

**W.P.No.20172/2012**  
**(M/s. Anuj Associates vs. National Mineral  
Development Corporation Limited & Ors.)**

**07.05.2015**

Shri R.P. Agrawal, Senior Advocate with Shri A.M. Lal, Advocate for the petitioner.

Shri Anoop Nair, Advocate for the respondents No.1 and 2.

Heard counsel for the petitioner and respondents No.1 & 2. Respondent No.3 is absent, though served.

2. In this petition filed under Article 226 of the Constitution of India, the petitioner has questioned the tender process which has already culminated with the issuance of work order in favour of respondent No.3. The tender document of the petitioner has not been accepted.

3. The principal ground urged in this petition is that the tender document submitted by the respondent no.3 was not accompanied by proof of requisite experience and P.F. Code as per Clause 4(b) at item No.11 of NIT. In other words, the tender document submitted by the respondent No.3 was incomplete as it did not contain the mandatory documents to establish the eligibility of the respondent No.3 to participate in the tender process, to wit, experience certificate and P.F. Code. Those documents were mandatory as can be discerned from Clause 4 of the notice inviting tender dated 15.09.2012

and conjointly read with the format of letter of bidders Annexure-I paragraph 3 mandating submission of documents mentioned as enclosures thereunder and more particularly Clause 5 of the general terms and conditions of the tender specified in Annexure-II. In the notice inviting tender Clause 4 refers to the pre-qualifying requirements. It reads thus:

**“4. Pre – Qualifying requirements:** The bidders in order to qualify shall satisfy the following criteria.

(a) Average annual turnover of bidder during last 3 years ending 31<sup>st</sup> March of the previous financial year should be 18 lakhs.

(b) Professional Competence:

Proof of experience having successfully completed similar works during last three years ending on date of Tender opening shall be one of the following

(i) One similar work for the value not less than 60% of estimated cost i.e. Rs.162 lakhs

or

(ii) Two similar works for the value not less than 40% of estimated cost i.e. Rs.108 lakhs each

or

(iii) Three similar works for the value not less than 30% of estimated cost i.e. Rs.81 lakhs each.

(c) The bidders should submit Solvency Certificate issued by scheduled bank for a value of Rs.30 lakhs and the certificate should not be earlier than one month from due date of submission of the tender”.

(emphasis supplied)

4. In Annexure-I, in the tender document titled as “Letter of Bidders”, the bidder is expected to submit documents mentioned in paragraph 3 therein. Paragraph 3

of the said Letter of Bidders reads thus:

“3. I/We submit the relevant documents as detailed hereunder:-

**ENCLOSURES;**

1. Notice Inviting Tender duly signed on each page.
2. Instructions to Bidders duly signed on each page.
3. Declaration – (Annexure V) duly filled-in & signed.
4. General conditions of contract duly signed on each page.
5. Documentary evidence of experience i.e. Work order, in running of bus services.
6. Documentary evidence about financial capability.
7. Income-tax PAN & Service Tax Registration No.
8. DD/FDR duly discharged for the EMD amount and cost of tender documents, if downloaded.
9. In case of Partnership firm or Company, a copy each of Partnership Deed/Power of Attorney/Articles of Association & Memorandum of Association as the case may be.
10. Proof of Turnover details i.e. copy of balance sheet.
11. PF Code No.
12. Solvency Certificate”.

(emphasis supplied)

5. In addition, we may usefully refer to Clause 5 of general terms and conditions of tender specified in Annexure-II, which reads thus:

**“5. Documentary proof for experience, financial capabilities, turnover for the last three years (i.e. Balance sheet for last three consecutive years up to March 2012) with technical bid (Part-II), statutory compliances etc.** as given in clause no.3 of Annexure-I of NIT, shall be submitted alongwith the tender. The offers of those bidders not enclosing these documents are liable to be rejected”.

6. On conjoint reading of the aforesaid stipulations there is no manner of doubt that submission of the proof of experience is a basic and mandatory requirement. That position is reinforced from the compliance to be made by the bidders while sending letter in the format prescribed in Annexure-I, especially noted in clause No.5 of the general terms and conditions. Clause No.5 has been highlighted in the tender document in bold. Clause 5 stipulates submission of documentary proof for experience amongst other documents when technical bid (Part-II) and other statutory compliances as given in clause 3 of Annexure-I i.e. Letter of Bidders referred to above. These documents have been made mandatory. As a matter of fact, proof of experience is bare minimum that the bidder has to submit alongwith tender document to substantiate his eligibility to participate in the tender process as notified.

7. The argument of the respondent Nos.1 and 2, however, is that, non-submission of proof of experience or for that matter P.F. Code number did not warrant

rejection of the tender document. It was always open to the appropriate Authority to permit the bidder to explain the position and to submit those documents or information in that process. The appropriate Authority is empowered to do so in view of Section-1-Institution of bidder compendium, extract whereof is appended to Annexure-R/1 to the reply-affidavit. Reliance has been placed on Clause serial No.12 in the Annexure-R/1. The same reads thus:

