

IN THE HIGH COURT OF JHARKHAND AT RANCHI
L.P.A. No. 309 of 2014

The State of Jharkhand through the Secretary, Water Resources Department, Government of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District Ranchi.

... Appellant

Versus

1. M/s CWE-SOMA Consortium having its office at 2, Avenue-4, Banjara Hills, Hyderabad-500 034 through its authorized signatory P.Subba Rao, S/o Mr. Venkateshwarlu, R/O B 4/45, Safdarjung Enclave, P.O. & P.S.-Safdarjung, New Delhi.
2. The Engineer-in-Chief-I, Government of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District Ranchi.
3. The Chief Engineer, Water Resources Department, Government of Jharkhand, Icha Galudih Complex, Adityapur, Jamshedpur (Jharkhand) P.O. & P.S. Adityapur, Distt. East Singhbhum.
4. The Deputy Secretary-cum-Internal Financial Advisor, Water Resources Department, Government of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District Ranchi.
5. The Executive Engineer, Kharkai Dam Division No.2, Icha Chaliama, Adityapur, Jamshedpur (Jharkhand) P.O. & P.S. Adityapur, Distt. East Singhbhum.

..... Respondents

PRESENT

HON'BLE MR. JUSTICE VIRENDER SINGH, CHIEF JUSTICE

HON'BLE MR. JUSTICE APARESH KUMAR SINGH

For the Appellant : Mr. Ajit Kumar, Additional Advocate General,
Mr. Rajesh Kumar, G.P.-V, Kumar Sundaram
& Chanchal Jail.

For the Respondents : Mr. Ajit Kumar Sinha, Senior Advocate,
Mr. Mukesh Kr. Sinha & Vivek Kumar, Advocates

C.A.V. on 20.01.2015

Pronounced on 13 /03/2015

Per Virender Singh, C.J. :

State of Jharkhand being aggrieved of the judgment dated 24.07.2014 handed down by learned Single Judge whereby allowing W.P.(C) No.2845 of 2014 filed by M/s. CWE-SOMA Consortium of Hyderabad (hereinafter to be referred to as 'SOMA' only) is before us through the medium of instant Letters Patent Appeal which is at admission stage. However, with the consent of learned counsel for both the sides who state that since the instant matter relates to construction of a Dam which project has not started for the last so

many years, it needs early consideration, we have taken it on board for its final consideration.

2. Water Resource Department, Government of Jharkhand through its Executive Engineer invited item rate bids for the construction of **Kharkai Dam** at Icha with all control gates and its allied works including Civil, Mechanical, Electrical and SCADA system under SMP on 28.02.2014 through e-Procurement from eligible and approved contractors. It was a project of more than 250 crores, terms and conditions of which were in accordance with Standard Bidding Documents (for short 'SBD').

3. On 24th of March, 2014, a pre-bid meeting was held in which 10 contractors, including SOMA also participated. During the course of pre-bid meeting, it was found that there had been some departure relating to terms and conditions of NIT from clauses of SBD which were never approved by the department. Conditions of NIT were said to be stringent. This was informed to the Chief Engineer with a request to issue necessary corrigendum to the tender notice so that the tender could be in accordance with SBD. Vide letter dated 02.04.2014 (Annexure-C to the counter affidavit available on writ court record), Chief Engineer gave his justification that the work was of specific and urgent nature, therefore, certain clauses were inserted so as to ensure appropriate and smooth implementation of the work in time.

4. Three tenderers namely M/s SOMA, Hyderabad, M/s IL & FS Engineering and Construction Company Limited, Hyderabad and M/s Navyuga Engineering Co. Limited, Hyderabad, participated in the tender process by submitting their bids and other relevant papers. A meeting was convened by the Departmental Tender Committee (for short 'DTC') on 02.06.2014, for taking decision upon

pre-qualification bid. In the said meeting, SOMA was found to be responsive whereas other two bidders were found to be non-responsive, accordingly, Tender Committee took a decision in terms of Clause 4.18 (d) of Central Vigilance Commission (for short 'CVC') guidelines to cancel it and to go for re-tender to make the process of tender more competitive. SOMA, being aggrieved of the said decision dated 02.06.2014 knocked the door of the Writ Court through the medium of aforesaid writ petition (W.P.(C) No.2845 of 2014) seeking quashing of the aforesaid order dated 02.06.2014 and letter dated 06.06.2014 subsequently issued by the office of Chief Engineer, whereby the Superintending Engineer, Kharkai Dam Circle, Icha, Chaliama, was directed to initiate the process of inviting fresh tender. We have been informed that the second tender has also been cancelled subsequently on 07.08.2014.

