

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CA-CWP No. 8 of 2017
Date of Decision: 03.05.2017

M/s Girdhari Lal Constructions Pvt. Ltd.

.....Appellant

Versus

Union of India and others

....Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL, JUDGE.**

Present : Mr. Akshay Bhan, Senior Advocate with
Mr. Amandeep Singh Talwar, Advocate, for the appellant.

Mr. Chetan Mittal, Senior Advocate with
Mr. Parminder Singh Kanwar, Advocate,
for respondent Nos.1 to 3.

Mr. Anand Chibbar, Senior Advocate with
Mr. Bikramjit Singh Patwalia, Advocate,
for respondent No.4.

S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order and judgment of the learned Single Judge dismissing the appellant's petition challenging the rejection of its tender. The official respondents held the appellant's tender to be non-responsive *inter-alia* on the ground that it had not filled in as required and had instead sought to suppress the material particulars.

2. Respondent No.2 is the Central Public Works Department which invited the tenders for the construction of buildings. Respondent No.3 is the Executive Engineer of respondent No.2. Respondent No.4 has been awarded the contract by respondent Nos.2 & 3.

3. The petitioner (herein appellant) submitted its tender which was rejected by the official respondents communication dated 29.12.2016 impugned in the writ petition. The petitioner was held to be ineligible with the following remarks:-

Sr. No.	Name of bidder	Reasons for disqualification
1.	----	----
2.	M/s Girdhari Lal Construction Pvt. Ltd.	M/s Girdhari Lal Construction Pvt. Ltd. Is not found eligible as per provision of para 1.2 of section-II at page 32 of NIT because the form 'C' has been changed by modifying the column 11 to hide the factum of carrying out work on back to back basis and the paragraph-4 of letter of transmittal also provides disqualification because of incorrect information given in the forms.

The learned Judge rightly upheld the official respondents' rejection of the appellant's bid.

4. Section-II of the notice inviting tenders contains the "INFORMATION & INSTRUCTIONS FOR ELIGIBILITY CRITERIA". Clauses 1.2 and 10.1 thereof read as under:-

"All information called for in the enclosed forms should be furnished against the relevant columns in the forms. If for any reason, information is furnished on a separate sheet, this fact should be mentioned against the relevant column. Even if no information is to be provided in a column, a "nil" or "no such case" entry should be made in that column. If any particulars / query is not applicable in case of the tenderer, it should be stated as "not applicable". The tenderers are cautioned that not giving complete information called for in the application forms or not giving it in clear terms or making any change in the prescribed forms may result in the bid being summarily disqualified. Tenders made by telegram or telex and those received late will not be entertained."

“10.1 Bidder should furnish the following: -

- (a) List of eligible similar nature of works successful completed during the last seven years in (Form “C”).
- (b) Performance report of works referred to in form “C” --- In form “D”.”

Form-C required the bidders to furnish the information in 11 separate columns as under:-

“Form ‘C’

Details of eligible similar nature of works completed during the last seven years ending previous day of last date of submission of tenders:-

Sr. No.	Name of work/project and location	Owner of sponsoring organization	Cost of work in crores of rupees	Date of commencement as per contract	Stipulated date of completion	Actual date of completion	Whether EOT case decided-Yes/No, if yes with or without levy of compensation	Litigation/arbitration cases pending/ in progress with details	Name and address/telephone number of officer to whom reference may be made	Whether the work was done on back to back basis-Yes/No.
1	2	3	4	5	6	7	8	9	10	11

Indicate gross amount claimed and amount awarded by the arbitrator.

5. The heading of column-11 was itself altered by the appellant. The heading in the form prescribed by the official respondents was “Whether the work was done on back to back basis-Yes/No”. The appellant was not entitled to change this heading to read “remarks”. This is not what the party inviting tenders namely the official respondents required. The particulars were also not furnished as required. The particulars furnished by the appellant namely “work completed in time” are no indication whether the work was done on a back to back basis or

not. The official respondents were, therefore, entirely justified in rejecting the tender.

6. Mr. Bhan, the learned senior counsel appearing on behalf of the appellant submitted that by the impugned communication dated 29.12.2016 the respondents rejected the tender not merely because of column-11 of Form-C having been wrongly filled in but on the ground that it had done so “to hide the factum of carrying out work on back to back basis”.

7. The submission is not well founded for orders/communications such as these cannot be read like a statute. The real intention of the order rejecting the bid must be ascertained. The rejection of the appellant’s tender was not because the appellant had changed clause-11 with a view to hiding the factum of having carried out the work on a back to back basis, to wit the appellant’s bid was not rejected because of it having modified the column and having done so with a view to hide the factum of carrying out the work on a back to back basis. The official respondents rejected the tender on the ground that the appellant had not filled in column-11 of Form-C correctly. The bid was also rejected independently on the ground that the appellant did so to hide the factum of carrying out the work on a back to back basis. The observation regarding the appellant having concealed the said fact was an additional ground or only an observation in support of the main ground namely clause-11 having been filled in incorrectly. This is also evident from the concluding words of that part of the impugned communication quoted earlier namely “paragraph-4 of letter of transmittal also provides disqualification because of incorrect information given in the forms”.

8. It is clear, therefore, that the wrongful alteration of clause 11 and the incorrect information in respect thereof was a ground for the rejection of the tender.

