned their against and thus does not qualify for opening of their price bid

(i) M/s Geomiller & Co. Pvt. Ltd.: Due to failure to submit form CON-2: "Historical Contract Non performance" and breakup of credit limits available, utilised and balance required as on 4.2.2015."

3. Aggrieved against the non-consideration of price bid and holding the petitioner's bid to be non-responsive, the present writ petition has been filed.

4. Mr. S. D. Singh and Mr. Ravi Bhansali, learned counsels appearing on behalf of the petitioner-Company contend that the petitioner was incorporated under the Companies Act, 1913 and was in the business of establishing Water Treatment Plants, Effluent Treatment Plants, Sewage Treatment Plants throughout the country and it has rich experience in the aforesaid field. The petitioner had constructed as many as 600 plants throughout the country and as many as 32 plants in the State of Rajasthan. It had established and executed plants of huge capacity to the tune of 68 MLD, 182 MLD, 216 MLD and 410 MLD and thus, having the necessary experience and fulfilling all the requisite qualifications, it was entitled to be considered as the most suitable bidder for the award of contract. It is submitted that the respondents had erred in holding the bid submitted as nonresponsive.

5. It is argued that the respondents rejected the technical bid of the petitioner on account of the fact that it had not submitted details in form COM-2 about the Historical performance of its contract and pending Litigation and the respondents had stated "failure to submit breakup credit limit available, un-utilized and balance required as on 4.2.2015" as a reason for holding the technical bid as non-responsive. The petitioner had submitted a certificate dated 30.5.2015 to the effect that the petitioner has credit limit of Rs. 74.50 crores and un-utilized balance of Rs. 24. 88 crores, which limit is beyond the required limit of Rs. 20.9 crores as required under the bid document (being the value of the project). As the technical bid was to open on 24.2.2015, the credit limit as existing on 31.3.2015 would necessarily cover the period and thus, it could not be said that the petitioner was not financially viable to undertake the project. It is further argued that asking the petitioner to submit a certificate as to the un-utilized amount of credit limit, goes beyond the requirement as specified in the bid document, since a bidder was supposed to mention only credit limit available to it with the bank without any mention of unutilized credit limit

available. Reliance has been placed upon a judgment of the Hon'ble Supreme Court reported in **Siemens Public Communication Networks Private Limited and another v. Union of India & ors., (2008) 16 SCC 215**, to contend that re-writing of the terms and conditions of the bid is not permissible and on **K.B. Contractors v. Engineer-in-Chief & anr., 100(2002) Delhi Law Times 1 (DB)**, where the Division Bench of the Delhi High Court held that the respondents are bound by the norms and conditions as laid down by themselves.

6. It is further argued that the two grounds as mentioned in the impugned order dated 15.6.2015 do not constitute adequate reasons to consider the bid as non-responsive since bid can be considered as non-responsive only when there is material deviation. The respondents are required to consider the technical bid in all aspects as contemplated in the bid documents and thereafter, if it arrives at a conclusion that there is material deviation in the bid and the same cannot be cured, only then such a document can be considered as nonresponsive. It is urged that the petitioner is aware that he has submitted a lowest bid and the price of the petitioner would be lower than the price quoted by other bidders, who had cleared the technical bid.

7. While relying upon several judgments rendered by the Hon'ble Supreme court in **M.I Builder Pvt Limited v. Radhey Sham Sahu (1996) 6 SCC page 464**, **Kumari Shrelekha Vidhyarthi & ors v. State of U.P & ors (1991) 1 SCC 212** and **Natural Resources Allocation in Re Special Reference No 1/2012 (2012) 10 SCC 1**, the counsels for the petitioners have urged that in matter of contractual nature the State can not act arbitrarily or unfairly and such arbitrariness is open to judicial review.