5. It appears from the writ court record that SOMA had also prayed for the stay of the re-tendering of the contract, but the main writ petition itself came to be disposed of within the shortest possible time.

6. Case of SOMA before the Writ Court was that the decision taken by the Tender Committee considering the case of single tender was against CVC norms as in terms of Clause 4.2 of CVC guidelines, single tender happens to be that tender, when there happens to be invitation to one firm only whereas in this case, along with SOMA, two other companies had also participated. It was further pleaded on behalf of SOMA that as per Clause 4.17 of CVC guidelines, in case, a single quote or a single valid acceptable quote is received against limited tender or open tender, this can result into a single vendor situation, therefore, it needs to be processed further and Clause 4.18(d) of CVC guidelines was not

attracted in this case. This is how SOMA questioned the aforesaid decisions dated 02.06.2014 asserting that it was not only contrary to CVC guidelines, but discriminatory as well.

7. Case of the State as one finds from the Writ Court record was that since the terms and conditions of NIT were not in consonance with SBD guidelines, therefore, a direction was given to the Chief Engineer to issue corrigendum by making the terms and conditions in consonance with the terms and conditions laid down by SBD, but the same was never done as a result of which, only one bidder (SOMA) was found to be responsive, therefore, decision was taken in terms of Clause 4.18(d) to go for re-bidding for the purposes of making the bid more competitive.

8. Learned Writ Court while discussing Clause 4.2, Clause 4.17 and Clause 4.18 of CVC guidelines ultimately held that the decision of cancelling present tender in which SOMA was found to be responsive and going for re-bidding on account of the fact that the conditions of NIT were stringent and good number of participants could not participate, was liable to be set aside being arbitrary in nature and also against the public interest as on account of the revision of schedule rates of the articles, the estimate amount would go higher. It is further held by learned Writ Court that it never appeared that the members of the Tender Committee had taken the decision for cancellation and re-bidding on account of clauses being stringent, rather it was on account of the fact that out of three participants, only SOMA was found to be responsive whereas the other participants were found to be non-responsive.

9. Hence, the instant Letters Patent Appeal by State.

10. We have heard Mr. Ajit Kumar, learned Additional Advocate General appearing for the State along with Mr. Rajesh Kumar, G.P.-

V, Kumar Sundaram and Chanchal Jain (J.C. to A.A.G.) and Mr. Ajit Kumar Sinha, learned Senior Advocate assisted by Mr. Mukesh Kumar Sinha and Vivek Kumar, Advocates for SOMA. We have also gone through the Writ Court records for appreciating the entire issue in its right perspective.

11. Mr. Ajit Kumar, learned Additional Advocate General submitted that every tender above the work amounting to more than 250 lakhs is published by a department in accordance with the SBD which needs approval from the Cabinet and if there is any variation in the general conditions of the tender from SBD, it is done only after seeing viability of inserting that clause whether or not the same is restrictive and stringent in nature. Learned State counsel submitted that it was found in a pre-bid meeting held on 24.03.2014 that there were various departures in the clauses of tender documents from the clauses of SBD, which were never approved by the department and the same was informed to the Chief Engineer, Icha Galudih Complex, Adityapur (Jamshedpur) vide letter dated 26.03.2014 with a request to issue necessary and appropriate corrigendum so that the departures could be met with and the tender published turns out to be in accordance with SBD. He submitted that since it was not done which reduced the number of participants to only three in which SOMA happened to be responsive and two others non-responsive, therefore, decision to re-tender was taken by the Tender Committee in consonance with Clause 4.18(d) of the CVC guidelines so that more participants could join in the tender bidding to make it more healthy and not for a particular tenderer.

12. Learned State counsel, in order to establish his case, submitted that two conditions 4.5(A)(a) and also 4.5(A)(c) were in

fact the stringent conditions by adding additional qualification and because of these stringent clauses, the bidders other than SOMA was not found responsive. The decision taken for rebidding, thus cannot be said to be an arbitrary decision, rather, it was on account of the fact that good number of participants could not participate.

