

(2013) 07 OHC CK 0073

In the Orissa High Court

Case No : Writ Petition (C) No. 11712 of 2012

Biswanath Das, Secretary Krushi Adivasi Selfhelp Society
(KASS)

APPELLANT

Vs

Chief Engineer, World Bank Project and Others

RESPONDENT

Date of Decision : 09-07-2013

Acts Referred:

Citation : (2014) 117 CLT 18 : (2014) 1 ILR (Ori) 1

Hon'ble Judges : C. Nagappan, C.J;Pradip Mohanty, J

Bench : Division Bench

**Advocate : Aurovinda Mohanty, P. Mohanty and P.K. Mohanty, for the Appellant;
Ramakanta Mohanty, D.K. Mohanty, S. Mohanty, A. Mohanty, S.N. Biswal, D.
Bharadwaj for Intervenor, for the Respondent**

Final Decision : Dismissed

Judgement

Pradip Mohanty, J.—The notice of Expression of Interest issued by the Chief Engineer, World Bank Project, Odisha vide letter No. PMU-WB-4512010-5189 dated 22.02.2012 under Annexure-1 for hiring of eligible Non-Governmental Organizations (NGOs) for the implementation of Social Safeguard Instruments for Jagatpur-Chandbali Road is under challenge in this Writ Petition. The case of the Petitioner-NGO, i.e., Krushi Adivasi Self-help Society (KASS) is that the Government of Orissa (GOO) through the Government of India signed a loan agreement with the International Bank for Reconstruction & Development (World Bank) amounting to US \$ 250 million equivalent for implementation of Orissa State Roads Projects. For improvement, widening & strengthening of road sector, the GOO decided to implement Social Safeguard Instruments (SSIs) in Jagatpur-Chandbali Road Corridor (SH-9A-106 km) by applying a portion of the said loan. Accordingly, Opp. Party No. 1 published a notification of Expression of Interest vide letter dated 05.02.2011 (Annexure-2) for hiring of NGO for the implementation of SSIs for Jagatpur-Chandbali road. Pursuant to Annexure-2, six eligible NGOs including the present Petitioner were short listed & finally, the

Petitioner was selected for submitting the Request For Proposal (in short "RFP"). Opp. Party No. 1 under Annexure-3 asked the Petitioner to submit the RFP along with the other required documents pursuant to which the Petitioner submitted its RFP on 28.07.2011 whereafter Opp. Party No. 1 on 14.10.2011 under Annexure-4 requested the Petitioner to extend the validity of its proposal up to 27.12.2011 to enable completion of the selection process. In response to the same, the Petitioner sent confirmation letter to Opp. Party No. 1 on 23.10.2011 through email. Opp. Party No. 1 organized a pre-bid meeting on 05.07.2011 in which the Petitioner along with other NGOs were present & the discussions made in the said meeting was communicated to the Center for Management & Social Research, Hyderabad (A.P.) on 15.07.2011 through email. It is further stated that the Petitioner-NGO was previously selected for two number of packages, one at Berhampur to Taptapani & the other at Bhawanipatna to Khariar Road. The Petitioner has completed 85% of the project work & submitted its report to Opp. Party No. 1 & the authorities of World Bank issued successful & satisfactory certificate to that effect. But, Opp. Party No. 1, without intimating the Petitioner about the status of the Expression of Interest published under Annexure-2, has illegally, arbitrarily & perversely issued Annexure-1 dated 22.02.2012 for hiring of NGO for the implementation of SSIs for Jagatpur-Chandbali Road, which is impugned in the present Writ Petition.

2. A counter affidavit has been filed by Opp. Party No. 1 & it is stated therein that Odisha State Road Projects (OSRP) is a World Bank funded project under the Works Department of Government of Odisha. The project consists of two components, namely, (i) Road Improvement Component (improvement & widening of selected road corridors) & (ii) Institutional Strengthening Component. As per the project agreement, the implementation of Resettlement Action Plan is to be taken up by help of one Implementing NGO (INGO) & the selection of the NGO is made as per the International Bank of Reconstruction & Development (IBRD) procurement guidelines for hiring of consultants (henceforth called "the World Bank Procurement Guidelines"). By following the steps prescribed in the said guidelines, Annexure-2 was published & short listing of six NGOs was approved by the Evaluation Committee & the request for proposal were sent to the six short listed NGOs under Annexure-3. The technical proposals submitted by the NGOs were evaluated by the Evaluation Committee in its meeting held on 07.09.2011, 15.09.2011 & 31.10.2011. Out of six NGOs, only three NGOs submitted their proposals & of them only the Petitioner was qualified in the technical proposal, as a result of which the tender was reduced to a single-bid. But, the Evaluation Committee recommended to the Government to reject the single bid of the Petitioner & to allow re-bid by forming the following opinion:

The Committee opined that as per OPWD Code single bid can be recommended for acceptance only if the authority is satisfied with the twin factors of fair competition & reliability. In the current case which is the least cost selection method of the World Bank Procurement System, the finance bid (proposal) of a single bidder lacks competition & cannot be treated as competitive. Regarding

reliability of the NGO KASS which has secured qualifying marks in technical evaluation, the committee has already discussed & opined at Para 3.1 above that KASS has adopted fraudulent practice in PO1(Y-1) & is not trustworthy.