9. The learned Judge also noted other defects in the appellant's tender. For instance, the Form required the details of the eligible similar nature of works completed during the last seven years. The appellant altered the period to five years in the form. This was clearly impermissible. Column-5 required the date of commencement as per the contract to be furnished. This heading was altered by the appellant to read "configuration/No. of stories". This was also impermissible. Column-8 of Form-C prescribed in the NIT was modified to read "actual date of completion". This had nothing to do with the requirement of column-8 of Form-C in the NIT which was "whether EOT case decided- Yes/No, if yes with or without levy of compensation". We appreciate that the tender was not rejected on account of the other infirmities and was rejected only on the basis of the modification of clause-11. This was probably because the Tender Evaluation Committee found the modification of clause-11 to be sufficient to reject the tender.

10. In the circumstances the learned Judge rightly dismissed the writ petition. A view to the contrary is not even possible.

11. Mr. Bhan then raised a grievance regarding the observation by the learned Single Judge that the information supplied by the petitioner cannot be said to be innocent or inadvertent and that it was an act of deliberate concealment of fact from the respondents. He submitted that there was no concealment of facts. He submitted that the documents forwarded alongwith the tender disclosed the fact that the work completed by the petitioner was pursuant to a sub contract i.e. it was done on a back to back basis and that the observation in the impugned communication rejecting the petitioner's tender to the effect

that the petitioner had modified column-11 of Form-C “to hide the factum of carrying out the work on back to back basis” was also unjustified. In this regard Mr.Bhan relied upon a letter dated 07.10.2016 issued by the official respondents in respect of the work on the basis of which the appellant claimed the experience. This letter stated that the work had been executed on a back to back basis. He then relied upon a reply dated 14.10.2016 addressed by the appellant to the official respondents in which the appellant stated that DG MAP had categorically recognized the work of Construction of Dwelling Units for officers/ WO’s, Airmen at Delhi (AF) & Hindon AF and that the same had been executed by the appellant on back to back basis from M/s Unity Infra Projects Ltd. and that on the successful completion thereof the same client had awarded to the appellant the work of the value of Rs.362 crores and that the department had expressed that it had no objection to all other departments qualifying the appellant on the basis thereof.

12. The least that must be said in favour of the appellant at this stage is that in view of the letter dated 07.10.2016 and the reply thereto dated 14.10.2016 prima-facie the official respondents were not misled by the incorrect modification of column-11 of Form-C. The official respondents appear to have noticed the fact that the experience was claimed on the basis of back to back contracts.

13. The respondents, however, submitted that clause 10.1 required the bidders to furnish in Form-C not merely on the basis of the nature of the work successfully completed but the nature of “eligible” similar nature of works successfully completed. It was contended that back to back contracts performed by the appellant were not eligible works inasmuch as the back to back contracts were entered into without the permission of the party inviting tenders in those cases. The

modification of Form-C was to conceal the fact that the back to back transaction had been entered into illegally as permission for the same had not been obtained. The adverse remarks were, therefore, justified.

14. We do not intend interpreting the meaning of the term 'eligible' in clause-10. It is not necessary to do so for the purpose of this appeal. This was not the basis of the communication dated 29.10.2016 impugned in the writ petition. A drastic finding to this effect would not be justified on the basis of the argument across the bar and without affording the appellant an opportunity of meeting the same. As Mr.Bhan pointed out, it is possible that the appellant *bona fide* believed that the word 'eligible' in clause-10 referred not to whether the contracts were entered into validly or not but as to whether they met the eligibility criteria in clause-8 of the NIT reads as under:-

“8.0 Evaluation criteria

8.1 The detailed submitted by the bidders will be evaluated in the following manner:-

8.1.1 The initial criteria prescribed in **para 7.0** above in respect of experience of **eligible** similar works completed, **loss, solvency** and financial turn over etc. will first be scrutinized and the bidder's eligibility for the work be determined.

C = Nil I = Nil O = Nil	AE EE	Page : 34
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8.1.2 The bidder's qualifying the initial criteria as set out in para **7.0** above will be evaluated for following attributes by scoring method as specified in 'ANNEXURE-I' on the basis of details furnished by them.

a)	Financial strength (Form 'A' & 'B')	:	Maximum 20 marks
b)	Experience in eligible similar nature of work during last seven years (Form 'C')	:	Maximum 20 marks
c)	Performance of works (Form 'D')- Time over run	:	Maximum 20 marks
d)	Performance on works (Form 'D')-Quality	:	Maximum 40 marks
	Total		100 marks

To become eligible for short listing the bidder must secure at least fifty percent marks in each (section a, b, c and d) and sixty percent marks in aggregate.

The department, however, reserves the right to restrict the list of such qualified contractors to any number deemed suitable by it.

Note: The average value of performance of works for time overrun and quality shall be taken on the basis of performance report of the eligible similar works.”

15. Had the appellant been afforded an opportunity of explaining itself it may have been in a position to contend successfully that it understood the term ‘eligible’ in clause-10 to mean the extent of the work referred to in clause-8 and not as to whether the work was performed pursuant to a contract considered by the employer in those cases to have been entered into illegally/contrary to the terms and conditions of those agreements. It would have been possible for the appellant to contend that even if the term ‘eligible’ is construed as contended by the respondents, its interpretation of the same was bona fide.

16. The operative part of the order of the learned Single Judge rejecting the petition is, therefore, upheld. However, the observations regarding the appellant having deliberately concealed the facts are set-aside. This, however, will not preclude the official respondents from taking any further action in respect of the contention to this effect. In the event of the official respondents doing so, all the contentions of the parties are kept open.

The appeal is accordingly disposed of.

**[S.J.VAZIFDAR]
CHIEF JUSTICE**

**[ANUPINDER SINGH GREWAL]
JUDGE**

3rd May, 2017

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Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No