13. Learned State counsel submitted that the Departmental Tender Committee in its meeting dated 09.07.2014 decided that the decision taken by the committee in its meeting dated 02.06.2014 and 06.06.2014 was correct and the same was accordingly affirmed but the said order was never challenged by SOMA and the learned Writ Court has also not considered that aspect despite it is specifically averred in Para 29 of the counter affidavit filed by the State that the meeting dated 09.07.2014 was held by Departmental Tender Committee in the light of the referral of the Hon'ble Chief Minister on an application moved by SOMA only in which decision dated 02.06.2014 and 06.06.2014 were affirmed in the light of Clause 4.18(d) of the CVC guidelines.

14. Learned State counsel submitted that inviting tenders and award of work is otherwise the prerogative of the State Government and the same cannot be claimed as a matter of right especially when the decision is taken on the strength of all applicable rules and in the present case, the entire tender process has been frustrated because of the lack of healthy competition.

15. Learned State counsel then submitted that there is no question of loss and gain to the State Exchequer in the present case as there is a clause of price escalation in the tender document itself and had SOMA got the tender, the revised rates and schedules would have been applicable to the payments made to it as per the norms, therefore, the decision taken for re-tendering of the bid

cannot be said to be against the public interest as held by learned Single Judge.

16. Learned State counsel thus prays for allowing the instant appeal by setting aside the impugned judgment. In short, he prays for affirming of the decisions dated 02.06.2014.

17. Per contra, Mr. Sinha, learned Senior Counsel, appearing for SOMA, while repudiating the submissions advanced by Mr. Ajit Kumar, submitted that the construction of dam in question (Kharkai Dam at Icha) is a specialized project to be carried out in the remotest area of Icha which, at one stage, used to be totally naxal infested area and in the year 1981, M/s. Hindustan Constructions Company, a reputed company, was to complete the construction of this dam, but they failed to complete the project. He submitted that construction of dam requires specialized skill, knowledge and infrastructure and any company undertaking the said project needs to have prior experience in the field and that SOMA is a pioneer in the field of such specialized nature of work which has already completed similar nature of projects very successfully.

18. Learned Senior Counsel submitted that the first tender was floated on 28.02.2014 which was of the estimated value of Rs.698 crores approximately and the second tender which was floated on 17.07.2014 was for an estimated value of Rs.738 crores approximately which tender was also cancelled on 07.08.2014. He submitted that the difference between the two tenders in a span of four months turned out to be Rs.40 crores approximately and going by re-tendering now, further additional burden on State Exchequer is going to be around Rs.100 crores which undoubtedly would be against the public interest. Learned Senior Counsel submitted that

action of cancellation of the bid and issuance of a fresh tender will be against the public interest, yet from another angle, as the tender in question is under Central Government aided scheme and funded through Accelerated Irrigation Benefits Programme (for short 'AIBP') for investment in the State and the same was to be completed by 2013-14. However, upon a written request made by the State of Jharkhand, the time was extended upto 31.03.2015 and one of the conditions stipulated in the above mentioned scheme was that if the grant-in-aid is not utilized within the stipulated time period, the same will be converted into a loan and if it is now converted into loan, State Exchequer will be burdened very heavily.

19. Learned Senior Counsel submitted that the decision for re-tendering to make the bid more competitive, on the face of it, is unjust, unfair and unreasonable as in as many as five such cases in the year 2014 itself, for similar nature of work wherein in the pre-qualification bid, only one tenderer was found responsive, the same has been cleared by the same committee. Learned Counsel submitted that the action now taken by the committee cancelling tender bid of SOMA amounts to adopting double standard which is violative of Article 14, 19(1)(g) and 21 of the Constitution of India. In order to strengthen his submissions, he has drawn the attention of the Court to Page 183-195 of LPA record (Page 54 to 69 of counter affidavit).

20. Learned Senior Counsel submitted that the learned Single Judge has rightly relied upon Clause 4.2 and 4.17 of CVC guidelines, the same being directly applicable as Clause 4.17 is invoked when there is **(a)** Invitation only to a single firm; and **(b)** Single valid acceptable quote of a tenderer. As regards the first situation, there is no dispute but in the second situation, there has

to be more than one bidder and in the present case, admittedly there were 10 persons in the meeting known as prequalification meeting and finally three had participated in the tender in which SOMA was found to be responsive on the strength of technically-cum-pre-qualification criteria. According to learned Senior Counsel, the decision was arrived after comparative analysis of three bidders upon which the bid of other two was found to be non-responsive as they had failed to meet the eligibility conditions.

