
(2002) 09 MP CK 0025

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3391 of 2002

Anil Kumar Grover

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Citation : (2002) ILR (MP) 460 : (2003) 1 MPHT 565

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : R.N. Singh and Arpan Pawar, for the Appellant; R.S. Patel, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.—In this writ petition, the petitioner is assailing the action of the respondents in not issuing the tender documents as per Orders (P-5), dated 11-5-2002 and (P-6), 26-4-2002. Petitioner preferred appeals that have also been disallowed as per order (P-9), dated 14-6-2002 and (P-16), dated 16-8-2002 passed by respondent No. 2.

2. Petitioner submits that petitioner is a reputed engineer and a recognized contractor in the field of construction. He is registered with the Public Works Department of Govt. of M.P. as a contractor of A-5 class which is of super special class (hereinafter referred to as "SS") that is the one which is of unlimited monetary limit. Petitioner submits that he has successfully executed a number of big works and is, therefore, equated with construction legends like M/s. Larson & Tubro Ltd., M/s. Ircon International Ltd. and M/s. Simco Birla Ltd., etc.

3. In the month of January, 2002, the respondent No. 3 Chief Engineer, Head Quarters, Jabalpur Zone, invited applications from eligible contractors enlisted with MES, PWD, CPWD, etc. for issue of tender forms in respect of two different works viz., (i) Replacement/New Construction of Magazines (Phase II) at Ordnance Factory, Khamaria and (ii) Provision of 144 OR"s OTM ACCN for 1 STC

at Jabalpur. Notices are Annexures P-1, P/1-A and P-2. Petitioner being an eligible and registered contractor with PWD, submitted his application to respondent No. 3 for issue of tender form in respect of both the aforesaid works alongwith various documents viz., the registration certificate, income tax clearance certificate, bankers solvency certificate, etc. After submitting the applications (P-3) and (P-4), petitioner was hopeful of issue of tender forms to him. However, the same have been denied to the petitioner without assigning any reason as per orders (P-5) and (P-6). Remedy of appeal was available to the petitioner. Petitioner preferred appeals; petitioner detailed his financial position, income tax clearance certificate, bankers solvency certificate, etc. However, the appeal for work of Replacement/New Construction of EDK Magazines (Phase II), O.E., Khamaria has been dismissed as per order (P-9) passed by respondent No. 2/Chief Engineer, Head Quarters, Central Command, Lucknow.

4. Earlier petitioner filed a Writ Petition No. 3434/2001 which was decided on 20-8-2001 whereby the respondents were directed to issue the tender form to the petitioner treating him as eligible for issue of tender form for similar nature of work.

5. The other appeal of the petitioner as against order (P-6) has been decided during pendency of the writ petition as per order P-16, dated 16-8-2002. Petitioner assails the orders (P-5), (P-6), (P-9) and (P-16) in the instant writ petition.

6. Petitioner submits that merely because adequate number of tender forms have been issued to MES contractors, the respondents cannot refuse supply of tender forms to the petitioner when he is eligible and competent. Reliance is also placed on a decision of this Court P-10 in W.P. No. 3434/2001, decided on 20th August, 2001 and in L.P.A. No. 249/2001, decided on 15-4-2001.

7. In the return filed by respondents, it is contended that the appeal with respect to work of Replacement/New Construction of EDK Magazines (Phase II) at OFK, Jabalpur has so far been considered and decided by the competent authority and appeal in respect of work under Provision of 144 Ors OTM Accommodation for 1 STC at Jabalpur is under consideration, therefore, the petition is premature. The eligibility criteria is enlistment of "SS" class in MES. Copy of Appendix A to NIT is annexed and marked as R-2 to the return. As per the departmental policy for enlistment in "SS" class of MES, following requirements are to be fulfilled :--

(i) The firm should have completed at least one work of Rs. 7.5 crores or two works each of Rs. 4.5 crores during the last three years;

(ii) The annual turnover of the firm for the last three years shall not be less than Rs. 4.5 crores.

Reliance is placed on instructions Annexure R-3. Petitioner firm does not meet the eligibility criteria for enlistment of SS class in MES, hence as per the NIT, the firm is not eligible for issue of tender form for the subject work. Petitioner turn

over does not meet the criteria of 4.5 crores for last three years. The biggest project completed by the petitioner firm till date is of meagre 3.12 crores. The decision has been taken properly not to issue the tender documents.