12	<b>25. Clarification of Bids</b> <b>25.1</b> To assist in the examination and comparison of Bids, the Employer may, at his discretion, ask any Bidder for clarification of his Bid, including breakdown of unit rates. The request for clarification and the response shall be in writing or by cable, but no change in the price or substance of the Bid shall be sought, offered, or permitted except as required to conform the correction of arithmetic errors discovered by the Employer in the evaluation of the Bids in accordance with Clause 27.	During the processing / evaluation of the tender proposals, the tenderers may be required to attend to the OWNER'S office for discussions/ clarifications. Tenderers, on request from the OWNER, shall attend Tender discussions at their cost.	To accept CDDDB clause in addition to NMDC Clauses.
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8. On a bare reading of this clause, it is noticed that the appropriate Authority can call upon the bidder to assist in the examination and comparison of the bids to offer certain explanation. This provision, however, does not mean that the mandatory document which is required to be furnished to substantiate the eligibility of the bidder

and necessary to be examined at the threshold as pre-qualifying requirement, can be submitted in the garb of clarification. The clarification can be in respect of matters, which are already before the Authority and some further information in that behalf is required. Non-submission of proof of experience certainly warranted rejection of the tender document submitted by respondent No.3.

9. The Counsel for the respondent Nos.1 and 2 was at pains to contend that the provision made in Clause 5 of Annexure-II must be read as directory and not mandatory. According to respondents, the very nature of expression used “is liable to be rejected” and not “shall be rejected”. It is well settled position that the expression used in the document must be interpreted in the context. When examined in the context whether the proof of experience is a mandatory document to be submitted alongwith the tender document, there can be no doubt that the expression “liable” must be treated as mandatory and not directory - because the proof of experience touches upon the issue of eligibility of the bidder. As aforesaid, Clause No.5 in Annexure-II providing for general terms and conditions of the tender has been highlighted in bold to attract the attention of all concerned and to impress upon them that submission of documents referred to therein are mandatory. Besides Clause No.5 of Annexure-

II, even the format of letter of bidders Annexure-I makes it amply clear that it was obligatory to enclose document of proof of experience as well as P.F. Code number alongwith the said letter being mandatory. If the argument of the respondents were to be accepted then even other documents referred to as enclosures in the letter of bidders would become dispensable and expendable, which contention cannot be countenanced.

**10.** In our opinion, submission of proof of experience alongwith the tender document in any case was a mandatory requirement. Understood thus, it should necessarily follow that the tender process finalized in favour of respondent No.3 is in excess of authority and in favour of person whose tender document should have been rejected at the threshold for want of proof of experience and having failed to substantiate eligibility to participate in the tender process.

**11.** Counsel for the respondents No.1 and 2 submits that both the bidders were invited to offer explanation by the appropriate Authority, in which, they participated and after completion of that procedure having found that respondent No.3 is the lowest bidder, contract has been awarded to him. The fact that the petitioner responded to the call given by the appropriate Authority to offer explanation in respect of certain matters, that does not take the matter any farther.

**12.** The moot question is : whether the tender document submitted by respondent No.3 fulfilled the mandatory requirement? If that is to be answered in the negative, all other incidental matters would be of no consequence, having held that tender document submitted by the respondent No.3 was defective for having failed to submit documentary proof of experience. It follows that the same should have been rejected by the appropriate Authority at the threshold.

**13.** The counsel for respondents No.1 and 2 lastly submits that even the petitioner is not eligible to participate in the tender process as the petitioner was relying on power of attorney executed in his favour in the year 2009. The tenure of that power of attorney had already expired and therefore the petitioner did not have legal authority to participate in the tender process. That is not the ground on which the tender document of the petitioner has been rejected. That question should have been examined by the appropriate Authority during the scrutiny of the documents submitted by the bidders. At the same time, we may observe that the substantive relief claimed by the petitioner is only to reject the technical bid of respondent no.3 and not for further relief that the contract should be awarded to the petitioner.

**14.** Moreover, since the work order issued to respondent No.3 is being quashed in terms of this order being



consequence of invalid process, it would be open to the respondents No.1 and 2 to consider the eligibility of the petitioner to participate in the impugned tender process and if the appropriate Authority finds that the petitioner was eligible to participate in the said process, may take decision, as may be advised, as the tenure of contract notified in the tender notice was limited to three years and extendable by one year. It will be open to respondents No.1 and 2 to also consider inviting fresh tenders. All these aspects will have to be considered by the respondents No.1 and 2 on its own merits in accordance with law.

**15.** Suffice it to hold that the relief as claimed by the petitioner even if accepted, the petitioner cannot be given further relief of directing the respondents No.1 and 2 to award contract to the petitioner.

**16.** We are conscious of the fact that the petitioner has asked for residuary prayer of any other relief and may contend that the Court must mould the relief in favour of the petitioner, but in the fact situation of the present case, we are not inclined to do so as the question regarding eligibility of petitioner itself has been raised, which will have to be examined by the appropriate Authority of respondents No.1 and 2 in the first instance.

**17.** Accordingly, this petition partly **succeeds** on the

above terms with no order as to costs.

**18.** At this stage counsel for the respondents No.1 and 2 submits that since the Court has cancelled the contract awarded to respondent No.3 in furtherance of impugned tender process, the respondents No.1 and 2 be permitted to continue with the present arrangement until the fresh tender process is resorted to.

**19.** We find this request to be fair and appropriate. The respondents No.1 and 2 are granted four weeks time for that purpose. We also make it clear that it will be open to respondent No.3 to participate in the fresh tender process, if so advised, in spite of setting aside of the contract awarded to him in furtherance of the impugned tender process.

**20.** Ordered accordingly.

**(A. M. Khanwilkar)**  
**Chief Justice**

**(K.K. Trivedi)**  
**Judge**