21. Learned Senior Counsel submitted that the word, “**single valid acceptable quote**” means composite bid documents as supplied by the respective tenderers which includes all the eligibility certificates, as required. The tender bid/quote would include all the eligibility certificates as well as financial bid. In both situations, the tender has to be progressed and processed and the financial bid to be opened even if there is a **single valid acceptable quote**. In the present case, Clause 4.17 of CVC guidelines ought to have been invoked and not 4.18(d) of CVC guidelines as already held by the learned Single Judge, the learned Senior Counsel so contends.

22. According to the learned Senior counsel Clause 4.18(d) of CVC guidelines would apply only in a situation, where there is lack of competition due to restrictive specification and there is no whisper in the order dated 02.06.2014 that the re-tendering was done because of stringent/restrictive conditions. Therefore, it can be comfortably said that two bidders who were declared non-responsive, it was not because of any stringent conditions, rather they failed to fulfill certain requirements, therefore, found ineligible. Learned Senior Counsel submitted that although an attempt was made by the State before the Writ Court by supplementing the

reasons justifying the order dated 02.06.2014 but it was not accepted in view of the decision rendered in case ***Mohinder Singh Gill and Another Vs. the Chief Election Commissioner and Others*** reported in ***(1978) 1 SCC 405***.

23. Learned Senior Counsel, on the strength of aforesaid submissions, submitted that the instant appeal may kindly be dismissed by affirming the impugned judgment of learned Single Judge with a further direction to the respondents to open the technical as well as the price bid of SOMA and award the tender considering it responsive in technically-cum-pre-qualification bid. Learned Senior Counsel submits that rather the State should be burdened in this case with very heavy costs for delaying the entire process.

24. What requires to be appreciated in this case is whether the case of SOMA is a case of ***single quote*** or a ***single valid acceptable quote*** against limited tender or open tender on account of lack of competition falling in Clause 4.17 of CVC guidelines or it is a case of re-tendering in terms of Clause 4.18(d) of CVC guidelines by cancelling the pre-qualification bid on account of lack of competition due to restrictive specifications which did not permit many vendors to participate. Clause 4.5A(a) and Clause 4.5A(c) which relate to certain conditions in this context can also be considered as reference to these two clauses have also been made in the impugned judgment. But in our considered view, primarily the present case calls for an answer on Clause 4.17 and 4.18 of CVC guidelines.

25. Admittedly, when the meeting was held on 24.03.2014 which is called as pre-bid meeting, 10 contractors including SOMA had participated in which certain issues over the work and also the

conditions of NIT were deliberated upon and during the course of that pre-bid meeting it was noticed that there had been departures relating to certain terms and conditions of NIT from the clauses of SBD which were never approved by the department, therefore, necessary corrigendum to tender notice in accordance with SBD was asked for. Justification given by Chief Engineer was that the work in question was of specific and urgent nature, therefore, all those clauses were inserted. In this regard, it would be relevant to refer to Clause 4.5(A), 4.5(A)(a) and also Clause 4.5 (A)(c).

“4.5(A) To qualify for award of the contract, each bidder in its name should have in the last five years as referred to in Appendix.

(a) Achieved a minimum annual turnover (in all classes of civil engineering construction works only) amount indicated in Appendix in any one year. (usually not less than one & half times the estimated cost of the project may be kept. However, for Turn- key & other projects where completion period is two years or more, the annual turnover may be kept as per the requirement upto 1.50 x Estimated cost/ years of completion of project).

(b).....

(c) Executed in any one year, the minimum quantities of the following items of work as indicated Appendix.

- ***cement concrete (including RCC and PSC)cum***
- ***earthwork in both excavation and embankment (combined quantities)cum***
- ***.....cum***
- ***..... cum***

(usually 50% of estimated quantity. However, for Turn-key & other projects where completion period is two years or more as per the requirement may be kept as estimated quantity/ years of completion of project.)”

26. What appears to the Court is that these were the two conditions which, according to learned State counsel are stringent, therefore, the necessity arose for the corrigendum to which the Chief Engineer did not agree by giving justification and went ahead with the tender process in which ultimately only three tenderers could participate including SOMA.