8. Per contra, Mr. P. R. Singh, learned Additional Advocate General assisted by Mr. Dinesh Ojha, Advocate have vehemently contested the writ petition on the ground that the petitioner is not entitled to invoke Article 226 of the Constitution of India, since there is a remedy of appeal available to it under the provisions of the Rajasthan Transparency in Public Procurement Act, 2012 ("the Act of 2012" in short). It is further argued that the petitioner and other likewise bidders were required to furnish complete details in form COM-2 "Historical Contract Nonperformance". (Contract non-performance did not occur during the stipulated period), in accordance with Sub-Clause 2.2.1 of Section III, Evaluation Criteria, The petitioner had not put tick (" v ") in specified box, which would necessarily imply that it had been found to be a non-performing firm and also in the same form CON-2, the petitioner did not give the details of the project where he was found as non-performing. It is also argued that the petitioner had withheld information regarding pending litigation, whereas the details were to be filled in the said form. It is also argued that the petitioner had clearly suppressed the information in the bid documents and thus, could not claim equitable relief under Article 226 of the Constitution of India. It is submitted that the documents submitted by the

petitioner-Company show the net worth of the petitioner-Company to be of Rs. 21.98 crores, whereas the petitioner, in joint venture Company, i.e., Patna Water Supply, is facing litigation, worth Rs. 426.98 crores and, therefore, the value of the litigation faced by the petitioner-Company comes to the tune of Rs. 111.01 crores which facts have been suppressed in the bid document, though the same were required to be furnished.

9. It is also argued that the bid documents form FIN 3. 3 sought information as to the proposed sources of financing, such as liquid assets, unencumbered real assets, lines of credit and other financial means, net of current commitments, available to meet the total construction cash flows demand of the subject contract or contracts as indicated in Section 3 (Evaluation and Qualification Criteria) and since the certificate dated 4.2.2015 did not mention un-utilized or utilised funds in immediate three months prior to opening of the bid that the same could not be termed as available funds. Even though all these discrepancies were found in the bid documents, the petitioner was provided an opportunity to provide the information, however, the petitioner-Company submitted a subsequent certificate giving the position and credit facility as on 31.3.2015, and not as on 4.2.2015, the date the bid documents had been submitted. It is further argued that in case Patna Water Supply Co. Ltd is not successful in its litigation filed against BUDICO then the petitioner-M/s Geo Millers & Co. Pvt. Ltd., being 26% shareholder, would have a liability to the extent of Rs. 111. 01 crores and would definitely not be a financially viable concern, capable of executing the contract.

10. I have heard learned counsel for the parties and have perused the record of the case.

11. Mr. Manoj Bhandari Advocate appearing on behalf of the intervenor has argued that the petitioner-Company stood black listed by an order dated 27.5.2015 and the same has not been disclosed in the writ petition and as such there has been deliberate suppression of this fact. In a judgment rendered in **Ramjas Foundation & anr. v. UOI & ors (2010) 14 SCC 38** it has been held as :

"14. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case. In *Dalglish v. Jarvie* 2 Mac. & G. 231, 238, Lord Langdale and Rolfe B. observed: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say

that he was not aware of the importance of any fact which he has omitted to bring forward. In *Castelli v. Cook* (1849) 7 Hare, 89, 94 Wigram V.C. stated the rule in the following words: "A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go.

"In **Republic of Peru v. Dreyfus Brothers & Company 55 L.T. 802, 803**, Kay J. held as under: "I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith in the Court when ex parte applications are made."XXXXXXXXXX

In **K.D. Sharma v. Steel Authority of India Ltd. and Ors., (2008) 12 SCC 481**, the Hon^{ble} Apex court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same principle has been reiterated in **G. Jayshree and Ors. v. Bhagwandas S. Patel and Ors., 2009 3 SCC 141**. By an order dated 27.5.2015 Bihar Urban Infrastructure Development Corporation has black listed Patna Water Supply Distribution Network Private Limited (SPV) as formed by M/s Gammon India Private Limited and M/s Geo Miller & Company Private Limited (the petitioner herein) for five years. This order of black listing came to be challenged in a writ petition filed before the Delhi High Court and the same is pending. However, there is no mention of the said black listing order in the writ petition which came to be filed on 26.6.2015.

Would this count as a material suppression of fact for the purposes of the present writ petition? It is not for the litigant to decide what would be relevant and what isn^t. In all fairness to the court all facts having some bearing upon the issue are to be brought to the notice of the court while seeking equitable relief, which is certainly lacking in the present case. This is enough to disentitle the petitioner to any relief, however, be that as it may, the writ petition is being decided on merits.