8. In the rejoinder the petitioner submits that the respondents have opened tenders for the contract work of provision of 144 ORs OTM ACC for 1 STC on 22-7-2002; the notice inviting applications, issued by the respondents nowhere provide that the contractor who do not fulfil the eligibility criteria for enlistment in SS class shall not be eligible for issue offender form. The criteria is registration in the requisite class.

9. In the additional return, the respondents have taken the stand that the documents given by the firm with application for issue of tender in the earlier case were different from those submitted now, hence the facts of the two petitions become entirely different. Thus, subject-matter of Writ Petition No. 3434/2001 and L.P. A. No. 249/2001 was different. Balance sheets, certificates of works executed in past etc., clearly show the name and style of firm as M/s. Anil Kumar Grover and this fact has not been denied. The firm M/s. Anil Kumar Grover does not meet the basic conditions in NIT, hence, the rejection of the applications for issue of tender documents by respondents is as per NIT and in accordance with law.

10. Minutes of the meeting of Tender Selection Committee have also been produced by the respondents. Minutes of meeting dated 13th February, 2002 indicate that petitioner was not issued the tender form only on the ground that :--

"as there are sufficient enlisted firms of eligible class "SS" of MES, firms not enlisted in MES are not considered for issue of tenders."

11. The name of petitioner/firm finds place in serial No. 30 Appendix A; Tender Selection Committee considered the matter on 8th April, 2002; minutes of this meeting have also been produced by respondents which read as under :--

"Findings and recommendations of Tender Selection Committee :

(1) The Board has perused the provisions of the following letters considered relevant to the subject :

(a) E-in-C's Branch letter No. 33416/POLICY/E8, dated 21st Apr., 1999.

(b) E-in-C's Branch letter No. 33416/POLICY/E8, dated 21st July, 2000.

(c) E-in-C's Branch letter No. 33416/POLICY/E8, dated 2nd July, 2001.

(d) HQ CE CC letter No. 915100/246/TSC/203/E8 CC dated 18th Dec., 2001.

(e) E-in-C's Branch letter No. 66546/E8, dated 22nd January, 1999.

(2) Accordingly, the criteria for selection of the firms is decided is as under :--

"Firms of "S" class having completed at least two works in the department each

costing Rs. 4.5 crores or single work costing Rs. 7.5 crores and annual turnover of Rs. 4.5 crores during last three years."

(3) On perusal of the details/replies in respect of the firms as per Appx "A" enclosed, only following firms meet the criteria mentioned above and accordingly recommended for issue of the tender.

No. Name of firm Index No. ITCC Validity

1. M/s. Lal Costn. Co, S-33/SC 29-1-2003
2. M/s. Bengal Trading Syndicate (1952) S-74/CC S-28/EC 10-2-2003
3. M/s. Shri Gurumukhdas Contractors S-77/CC 31-3-2002
4. M/s. Bee Jay Associates Pvt. Ltd. S-29/SC 15-7-2002
5. M/s. Mohta Constn. Co. S-46/SC 13-12-2002
6. M/s. National Bldg. Constrn. Corpn. S-1/SC 24-4-2002

Accordingly, the Appx "B" of earlier report of Tender Selection Committee should be modified."

Thus, a decision was taken to include even the S category of contractors who were earlier not qualified for issue of tender documents as per conditions mentioned in NIT.

12. Shri R.N. Singh, learned Senior Counsel for petitioner submits that it is a case where respondents have continuously harassed the petitioner; previously the petitioner had to file W.P. No. 3434/2001 when the tender documents were not issued with respect to the work which was to the extent of Rs. 8.5 crores; Writ Petition No. 3434/2001 was allowed by this Court on 20th August, 2001; the decision was challenged in L.P.A. No. 249/2001 which was disposed of on 15-10-2001 as the respondents decided to issue the tender form to the petitioner. This Court in L.P.A. directed that "the appellants would give tender form to the respondent, which he would fill in and furnish to the appellants. It would be considered along with other tenders, if any, and decided on merits". The work in question are for respectively 9 crores and 1 crore; to the extent of which amount of work this Court in the previous writ petition held petitioner to be eligible for issue of tender form which decision was affirmed in LPA and respondents were directed to issue the tender. Now again the respondents have taken a decision not to issue the tender form for similar work on flimsy grounds. Learned Senior Counsel further submits that in the notice inviting tenders (P-1) and (P/1-A) the only requirement was enlistment with MES, PWD, CPWD and Railway Contractors of "appropriate class" for the replacement/new construction of EDK Magazines (Phase II) at O.F., Khamaria, Jabalpur. Estimated cost is Rs. 900 lakhs; earnest money is Rs. 4,25,000/- in favour of G.E. (P) Fy., Khamaria, Jabalpur. Contractors not enlisted with the MES are required to submit with their application, copies of letters of enlistment in other Department, Income Tax