27. We have perused the order dated 02.06.2014 whereby the tender was cancelled. It is in the shape of minutes of meeting. It was attended by Engineer-in-Chief, Chief Engineer and Deputy

Secretary-cum-Internal Financial Advisor. It does not appear in the decision that the members of the tender committee took decision for cancelling and rebidding on account of clauses being stringent, rather, on account of the fact that out of three participants, only SOMA was found to be responsive and the other participants were found to be non-responsive in light of Clause 4.A(b) and 4.A(c). We do find that in vernacular one word “विशेष” is mentioned which relates to conditions, but the cancellation is not on account of the clauses being stringent. What appears to the Court is that the decision of cancelling the tender was taken primarily on the ground that it is only SOMA who is responsive bidder and others not. The decision in vernacular reads :-

“इस कार्य हेतु आमंत्रित निविदा के निर्धारित विशेष शर्तों के आलोक में मात्र एक निविदादाता ही Technically-cum-Pre-qualification में Responsive पाए गए।

उपरोक्त के क्रम में विषयांकित निविदा को Competitive बनाने हेतु विभागीय निविदा समिति द्वारा सम्यकविचारोपरांत इस निविदा को रद्द करते हुए SBD Norms, जिसके आधार पर विभाग द्वारा निविदाएं आमंत्रित की जा रही है के आलोक में पुनर्निविदा आमंत्रित करने का निर्णय लिया गया।

मुख्य अभियंता ईचा-गालूडीह काम्पलेक्स आदित्यपुर जमशेदपुर तदनुसार अविलम्ब SBD में निर्धारित शर्तों के अनुरूप निविदा आमंत्रित करने की कार्रवाई सुनिश्चित करेंगे।”

28. In the aforesaid factual backdrop, there should not be any difficulty in holding that in the pre-qualification bid, out of three bidders, it is only SOMA which could qualify the bid being responsive and other aforesaid two companies being non-responsive.

29. Whether, in this eventuality, the present case is of only a single quote or a single valid acceptable quote received resulting into a single vendor situation indicating lack of competition for the purposes of processing it further falling within Clause 4.17 of CVC

guidelines or a case of re-tendering in terms of Clause 4.18(d) of CVC guidelines on account of lack of competition due to restrictive specification which die not permit many vendors to participate.

30. Clause 4.17 of CVC guidelines reads as follows:-

“4.17 There are cases when only a single quote or a single valid acceptable quote is received even against LTE or OTE, this results in a single vendor situation indicating lack of competition. These cases will not be treated as procurement against Single Tender Enquiry and shall be progressed as an LTE or OTE case as applicable.”

31. Clause 4.18 of CVC guidelines reads as follows:-

“4.18. Re-tendering- Re-tendering may be considered by the TPC/CFA with utmost caution, under the following circumstances:

(a) Offer do not confirm to essential specification.

(b) Wherever there are major changes in specification and quantity, which may have considerable impact on the price.

(c) Prices quoted are unreasonably high with reference to assessed price or there is evidence of a sudden slump in prices.

(d) There may be cases when the lack of competition is due to restrictive specification, which do not permit many vendors to participate. The CFA must consider if there are reasons for review of specification of the item to facilitate wider competition. Re- tendering will be done only after approval of IFA and CFA in all cases.”

32. If one reads Clause 4.17, single quote or single valid acceptable quote would certainly mean composite bid documents as supplied by the respective tenderer which would include the eligibility certificates as required, such as, completion certificate of the similar work within the specified financial period, experience and infrastructure etc. It would include financial bid as well. If this situation results into single vendor situation indicating lack of competition, the tender has to be progressed and processed and the financial bid has to be opened despite there being lack of competition. This is how Clause 4.17 is to be operated.

33. Situation is little bit different for the purposes of resorting to Clause 4.18(d) of CVC guidelines. It will apply only if there is lack of competition due to restrictive specification which did not permit many vendors to participate. The distinction is that in the first situation, attracting Clause 4.17, it turns out to be a case of single vendor indicating lack of competition which means the competition was there, whereas Clause 4.18 of CVC guidelines deals with a situation when there is no competition at all. In the case on hand, there was certainly a competition within three companies including SOMA in which SOMA turned out to be single vendor and therefore, it cannot be said to be a case for re-tendering on account of lack of competition due to restrictive specification. Lack of competition has to be construed in that manner only. In this eventuality, it is only Clause 4.17 of CVC guidelines which ought to have been invoked and not Clause 4.18 of CVC guidelines as rightly held by learned Single Judge.