12. Mr. P. R. Singh learned Additional Advocate General appearing on behalf of the State has urged that without exhausting the statutory remedy of appeal as available

under Section 38 of the Act of 2012, the writ petition is not maintainable. Reliance has been placed upon **Gopi Lal Teli v. State Of Rajasthan and others reported in 1995 (2) WLC (Rajasthan) 1, U.P. State Bridge Corporation Limited and others v. P. Rajya Setu Nigam s. Karamchari Sangh 2004 (4) SCC 268, A.P. Foods v. S. Samuel and others 2006 (5) SCC 469**. However counsel for the petitioner contends that the remedy of filing the appeal is not available to it as there is no "designated officer" as provided under the act to whom an appeal can lie.

Section 38 of the Act of 2012 reads as:

"38. Appeals.-(1) Subject to section 40, if any bidder or prospective bidder is aggrieved that any decision, action or omission of the procuring entity is in contravention to the provisions of this Act or the rules or guidelines issued thereunder, he may file an appeal to such officer of the procuring entity, as may be designated by it for the purpose, within a period of ten days or such other period as may be specified in the pre-qualification documents, bidder registration documents or bidding documents, as the case may be, from the date of such decision or action, omission, as the case may be, clearly giving the specific ground or grounds on which he feels aggrieved:

Provided that after the declaration of a bidder as successful in terms of section 27, the appeal may be filed only by a bidder who has participated in procurement proceedings:

Provided further that in case a procuring entity evaluates the technical bid before the opening of the financial bid, an appeal related to the matter of financial bid may be filed only by a bidder whose technical bid is found to be acceptable. (2) On receipt of an appeal under sub-section (1), the officer designated under that sub-section shall, after affording a reasonable opportunity of being heard to the parties, determine as to whether or not the procuring entity has complied with the provisions of this Act, the rules and guidelines made thereunder and the terms of the pre-qualification documents, bidder registration documents or bidding documents, as the case may be, and pass an order accordingly which shall, subject to the order passed under sub-section (5), be final and binding on the parties to the appeal.

(3) The officer to whom an appeal is filed under subsection (1) shall deal with the appeal as expeditiously as possible and shall endeavour to dispose it of within thirty days from the date of filing of the appeal.

(4) If the officer designated under sub-section (1) fails to dispose of the appeal filed under that sub-section within the period specified in sub-section (3), or if the bidder or prospective bidder or the procuring entity is aggrieved by the order passed under sub-section (2), the bidder or prospective bidder or the procuring entity, as the case may be, may file a second appeal to an officer or authority designated by the State Government in this behalf within fifteen days from the expiry of the period specified

in sub-section (3) or of the date of receipt of the order passed under sub-section (2), as the case may be.

(5) On receipt of an appeal under sub-section (4), the officer or authority designated under that sub-section shall, after affording a reasonable opportunity of being heard to the parties, determine as to whether or not the procuring entity has complied with the provisions of this Act, the rules and guidelines made thereunder and the terms of the pre-qualification documents, bidder registration documents or bidding documents, as the case may be, and pass an order accordingly which shall be final and binding on the parties to the appeal.

(6) The officer or authority to which an appeal is filed under sub-section (4) shall deal with the appeal as expeditiously as possible and shall endeavour to dispose it of within thirty days from the date of filing of the appeal:

Provided that if the officer or authority to which an appeal is filed under sub-section (4) is unable to dispose of the appeal within the aforesaid period, he shall record reason for the same.

(7) The officer or authority to which an appeal may be filed under sub-section (1) or (4) shall be indicated in the pre-qualification documents, bidder registration documents or bidding documents, as the case may be.

(8) Every appeal under sub-sections (1) and (4) shall be filed in such form and manner and shall be accompanied by such fee as may be prescribed.

(9) While hearing an appeal under this section, the officer or authority concerned shall follow such rules of procedure as may be prescribed.

(10) No information which would impair the protection of essential security interests of India, or impede the enforcement of law or fair competition, or prejudice the legitimate commercial interests of the bidder or the procuring entity, shall be disclosed in a proceeding under this section."