Clearance Certificate and particulars of works carried out by them during the last two years giving the designation of the officers under whom the works were executed. However, the right was reserved by the respondents to issue the tender, but they cannot act arbitrarily in such matter. Learned Senior Counsel submits that for the work as per NIT (P-2) applications were invited from "A" class contractor; estimated cost of the work is Rs. 100 lakhs, completion period is 15 months. Thus, the petitioner company enlisted in "A-5" class with PWD qualifies for both the works. To the utmost surprise, the petitioner is not found fit whereas the respondents have decided to issue the tender of 9 crores even to the "S" class contractor and with respect to P-2 petitioner is the higher class contractor than required but still he has not been found eligible for issue of tender. He submits that petitioner is registered as A-5 class contractor which is equivalent to SS class contractor of MES. The decision is arbitrary and there is continuous harassment of the petitioner, hence, interference is required to be made in this writ petition.

13. In order to appreciate the rival submission it is necessary to quote the relevant portion of NIT Annexure P/1-A :--

"The Chief Engineer, Jabalpur Zone, Bhagat Marg, Post Box No. 84, Jabalpur - 482 001, invites applications by 6th February, 2002 from enlisted MES, PWD, CPWD and Railway Contractors of appropriate class for issue of tenders for the undermentioned work :--

Sr. No.	Name of Work	Estimated cost Rs.	Earnest Money Rs.
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1.	Replacement/New Construction of EDK Magazines (Phase II) at O.F., Khamaria, Jabalpur	900 lakhs	4,25,000 in favour of GE(P) Fy., Khamaria, Jabalpur.
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Contractors not enlisted with the MES are requested to submit their application, copies of letters of enlistment in other Department, Income Tax Clearance Certificate and particulars of works carried out by them during the last two years giving the designation of the Officers under whom the works were executed.

Earnest money shall be deposited alongwith the tender by the contractors who have no Standing Security with the MES."

14. Appendix "A" to Notice of Tender as contained in Annexure R-2 is also relevant which is quoted below :--

"8 Appropriate class of contractor "SS" class Note :--Invitation for application for issue of tender does not constitute any guarantee for issue of tender to applicants even to contractors of appropriate class enlisted in this department. Issue of tenders will be decided by the Accepting Officer based on inter alia, past

track record, financial position and experience of similar works executed by the applicant/contractor. The Accepting Officer shall consider applications received upto the last date of receipt of applications/extended date of receipt of applications for issue of tender. The applicant/contractor will be informed regarding non-issue of tender without assigning reasons. The applicant/contractor if so desires, may appeal to the next higher Engineer Authority HQ CE, Central Command, Lucknow with copy to the Accepting Officer. No appeal/representation shall be entertained in respect of applications for issue of tender received after the due date of receipt of applications. The decision of the next higher Engineer Authority shall be final and binding. No applicant contractor shall be entitled for any compensation whatsoever for rejection of his application.

The Accepting Officer reserves his right to accept a tender submitted by a Public undertaking giving a price preference over other tender which may be lower as are admissible under the Govt. Policy. No claim for any compensation or otherwise shall be admissible for such tenders whose tenders may be rejected on account of the said policy."

15. The decision taken by the Tender Selection Committee on 13 February, 2002 is relevant with respect to the petitioner; the Tender Selection Committee decided not to issue the tender only on the ground that there are sufficient enlisted firms of eligible class "SS" of MES. The orders (P-5) and (P-6) do not give any reason; simply intimation was issued that the subject tender has not been issued to the petitioner in both the cases. Order (P-9) passed by respondent No. 2 gives the following reasons :--

"2 (a) The estimated value of the work is Rs. 900.00 lakhs, and for a work of this magnitude, a contractor enlisted in class "SS" (unlimited tendering limit) is eligible for issue of tender. Adequate number of tenders have already been issued to the contractors enlisted with department.