34. We are conscious of the limits of judicial review in administrative action and the Court does not sit in appeal to merely review the manner in which the decision is made. However, though the Government does have a freedom of contract and in certain measures “free play in the joints” is necessary for administrative functioning, but the decision so taken is subject to be tested by the application of “**Wednesbury principles of reasonableness**” including other facets as have been held by the Hon’ble Supreme Court in the judgments laid down from time to time. Larger public interest, however is also one of the very important factors to be kept in mind by the Court. In the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into contract with

any person he likes. State is supposed to act fairly and reasonably, therefore, any decision cannot afford to be irrational or irrelevant. Testing the present case on the aforesaid “**Wednesbury Principles of reasonableness**” and keeping in view the larger public interest, the impugned action/decision taken by the Tender Committee for re-bidding warrants our interference in exercise of judicial review. Our view is reinforced by principles laid down on the subject by Hon’ble Supreme Court in case **New Horizons Ltd. v. Union of India [(1995) 1 SCC 478]** wherein their Lordships also considered the past experience, the equipment and resources at the disposal of the company as a very important factor for entering into a contract. We have also considered that aspect in the present case where construction of dam being a specialized job cannot be undertaken by everybody. The qualifications required for such like project have to be exceptionally high as any lapse can turn out to be hazardous. All these aspects have to be examined from professional point of view which means the background of the company, the persons who are in control of the same and their capacity to execute the work. This appears to be the reason that the Chief Engineer, regarding this contract gave justification for not changing the conditions of NIT, being a specialized kind of work. Perhaps, he was right in his justification as such type of construction work cannot afford discontinuation at any stage on account of inability of the company for any reason whatsoever, may be financial or technical. Huge machinery and perfect technical knowhow is required to perform such like job, therefore, exceptionally high qualification/eligibility criteria is required. We consider it proper to refer to the considerations which have to weigh upon arriving at

a decision in matters of such commercial transaction even by a public body or the State as held in the case of ***Raunzq International Ltd. V. I.V.R. Construction Ltd. [(1999) 1 SCC 492]*** in Para-9 and 10, which read 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 fulfill 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 fulfillment 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.”

Undoubtedly, SOMA qualifies all the criterias.

35. What appears to us more strange in this case is that instead of the aforesaid two tenderers M/s IL & FS Engineering and

Construction Company Limited, Hyderabad and M/s Navyuga Engineering Co. Limited, Hyderabad who have been disqualified in technically-cum-pre-qualification bid by the Tender Committee, did not challenge SBD norms or NIT conditions and the State is taking all the pains. If the issue was of stringent conditions, then the aggrieved party should have come forward challenging the same seeking re-tendering. Government and its Tender Committee appointed under the Rules are bound by their decision, more so when the Chief Engineer while disagreeing for issuance of necessary corrigendum to the tender notice has given all the justification in his letter dated 02.04.2014, relevant extract in this regard from Para (ii) is reproduced as under :-

“(ii) **IFB** की कंडिका-14 के अनुरूप कंडिका-4 में संशोधन कर दिया गया है। **SBD** की कंडिका-4.5A(b) में **Usually 50%** मूल्य के **Similar** संपादित कार्य का अनुभव होने का न्यूनतम **Qualifying Criteria** का सुझाव है। बड़े डैम जैसे अतिविशिष्ट प्रकृति के कार्य में उसके मूल्य का **50%** आकार के कार्य अनुभव के आधार पर संवेदक का चयन किया जाना कार्य की प्रस्तावित निर्धारित समय एवं गुणवत्ता के अनुरूप कार्य करने के उद्देश्य का पूरा होना संदिग्ध होगा। यहाँ भावना है कि जिस संवेदक के द्वारा 5 साल की अवधि में पूरे **Bid Value** का कार्य पूर्ण किया है, उसी से तीन साल में कार्यपूर्ण करने की उम्मीद की जा सकती है। इसी कारण से इस शर्त को **Upgrade** किया गया है, जो **SBD** के न्यूनतम **Qualifying Criteria** को **Contradict** नहीं करता है। **Pre Bid Meeting** में विभाग का प्रतिनिधित्व अद्योहस्ताक्षरी द्वारा किया गया है। इस लिए पृच्छाओं का उत्तर विभाग की ओर से देते हुए **Pre Bid meeting** के **Participants** को संतुष्ट किया गया है।”

36. What appears is that from 01.06.2014 a new schedule rate was made effective, therefore, a decision was taken on 06.06.2014 by Chief Engineer with regard to fresh proposal for pre-qualification bid in tune with the revised schedule made effective from 01.06.2014. This is how the second tender was floated on 17.07.2014 with an estimated value of Rs.738 crores (approximately) whereas the first tender was floated in February,

2014 for an estimated value of Rs.698 crores (approximately) and subsequently even the second tender has also been cancelled in August, 2014 as is the admitted position before us.