A reading of the said section shows that an appeal can be filed by any bidder who is aggrieved by any decision, action or omission of the procuring entity and an appeal can be filed to such officers of the procuring entity as may be "designated" by it for the purpose, within a period of ten days or such other period as may be specified in pre-qualification documents, with a proviso that only such bidder can file an appeal who has been declared successful in terms of Section 27 of the Act with a further proviso that an appeal can be filed only by those bidders whose technical bid is found to be acceptable. It is worthwhile to note that too date, no person /authority has been designated as prescribed under Section 38 of the Act and in the absence of such designated authority, a remedy of appeal is not available to the petitioner. Moreover as specified in proviso to Section 38 of the Act of 2012, only those persons whose technical bid has been accepted will have a remedy of filing an appeal and therefore the petitioner not qualifying the technical bid would in any case be

deprived of filing an appeal before the designated authority. The case law as relied upon by the parties does not envisage such a situation and thus is not applicable to facts of the present case. Resultantly, the objection raised that an appeal ought to have been filed by the petitioner-Company is not maintainable. In such a situation, only remedy available would be to file a writ under Article 226 of the Constitution of India.

13. The bid document requires the petitioner to furnish details in form CON-2 which is in two parts i) the historical contract non-performance form and ii) details of pending litigation . The instructions to fill the bid document is specified and detailed in Clause 2.2.1 and 2.2.2 of Part III of the bid document which reads as under:-

| | | | |
|------------|---|----------------------|----------------------|
| Factor | 2.2 Historical Contract Non-Performance | | |
| Sub-Factor | Criteria | | |
| | Requirement | Bidder | Documentation |
| | Single Entity | Joint Venture | Required |
| | | All Partner combined | At least one Partner |
| | | Each Partner | |

| | | | | | |
|--|----------------|-------------|-----|-------------|-----|
| 2.2.1 History of nonperforming contracts | Nonperformance | | | | |
| | of a | | | | |
| | contract | | | | |
| | did not | | | | |
| | occur | | | | |
| | within | | | | |
| | the | | | | |
| | preceding | | | | |
| | five (5) | | | | |
| | financial | | | | |
| | years | | | | |
| | prior | | | | |
| | to the | | | | |
| | deadline | | | | |
| | for | | | | |
| | application | | | | |
| | submission | | | | |
| | based | | | | |
| | on all | | | | |
| | information | Must | | Must | |
| | on | meet | | meet | |
| | fully | requirement | | requirement | |
| | settled | by | | by | |
| | disputes | itself | | itself | |
| | or | or | | or | |
| | litigation. | as | N/A | as | N/A |
| | A fully | partner | | partner | |
| | settled | to | | to | |
| | dispute | past | | past | |
| | or | or | | or | |
| | litigation | existing | | existing | |
| | is one | JV | | JV | |
| | that | | | | |
| | has | | | | |
| | been | | | | |
| | resolved | | | | |
| | in | | | | |
| | accordance | | | | |
| | with | | | | |
| | the | | | | |
| | Dispute | | | | |
| | Resolution | | | | |
| | Mechanism | | | | |
| | under | | | | |
| | the | | | | |
| | respective | | | | |
| | contract, | | | | |
| | and | | | | |
| | where | | | | |
| | all | | | | |
| | appeal | | | | |
| | instances | | | | |
| | available | | | | |
| | to the | | | | |
| | bidder | | | | |
| | have | | | | |
| | been | | | | |
| | exhausted. | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| Form CON-2 | | | | | |

| | | | | | | |
|--------------------------------|--|--|-----|--|-----|---------------|
| 2.2.2 Pending Litigation | All pending litigation shall in total not represent more than Fifty percent (50%) of the Bidder's net worth of latest preceding financial year and shall be treated as resolved against the Bidder. | Must meet requirement by itself or as partner to past or existing JV | N/A | Must meet requirement by itself or as partner to past or existing JV | N/A | Form CON-2 |
| | | | | | | |