Consequently, the World Bank approved the proposal for re-bid vide its email dated 16.01.2012 & Opp. Party No. 1 cancelled the Expression of Interest under Annexure-2 vide office order No. 4886 dated 18.02.2012 (Annexure-B/1).

It is further stated that the Petitioner in Para 7 of W.P. (C) No. 7106 of 2012 filed for Bhawanipatna-Khariar Road work had clearly stated that it had completed 55% of the said work whereas in the instant Writ Petition it has stated that 85% of the said work has been completed. The version of the Petitioner is therefore not trustworthy. Furthermore, the said contract of the Petitioner was terminated by the Government on 05.04.2012 under Annexure-G/1 to the counter for fraudulent practice. Therefore, it has been specifically pleaded in Para 12 of the counter affidavit that since the Petitioner was involved in fraud & corrupt practice during implementation of Social Safeguard Instruments in Bhawanipatna-Khariar Road Corridor (P-01), the Evaluation Committee decided not to evaluate the Expression of Interest of the Petitioner.

3. A counter affidavit has also been filed by the intervenor Opp. Party No. 3, VARRSA, a Non-Governmental Organization. It has been pleaded therein that the cause of action for which the Writ Petitioner is espousing no longer exists, since pursuant to the tender notice (Annexure-1) Opp. Party No. 3 has already been declared successful. Furthermore, the Petitioner though had qualified for the selfsame tender published in the previous year, the Evaluation Committee rejected the single bid of the Petitioner, as it had adopted fraudulent practice, & allowed for re-bid which was approved by the World Bank for fair competition. The unopened financial proposals of all the three NGOs were returned vide letter Nos. 25585, 25586 & 25587 dated 04.08.2012. But, the Petitioner has suppressed these facts in the Writ Petition & has not come to this Court with clean hand. Therefore, the Writ Petition is liable to be dismissed in li(sic)mini being frivolous, vexatious & misleading.

4. In the matters relating to tenders or award of contracts, the scope of interference in exercise of power of judicial review has been discussed by the Apex Court in Jagdish Mandal Vs. State of Orissa and Others, which is extracted hereunder:

While invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders & awarding of contracts are essentially commercial functions & principles of equity & natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide & is in public interest, Courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public

interest, or to decide contractual disputes. Tenderer or contractor with a grievance can always seek damages in a civil Court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if: (i) the process adopted or decision made is mala fide or intended to favour someone, or (ii) the same is so arbitrary & irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. However, cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse stand on a different footing as they may require a higher degree of fairness in action.

5. In the case at hand evidently the first notice of Expression of Interest for hiring of NGO for the implementation of SSIs for Jagatpur-Chandbali Road was issued by Opp. Party No. 1 vide letter No. 5758 dated 05.02.2011 under Annexure-2. Six number of NGOs including the Petitioner, who were short listed, were requested for sending proposal under Annexure-3. On evaluation of technical proposals by the Evaluation Committee it was found that only three NGOs had submitted their proposals & of them the Petitioner NGO was found qualified in the technical proposal & thus the tender was reduced to a single bid. As per OPWD code, single bid can be recommended for acceptance only if the authority is satisfied with the twin factors of fair competition & reliability. Regarding reliability of the Petitioner NGO, the Evaluation Committee in its meeting dated 31.10.2011 found that the Petitioner NGO has adopted fraudulent practice in PO 1 (Y-1) & is not trustworthy. Accordingly, the Evaluation Committee recommended to the Government to reject the single bid of the Petitioner NGO & to allow re-bid, which was approved by the World Bank vide its email dated 16.01.2012. Subsequently, the Expression of Interest under Annexure-2 was cancelled by Opp. Party No. 1 vide its letter No. 4886 dated 18.02.2012 under Annexure-B/1, the unopened financial proposals were returned to the NGOs from whom they were received, & the second notice of Expression of Interest under Annexure-1 was issued. In the circumstances, it cannot be said that the action of Opp. Party No. 1 in issuing the second notice of Expression of Interest is arbitrary, irrational, unreasonable, bias & mala fide.

6. The Apex Court in the plethora of Judgments have repeatedly ruled that evaluation of tenders & awarding of contracts are essentially commercial functions &, therefore, principles of equity & natural justice stay at a distance. The power of judicial review cannot be permitted to be invoked to protect private interest at the cost of public interest. The tenderer or contractor with a grievance can always seek damages in a civil court. In the instant case, as already stated, the action of the Opp. Party No. 1 in issuing the second notice of Expression of Interest under Annexure-1 being bona fide & being in public interest, this Court cannot interfere with the same in exercising the power of judicial review.

Before parting with the case, it is observed that since this is a time bound project for two years & it has been substantially delayed on account of the interim order passed by this Court on 03.10.2012 in Misc. Case No. 10274 of 2012, the Opp.

Parties are directed to proceed with the tender immediately without causing any further delay.

The Writ Petition is accordingly dismissed. No costs.

C. Nagappan, C.J.

I agree.