37. Another important aspect that requires to be kept in mind is that the construction of Kharhkai dam, which undoubtedly is a specialized project, was given to one M/s Hindustan Constructions Company in year 1981, a reputed company, but the same was abandoned as it failed to complete the project on account of certain naxal activities, the said area being naxal infested area. A project of construction of dam which was supposed to be completed somewhere in the 80's, has not started as yet. This project has to be completed under AIBP for which huge amount, running into crores, has been sanctioned. Although it has not been brought to our notice as to what was the estimated cost of this project when it was floated in 1981 and allotted to M/s. Hindustan Constructions Company, but one aspect is very clear that the tender which was floated in February, 2014 in which SOMA was found to be responsive was for an estimated value of Rs.697,20,31,363.00 exactly. It is in the second tender when floated in July, 2014, the estimated value was enhanced to Rs.738 crores approximately. As stated above, the second tender, however, stands cancelled on 7th of August, 2014. If re-tendering has to be done now, after the lapse of about 8 months, it would be certainly with enhanced estimated value which can bring the difference of another Rs.50-60 crores (approximately) and in all, it would be touching around Rs.100 crores, if seen from the estimated value of the first tender floated in February, 2014. It is certainly going to cause loss to the State Exchequer. We are conscious of the fact that this amount ultimately has to be adjusted from the total amount sanctioned and

funded by the Central Government through AIBP, but undoubtedly, it is a public money which cannot be wasted like this. Another aspect which is worth noticing is that all the amount funded by the Central Government under the aforesaid scheme was for a limited period for which the State of Jharkhand sought extension and got it upto 31st of March, 2015 and will have to make a request now for further extension otherwise, the grant will be converted into loan which in turn, would burden the State Exchequer more. Viewed thus, we are of the view that element of public interest would be better served, if re-bidding is not allowed and the petitioner who was considered to be responsive and the other two tenderers non-responsive, the work in question is allowed to be executed by the petitioner in the right earnest as not only it would save unnecessary escalation of cost of the project by further re-tendering of the work, but the commission of the project on an expeditious basis would serve the public purposes in its true sense as the instant Kharkai Dam was conceived in 80's and not started as yet. The timely completion of the project, undoubtedly would directly be beneficial to the public at large on all counts.

38. Arguments of Mr. Ajit Kumar that SOMA has not questioned the decision dated 09.07.2014 taken by Departmental Tender Committee finding the earlier decision to be correct as the Departmental Tender Committee was constituted on the referral of Hon'ble Chief Minister after SOMA moved an application in this regard would not change the complexion of the present case as the main issue fallen for our consideration was whether in the present set of circumstances when two other bidders had also participated and found non-responsive, Clause 4.17 of CVC guidelines ought to have been

invoked as held by learned Single Judge or it is a case attracting Clause 4.18(d) of CVC guidelines for re-bidding.

39. After examining the present case from all angles in detail, we are of the considered view that the impugned judgment of learned Single Judge setting aside the decision taken by the Tender Committee vide order dated 02.06.2014 (Annexure-3 of the writ petition) and also the decision taken vide order dated 06.06.2014 (Annexure-6 of the writ petition), does not suffer from any infirmity on any count as going for re-bidding at this stage would certainly be against larger public interest costing the State Exchequer very hugely, running into many crores. We thus affirm the said view and dismiss the instant Letters Patent Appeal. In turn, the writ petition W.P.(C) No.2845 of 2014 stands allowed, as prayed for.

40. Tender Committee is directed to open the technical as well as price bid of SOMA, having been found responsive in technical-cum-pre-qualification bid and proceed ahead to complete the entire process within one month only so that project of construction of Kharkai dam which had started 35 years back somewhere in 1981 and then abandoned, is complete atleast now.

41. However, There shall be no order as to costs.

(Virender Singh, C.J.)

(Aparesh Kumar Singh, J.)

Jharkhand High Court, Ranchi
Dated the 13 day of March, 2015

A.F.R./Birendra