In Form CON-2 the historical contract non-performance form, the petitioner marked it as dash "--" and specified that "" No litigation pending against us (bidder GEO Miller & Co. Pvt Limited)". Admittedly the petitioner is part of a Joint Venture Company, namely, Patna Water Supply Distribution Network Private Limited and the said Joint venture Company is facing litigation for non-completion of the contract worth Rs. 426. 98 crores wherein apart from cancellation of contract, bank guarantees have been revoked. An argument has been raised by counsel for the petitioner that a bidder is required to make only disclosures of such

non-performance which has attained finality after exhausting of the remedy of appeal and as such since the matter of cancellation of contract and revocation of Bank guarantee was sub-judice it could not be said that there was non-performance. A careful reading of clause 2.2.1 shows that a bidder was supposed to disclose non-performance of a contract within preceding five financial years prior to deadline of the application submission based on all information on fully settled dispute or litigation. A fully settled dispute or litigation has been further defined as one that has been resolved in accordance with the dispute resolution mechanism under the contract and where all appeal instances have been resolved. The matter regarding non-performance and the revocation of bank guarantee by BUDICO was sub-judice till the date of submission of bid documents and had not attained finality, therefore, in terms of the bid document, it could not be said that there was non-performance of a contract. In other words, it can safely be said that the litigation pending of Patna Water Supply Distribution Network Private Limited at Delhi High Court had not attained finality and thus, having left the column blank, it could not be said that there was non-disclosure.

14. The petitioner had filled in a column as ""No litigation pending against us (bidder GEO Miller & Co. Pvt Limited)". As per 2.2.2 of the bid document, a bidder was to disclose pending litigation as the value of such litigation shall not represent more than 50% of bidders net worth of latest preceding financial year and shall be treated as resolved against bidder. On account of non-performance of the contract by Patna Water Supply Distribution Network Private Limited, the bank guarantee as submitted by the said Company, in which the petitioner-Company is 26% shares holder stood revoked. Against the revocation of the bank guarantee, the said joint venture company of which the petitioner has 26% shares, approached the court at Delhi and has presently obtained a stay order against the said revocation. In the eventuality of matter not being resolved in favour of the Joint Venture Company, the liability of the petitioner would be almost Rs. 111.00 corers as against the net worth of the bidder petitioner which is Rs. 21.98 crores. The argument raised that the petitioner itself has not suffered any disqualification as litigation pertains to Patna Water Supply Distribution Network Private Limited and not against the petitioner individually is without substance, particularly in view of the fact that clauses 2.2.2 of part 111 of Bid document clearly mentioned "Must meet requirement by itself or as a partner to past or existing JV"" and the petitioner has a 26% share in the Joint Venture Company . Therefore such vital Non disclosure is enough to disqualify the petitioner from the bid and there is no illegality in the order dated 15.6.2015 holding that the bid was non responsive due to failure to submit form CON-2: "Historical Contract Non-performance". The requirement of furnishing details of pending litigation and the net value of such litigation is an integral part of disclosure to be made in Form CON 2. and details are lacking. It does appear to the court that there has been concerted attempt by the petitioner to evade giving correct and full facts. Suppression of material fact is relevant while considering whether or not the

contract ought to be awarded. These grounds are enough to dis-allow the writ petition.

15. Mr. P. R. Singh has also vehemently argued that the petitioner was not financially viable and capable of fulfilling the contract. As per the financial information supplied, even though the petitioner had sufficient credit limit, as given by the Union Bank of India, there was no breakup of un-utilized credit limit available with it. Per contra it is argued by learned counsel for the petitioner that asking for details of un-utilized credit limit is beyond the scope of the bid documents. Reliance has been placed on **Siemens Public Communication Networks Private Limited and another v. Union of India & ors., (2008) 16 SCC 215**, to contend that re-writing of the terms and conditions of the bid is not possible and on a case reported as **K.B. Contractors v. Engineer-in-Chief & anr., 100(2002) Delhi Law Times 1 (DB)**, wherein it was held that the respondents are bound by the norms and conditions as laid down by themselves. A reading of Form FIN- 3.3 read with clauses 2.3.3 in Part 111 of the bid document clearly required the bidder to supply details of credit limit (funds based and non-funds based) available with the bidder and the same was not to be less than Rs. 22.9 crores. There was a requirement to specify proposed sources of financing ,such as liquid assets, unencumbered real assets, lines of credit and other financial means, net of current commitments, available to meet the total construction cash flow demand of the subject contract or contracts as indicated in section 3 (evaluation and Qualification Criteria). Requirement of supplying information of "net of current commitments" is nothing other than seeking information as to un utilised funds available. The information as supplied by the bank on 31.3.2015 regarding financial viability did not disclose whether the petitioner had any funds available to it as on date bid document was submitted. The information sought does not go beyond the scope of the bid requirement as the very purpose of having information about un-utilized funds available with bidder touches upon the credibility and viability of the Company to execute the contract. In case a bidder, though having a credit limit had already utilised the entire funds available, it would amount to having no credit limit for the next project to be undertaken. The financial viability was part and parcel of the bid documents and the financial position ought to be reflected as on the date the bid was submitted. Therefore, it is held that the documents submitted on 4.2.2015 did not furnish complete and correct information as required and thus there is no infirmity in the order dated 15.6.2015.

