
(2011) 06 GAU CK 0084
In the Gauhati High Court
Case No : Writ Appeal No. 97 of 2011

Avon Cycles Limited

APPELLANT

Vs

The State of Assam and S.K. Bikes (P) Ltd.

RESPONDENT

Date of Decision : 03-06-2011

Acts Referred:

Citation : (2011) 5 GLR 861

Hon'ble Judges : K. Meruno, J; Amitava Roy, J

Bench : Division Bench

Advocate : G.N. Sahewalla, Md. Aslam, D. Senapati, J. Bora and U. Dutta, for the Appellant; S.N. Sarma U.K. Nair and V.M. Thomas, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The instant appeal mounts a challenge to the judgment and order dated 25.2.2011 rendered in WP(C) No. 324/2011 negating the Appellant/writ Petitioner's impingement of the process initiated by the Notice Inviting Tender (for short, hereinafter referred to as "the NIT") dated 20.11.2010 for procurement of 35,086 or more ladies bicycles as well as the order dated 10.1.2011 issued by the Director of Elementary Education, Assam awarding the contract therefore in favor of the Respondent No. 3 herein.

2. I have heard Mr. GN Sahewalla, learned senior counsel for the Appellant/writ Petitioner; Mr V.M. Thomas, learned Standing Counsel, Education Department, Govt. of Assam and Mr SN Sarma, learned senior counsel assisted by Mr UK Nair and Mr A Sarma, Advocates for the Respondent No. 3.

3. The facts in bare essential have to be recited to better comprehend the rival submissions. A NIT bearing No. EE(Plan)114 dated 20.11.2010 was issued by the Director of Elementary Education, Assam, Guwahati inviting bids for the aforementioned supply. The bidding document furnished in connection therewith mentioned inter alia the last date and time of submission of Bids and opening of the Technical Bids to be 29.11.2010 up to 1400 Hrs. and 29.11.2010 at 1530

Hrs. respectively. The bid document disclosed that the date and time of opening of the commercial bids would be intimated to the qualified Bidders by the Purchaser on the date of opening of the Technical Bid or on any subsequent date either through fax or letter. In Chapter-D under Section-II carrying the instructions to the bidders the relevant steps pertaining to Bid opening and evaluation were set out in succession. Clause 19.1 prescribed that the Purchaser would open all the Technical Bids in presence of the Bidders' representatives who choose to attend as per the schedule given in the invitation for Bids. Under Clause 19.2 the Bidders' representatives present at the time of opening of the technical bids were required to sign a register evidencing their attendance. Clause 19.5 enjoined that the Commercial Bids would be opened after the evaluation of the Technical Bids on the date, time and place to be notified and the Purchaser at its discretion might call the responsive bidders to read out their price.

4. In all, four firms submitted their bids-Technical and Commercial in separate envelopes. The Technical Bids were opened on 29.11.2010 as scheduled. According to the Appellant/writ Petitioner, the Technical Bids of all the Bidders except that of the Respondent No. 3 were found to be in order. Vis-à-vis that of the Respondent No. 3 it was commented upon by the concerned State official that it had not properly furnished the capability statement and the tender form as stipulated in Section -XII and XIII of the bidding document.

5. After opening of the Technical Bids, however, the representatives of the Bidders were informed that the date of opening of the Commercial Bids would be subsequently intimated to them (Bidders). As there was a stony and inexplicable silence thereafter, the representative of the Appellant/writ Petitioner enquired of those of the Respondent Nos. 4 and 5 as to whether they had any intimation with regard to the date of opening of the Commercial Bids to which the reply was in the negative. Situated thus, the representative of the Appellant/writ Petitioner visited the office of the Respondent No. 2 on 28.12.2010 and could come to learn that the price bids of the Bidders had meanwhile been opened and that the concerned authorities were contemplating to award the contract in favor of the Respondent No. 3. Contending that the process was being administered in departure of an express tender norm which was impermissible and relying as well on the report of the Chief Technical Examiner's Organization of the Central Vigilance Commission underlining the necessity of prior information to the Bidders or their representatives about the opening of the bids, the Appellant/writ Petitioner approached this Court seeking the above relief's. The writ petition was thereafter amended to bring on record the factor of constitution of a Purchase Committee by the Govt. of Assam vide its notification dated 3.12.2010, its recommendations in favor of the Respondent No. 3 and the Memo No. EE(Plan)114/2010/95 dated 10.1.2011 placing the order of supply of the bicycles in its favor.