(b) For enlistment in class "SS" a contractor is required to complete two works each of value Rs. 4.50 crores or one work of value Rs. 7.50 crores. Also, the annual turn over of the firm during the previous three years should be more than Rs. 4.50 crores. The details of contract works (Annexure IV) submitted by you show two works, one of the value of Rs. 312.00 lakhs and the other of value Rs. 550.00 lakhs. Both these works are currently under execution and have not been completed as on date. Thus, these do not show your capability as per guidelines fixed by the department.

(c) It is also considered that you are adequately loaded as it has been shown by you that works amounting to Rs. 800.00 lakhs are under progress.

(d) As per the Income Tax Clearance Certificate submitted by you, the total contract amount received by you as the years 1999-2000 and 2001-2002 is less than Rs. 4.50 crores which shows that your turnover is less than Rs. 4.50 crores which is one of the criteria for enlistment in class "SS".

16. The first question for consideration is that whether the decision taken not to issue the tender document to the contractors from whom the applications were invited and a decision to issue it only to enlisted contractors in MES is in accordance with the terms and conditions on which the notice inviting tenders (P-1), (P/1-A) and (P-2) were issued. True it is that invitation for application for issue of tender does not guarantee issue of tender form to the applicant, but at the same time it is ensured in the fair procedure that case is not to be dealt with arbitrarily; if a contractor is qualified in terms of the notice inviting tenders and applications have been invited from contractors enlisted with PWD, CPWD and Railways of appropriate class they could not be ousted at the threshold only on the ground that sufficient applications have been received from the contractors enlisted/registered with MES which was not so mentioned in (P-1) or (P-2), thus, in my opinion, the petitioner has been kept out of process in arbitrary manner. Once the contractor who has submitted his form and was having proper eligibility, could not be ousted simply on the basis that MES contractors have filed applications. The decision ousts the eligible contractors on classification which is not permissible as per NIT.

17. Yet another flaw in the procedure is to be found that the applications were invited as per R-2 for "SS" class contractor only; later on this qualification has also been relaxed with respect to enlisted contractors with MES and "S" class contractors enlisted with MES has been considered to be eligible for the work of 9 crores. This is in contravention to the Appendix A filed as R-2 with the return.

18. The Apex Court has laid down the parameters of reasonableness which are to be followed in the matter of grant of contracts and unreasonable action cannot be allowed to stand with test of reasonableness. No doubt that condition of eligibility requires strict compliance but at the same time fair and equal opportunity has to be ensured is the law laid down by the Apex Court in number of the decisions viz., Tata Cellular Vs. Union of India, and in Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, .

19. In Tata Cellular (supra), the Apex Court has laid down that obligations of Notice Inviting Tender must be fulfilled. The Apex Court has laid down the following principles :--

"The principles deducible from the above are :--

- (1) The modern trend points to judicial restraint in administrative action;
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made;
- (3) The Court does not expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible;
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking,

the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury Principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides;

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

20. In *Air India Ltd.* (supra), it has been laid down that judicial review is confined to the process adopted not to the actual decision. It is open to the State to choose its own method but the method adopted should be complied with the norms, standard and procedure. The price need not always be the decisive factor. Decision has to be taken on the basis of overall view of the transaction viability weighing various relevant factors and having regard to commercial viability. Court cannot interfere with the decision but it can interfere with the decision making process on grounds of malafides, unreasonableness or arbitrariness. Court has to exercise its jurisdiction towards furtherance of overwhelming public interest.

21. Apex Court in case of *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, , has classified the requirement in a tender notice into two categories those which lay down the essential condition of eligibility and the others which are merely ancillary or subsidiary with the main object to be levied by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

22. The reasons mentioned by the appellate authority are also insufficient to render the decision of Tender Selection Committee to be valid. One of the reason adopted by the appellate authority that adequate enlisted contractors are available; it is also mentioned in order (P-9) mainly that petitioner is not qualified and experienced; this aspect has been dealt with in the previous Writ Petition No. 3434/2001 elaborately by this Court wherein this Court held that :--

"9. To appreciate the rival submissions raised at the Bar, I have carefully persued Annexure P-1, the notice inviting tender published in "Dainik Bhaskar", On a scrutiny of the same it does not appear that the contractor in question must be an approved contractor. It has not been spelt out which is the authority to have approved the contractor. There is no stipulation with regard to completion of any kind of work within a particular period. That apart I may hereby refer to Regulation 419 of MES. It reads as under :--

"Tenders will normally be issued only to those contractors who are on the MES list of approved contractors and within whose tender limit the amount of the proposed work lies (but see para 413). Tenders may also be issued, at the discretion of the Accepting Officer, to registered contractors of PWD or Railways and to unregistered contractors :

Provided always that the successful tenderer is registered with the MES before his order is accepted."