16. It is argued by learned counsel for the petitioner that it is only on account of material deviation that a bid document can be determined as non-responsive and in the present case there is no material deviation to disqualify the petitioner. Rule 59 of the Rajasthan Transparency in Public Procurement Rules, 2013 requires to be read in totality.

Rule 59. Determination of responsiveness.-

(1) The bid evaluation committee shall determine the responsiveness of a bid on the basis of bidding documents and the provisions of sub-section (2) of section 7.

(2) A responsive bid is one that meets the requirements of the bidding documents without material deviation, reservation, or omission where: - (a) "deviation" is a departure from the requirements specified in the bidding documents; (b) "reservation" is the setting of limiting conditions or withholding from complete acceptance of the requirements specified in the bidding documents; and (c) "Omission" is the failure to submit part or all of the information or documentation required in the bidding documents.

(3) A material deviation, reservation, or omission is one that,

(a) if accepted, shall:- (i) affect in any substantial way the scope, quality, or performance of the subject matter of procurement specified in the bidding documents; or (ii) limits in any substantial way, inconsistent with the bidding documents, the procuring entity's rights or the bidder's obligations under the proposed contract; or

(b) if rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids.

(4) The bid evaluation committee shall examine the technical aspects of the bid in particular, to confirm that all requirements of bidding document have been met without any material deviation, reservation or omission.

(5) The procuring entity shall regard a bid as responsive if it conforms to all requirements set out in the bidding documents, or it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the bidding documents, or if it contains errors or oversights that can be corrected without touching on the substance of the bid.

The argument is without any substance. Rule 59 of the rules of 2013 clearly allows a bid evaluation committee to determine the responsiveness of a bid on the basis of bidding documents submitted and in case there is any deviation, reservation or omission the bid can be declared as non-responsive. As defined in Rule 59 (2) (c) of the Rules of 2013 "Omission" is the failure to submit part or all of the information or documentation required in the bidding documents. In the present case there is omission on the part of the bidder to supply full details and particulars as required in Form Con 2 as well as details of un utilised credit balance as on date of submission of the bid document and therefore the order dated 15.6.2015 holding the bid to be non-responsive is justified.

17. The argument that the High court must interfere under writ jurisdiction in contractual matters in case the state has acted fairly or arbitrarily does have merit but the court has to be first satisfied that the State has acted in such a manner. In a judgment reported as Jagdish Mandal v. State Of Orissa Appeal (civil) 5699 of 2006

decided on 11 of December 2006 and it has been held that :-

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. 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 and succor to thousands 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, 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."

18. Similar view has been taken in judgments rendered in **Tata Cellular v. Union of India (1994) 6 SCC 651**, **Sri Ram Builders v. State of M.P. (2014) 4 SCC 746** from where the ratio culled out is that the courts can interfere if satisfied that there is infirmity in process of taking a decision, decision is irrational, there is procedural impropriety. In the present case the categorical finding of this court is that the petitioner filed this petition without disclosing the fact that it stood blacklisted, did not give full particulars as required in the bid documents, and the decision taken that the bid documents is non-responsive is not borne out of malafides nor there is any infirmity in the decision making process for this court to interfere.

19. Resultantly, this writ petition being devoid of any merit is dismissed while vacating any interim stays granted.