6. The Respondent No. 2, the Director of Elementary Education, Assam in his

affidavit while affirming that in all four tenders were in the fray and that their Technical Bids on being opened on 29.11.2010 in presence of their representatives were found to be valid in all respects, denied the plea of the Appellant/writ Petitioner that it was mandatory to notify or call the Bidders or their representatives about the date and time of opening of the Commercial Bids. The answering Respondent admitted the constitution of a Purchase Committee by the Notification dated 3.12.2010 and asserted that it was considered necessary to ensure acceptance of reasonable and fair rates for supply as contemplated. It was pleaded in categorical terms that on proper scrutiny of all aspects the Purchase Committee had ascertained the rate quoted by the Respondent No. 3 to be the lowest and its sample to be in conformity with the prescribed specifications and, thus, recommended the award of the contract to it. The answering Respondent stated that accordingly the impugned Memorandum dated 10.1.2011 was issued.

7. In its affidavit-in-reply, the Appellant/writ Petitioner while generally reiterating and reaffirming the statements made in the writ petition, questioned the validity of the proceedings of the Purchase Committee on the ground that all the members thereof had not attended its meeting on 28.12.2010 in which the Respondent No. 3 was recommended for the contract.

8. Mr Sahewalla has assiduously argued with reference to the tender conditions aforementioned as contained in the bid document as well as the CVC recommendation that the omission on the part of the State authorities to intimate the Bidders or their representatives about the date and time of opening of the Commercial Bids was an incurable infirmity rendering the process non-est in law. According to him, as the exercise undertaken was for the award of a global contract, no deviation from the express tender conditions was permissible. He contended that having regard to the language applied in Clause 19.5 in particular, it was incumbent on the part of the State Respondents to intimate the Bidders and their representatives about the date and time of opening of the Commercial Bids and that failure on their part to do so has vitiated the process as a whole. He maintained that in absence of any provision in the tender norms allowing constitution of a Purchase Committee, it was prohibited in law and, thus, its purported recommendations recorded in its meeting dated 28.12.2010 ought to be adjudged non-existent. As the requirement of proper information to the Bidders and their representatives to be present at the time of opening of the Commercial Bids was by way of certitude of transparency in the pursuit undertaken, the failure of the State Respondents in this regard has afflicted the process with a vitiating want of objectivity, fairness and transparency, thus, rendering it null and void. The learned senior counsel having regard to the sequence of events has expressed apprehension with regard to the possibility of interpolation of rates, more particularly in absence of any explanation for the outright departure from the express tender norms. According to him, the learned Single Judge left out of consideration this vital aspect of the debate. To endorse his arguments Mr Sahewalla has placed reliance on the decision of the Apex

Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,

9. Mr Thomas, learned Counsel for the official Respondents has argued that it being evident from Clause 19.5 of the bidding document that intimation to the Bidders or their representatives about the date and time of opening of the Commercial Bids was not an essential and imperative stipulation but an optional one, the plea to the contrary of the Appellant is wholly misplaced. As it was within the authority of the official Respondents to set up a Purchase Committee to assess the suitability of the Bids for the contract, its recommendations on an objective analysis of the offers made can by no means be faulted with. According to him, as none of the competing Bidders had been intimated about the date and time of opening of the Commercial Bids, no element of unfairness or discrimination can be alleged. In absence of any tangible material with regard to bias and malafide, the learned Single Judge right declined to interfere, he urged.

10. Mr Sarma, learned senior counsel for the Respondent No. 3 while endorsing the stand of the official Respondents, has submitted that meanwhile in terms of the impugned order it (Respondent No. 3) has already supplied 26,665 Nos. of bicycles and the delivery of the rest was temporarily withheld in view of the Code of Conduct formulated by the Election Commission of India in the wake of the recent elections to the State Assembly. The learned senior counsel on instructions submitted that the stage is now set for completing the supply and that, therefore, on that count as well interference with the impugned settlement at this stage is unwarranted. Dismissing the contentions raised on behalf of the Appellant as speculative and without any basis, the learned senior counsel has submitted that the view taken by the learned Single Judge being flawless, no interference is called for. In support of his reiteration that intimation to the Bidders and/or their representatives about the date and time of opening of the Commercial Bids was not an essential tender condition and that the alleged omission on the part of the State authorities does not vitiate the process, Mr Sarma has placed reliance on a decision of the Apex Court in M/s. G. J. Fernandez Vs. State of Karnataka and others,

11. I have lent my anxious consideration to the pleadings available and the arguments advanced. Visibly the Appellant's case is structured on the plea of its perceived deviation by the State Respondents from the requirement of intimation to the qualified Bidders and their representatives of the date and time of opening of the Commercial Bids. Section-I of the bidding document in serial No. 6 of the list of activities with regard to the invitation of bids discloses that the date and time of opening of the Commercial Bids would be intimated to the qualified Bidders on the date of opening of the Technical Bids or on any subsequent date either through fax or letter. Clause 19.5 under Section-II: Instruction to Bidders (ITB) provide as follows:

19.5. The Commercial Bids will be opened after the evaluation of the Technical Bids at a time and place to be notified (as explained in Section I) and the Purchaser at its discretion may call the responsive bidders for price read out. No

bid shall be rejected at bid opening, except for late Bids, which shall be returned unopened to the Bidder pursuant to ITB Clause 17.