10. On a perusal of the aforesaid regulation it is quite vivid that discretion has been vested with the authority to provide the tender forms to the PWD contractors with a stipulation that the successful tenderer would get himself registered with the MES before his tender is accepted. Quite apart from the above this regulation has also not been incorporated in the NIT. On a query being made Mrs. Nair fairly stated that as the discretion has been vested with the authority concerned to choose a PWD contractor the same regulation has not been published in the NIT as that would have worked as a mandatory condition. In absence of such incorporation, I am of the considered view the petitioner was eligible to receive the tender form. I am conscious the Court should be very slow in the matter of interference with regard to conditions imposed in the NIT as that is the privilege of the owner. This view of mine gets support from the decision rendered in the case of Tata Cellular Vs. Union of India, . But the present factual matrix stand on a different footing inasmuch as the question of interference in the terms and conditions of the NIT does not arise inasmuch as the NIT does not stipulate and terms and conditions and in absence of any postulate the petitioner cannot be deprived to receive the tender form. I may hasten to add supply of a tender form to the petitioner does not confer any right to him to get the work. It is open to the owner to have a comparative merit to choose the best. This is his prerogative. However, as far as the present relief is concerned a direction is issued to the respondent Nos. 2 and 3 to supply the tender form to the petitioner by tomorrow, i.e., 21-8-2001. The petitioner shall submit his tender by the stipulated date, i.e., 23-8-2001."

23. The decision ought to have been followed and petitioner's claim should not have been rejected at the threshold as has been done which again necessitated filing of the present writ petition. It is also to be noted that decision of Single Bench of this Court in W.P. No. 3434/2001 was also subject-matter of L.P.A. No. 249/2001 in which Division Bench of this Court passed the following order on 15-10-2001 :--

"Smt. I Nair, Advocate for the appellant.

Shri R.N. Singh, Sr. Advocate with Shri A.P. Singh, Advocate for the respondent.

Smt. I. Nair, learned Counsel submits that her clients are implementing the judgment of this Court by issuing tender form to the respondent. This statement is recorded. Learned Counsel for the appellants submits that the respondent may be asked to furnish documents communicated to him, by letter dated August 27,

2001 (AnnexureA-3).

Shri R.N. Singh, learned Senior Counsel appearing for the respondent, submits that the appellants want to put his client in difficulty calling for all these documents and other related information with a view to reject his form on flimsy grounds.

With a view to settle the dispute between the parties, we direct as follows :--

"The appellants would give tender form to the respondent, which he would fill in and furnish to the appellants. It would be considered along with other tenders, if any, and decided on merits. In the event of tender of the respondent being accepted for allotment of work, the respondent would furnish the relevant and necessary documents".

The appeal is disposed of accordingly."

24. Thus, with respect to the qualification of the petitioner the previous decision takes care and even otherwise the submission raised by learned Counsel for respondents that the requirement of MES for registration as "SS" class contractors should be read into in the NIT cannot be accepted as the applications were invited even from the contractors enlisted with PWD, CPWD and Railways and from those who are enlisted with MES having the capacity to perform the work of unlimited value are qualified. The enlistment condition as "SS" class in MES cannot be read for enlistment conditions for PWD, CPWD and Railways. Once having framed the conditions of inviting the applications from the contractors enlisted with other departments, it was not open to impose on them the experience required for enlistment as "SS" class contractor in MES. Even otherwise that is not the ground taken by the Tender Selection Committee while rejecting the applications at the threshold.

25. Thus, in my opinion, the decision of the respondents not to issue the tender documents to the petitioner is bad in law. It is still surprising that petitioner has not been found fit for issue of tender form for even 1 crore work which can be performed by "A" class contractor wherein petitioner is "A-5" class contractor and can perform the work for an unlimited value. Thus, the decision shows arbitrariness and cannot be allowed to stand. The respondents are directed to proceed in accordance with law.

26. Resultantly the petition is allowed. Costs on parties.