12. It would be apparent from the above extract that the Commercial Bids were stipulated to be opened for the evaluation of the Technical Bids at a time and place to be notified (as mentioned in Section I) and the Purchaser at its discretion might call the responsive bidders for price read out. According to the Appellant, this constitutes an imperative tender condition departure wherefrom spelt an incurable vitiation. Reliance on the Central Vigilance Commission recommendations emphasizing on the presence of the bidders' representatives at the time of opening of their Bids has also been placed to reinforce this plea.

13. Admittedly, in the instant case none of the competing Bidders had been notified about the date and time of opening of their Commercial Bids. Instead, by Notification dated 3.12.2010 (Annexure-V to the memorandum of appeal), the Govt. of Assam constituted a Purchase Committee to approve reasonable and fair rates for the procurements. This Purchase Committee in its meeting held on 28.12.2010, as Annexure-VI to the memorandum of appeal would disclose, on a comparison of the rates offered by the Bidders opined that the one quoted by the Respondent No. 3 was the lowest and approved the same. That the rate quoted by the Respondent No. 3 is the lowest is a matter of record. A scrutiny of the original records pertaining to the impugned selection does not disclose a shred of evidence to even indicate any foul play in this regard. The Appellant noticeably also has not imputed any such illegal intervention in particular and has only expressed its apprehension of such a possibility. In absence of any existing and discernible proof of such illegality or anomaly, such an inference would be wholly hypothetical. The allegation of possibility of malafide or bias is also unsustainable on the analogy of reasoning.

14. Not only the tender norms do not bar the State Respondents to constitute a Purchase Committee as done, in the estimate of this Court, no requirement of peremptory nature making it incumbent on them to intimate the Bidders or their representatives about the date and time of opening of the Commercial Bids is decipherable. Though the list of activities with regard to opening of the Bids under Section-I and Clause 19.5 of Section-II of the bidding document do suggest such a step, it cannot be construed to be an inviolable enjoinder to render the process void in case of non-conformance. The requirement of intimation to the Bidders and/or their representatives of the date and time of opening of their Commercial Bids, thus, in the context of the bidding document and the facts and circumstances of the case cannot be raised to the status of an essential tender condition deviation wherefrom would invalidate the related process.

15. The Apex Court in *G.J. Fernandez* (supra) had held in substance that if any departure is made from an inessential tender condition which does not ensue in any substantial prejudice or injustice to any of the parties in the fray or the public interest in general but affects all of them alike, interference on this count

would be uncalled for. The textual facts in Dutta Associates (supra) are patently distinguishable. Therein tenders were invited for wholesale supply of rectified spirit (Grade-1). The tender of the Appellant which was one of the contending bidders was eventually accepted by applying the test of "viability range". Such a requirement of "viability range" was not specified in the tender notice. It did not even indicate that any such exercise on the basis of this norm would be undertaken to ascertain the suitability of the bidders for awarding the contract. Their Lordships not only recorded the above omission in the tender notice, the concept of "viability range" was also not approved. It is in this context that their Lordships observed that the procedure proposed to be followed ought to be clearly stated in the tender notice. That the exercise has to be transparent, fair, open and free from abuse of power for extraneous reasons was underlined in this background.

16. As alluded hereinabove, in the case in hand none of the competing Bidders or their representatives had been intimated about the date and time of opening of the Commercial Bids. The proceedings of the Purchase Committee also do not admit of any reservation vis-?-vis the selection of the Respondent No. 3 to be the most suitable Bidder for the contract. No other illegality as such is also discernible vitiating the process. The selection of the lowest rate for the supplies accords with public interest. The perceived departure on the part of the State Respondents from the requirement of intimation to the Bidders and/or their representatives about the date and time of opening of the Commercial Bids, thus, in our opinion, does not invalidate the process or the impugned order passed on the culmination thereof.

17. On a perusal of the impugned judgment and order we find ourselves in complete agreement with the views expressed by the learned Single Judge.

18. The appeal lacks in merit and is dismissed. No costs.