
(1994) 05 OHC CK 0013

In the Orissa High Court

Case No : Criminal Jurisdiction Case No. 9866 of 1993 & Original Jurisdiction
Case No. 9866 of 1993

Chandrakant Jayantilal and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-05-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1994) 2 OLR 162

Hon'ble Judges : G.B. Pattnaik, J; D.M. Pattnaik, J

Bench : Division Bench

Advocate : G. Rath, for the Appellant; A.G.A., Senior Standing Counsel (Central), R.K. Mohapatra and S.S. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Pattnaik, J.—The petitioner, a registered firm and engaged in the business of weighing scales assails the award of contract for supply of 2 1977 sets of weighing scales for World Bank aided ICDS Project to opp. party No. 4, inter alia, on the ground that opp. party No. 4 who was not eligible for giving the offer was allowed to give the offer and was given the contract and also on the ground that the decision of the Procurement Committee while evaluating the bids became vitiated by taking into consideration the payment of sales tax on the supply in question, even though it was prohibited for being considered under Clause 25.2 of a set of instructions called "Instructions to Bidders" annexed as Annexure-3.

2. The Government of India had received a credit from the Inter-National Development Association of the World Bank to the extent of 106 million U.S. Dollars towards the cost of the World Bank assisted ICDS Projects and intended to apply part of the same for purchase of weighing scales in Orissa. The Secretary to the Government of Orissa in Panchayat Raj Department, issued an advertisement in the Daily "Samaj" dated 28-9-92 inviting tender from the eligible bidders for supply of weighing scales numbering 2 1977 sets and in

response to the said advertisement the petitioner purchased a complete set of bidding documents from the Director of Social Welfare, opp. party No. 2. It is alleged in the writ application that after fulfilling all the required formalities, the petitioner participated in the bid by submitting a sealed tender addressed to the opp. party No. 2 and opp. party No. 4 was also a participant in the said bid. In all offer from 11 bidders had been obtained. The tenders were opened in presence of all the parties or their authorised representatives on 20-10-1992 and the partners of the petitioner's firm could know that the rates quoted by their firm are the lowest and the quality of goods offered by them were the best, It was also alleged that the petitioner's firm was the only bidder who has offered a list of after-sale service centres in the State of Orissa along with the tender papers which was the mandatory requirement under the "instructions to Bidders". Though more than a year elapsed after the opening of the tender, but no decision was communicated to the petitioner and therefore, the petitioner submitted a representation before opp. party No. 1 and enquired about the contract, but still the petitioner was not favoured with any reply. Then petitioner somehow could learn that opp party No. 1 has decided to award the contract for the supply of weighing scales to opp. party No. 4 and accordingly he moved this Court by filling a writ petition on 21-12-93 challenging the award of contract in favour of opp. party No. 4 on several grounds including the ground that by taking into account the sales tax payable on the sets the evaluation made by the Committee got vitiated and consequently the final approval and award of contract was vitiated. On 23-12-1993, this Court has passed an interim order staying the execution of the contract until further orders.

3. Opp. parties 1 and 2 filed a return in this Court stating therein that the contract has been awarded to opp. party No. 4 in accordance with the terms and conditions of the bidding documents and after due evaluation of the bids by a Committee under the Chairmanship of the Commissioner cum-Secretary, Panchayat Raj Department and said evaluation as well as the decision of the Committee in favour of opp. party No. 4 was approved by the World Bank Authorities. Several allegations made in the writ application with regard to the ineligibility of opp. party No. 4 to participate in the bid were denied. It was, however conceded in the counter affidavit that after establishing responsiveness of the bidders comparison on the rates of different bids was taken up taking into consideration of the unit price, tax, transportation packing and forwarding and insurance charges. It was also and stated in the counter affidavit that the detailed situation and comparison of the bids made by the Committee was approved by the Government of India and the World Bank and then orders were placed with opp. party No. 4 for supply of the material in question. The further stand taken in the counter affidavit that non-impleading the World Bank is fatal to the writ petition.

4. The opposite party No. 4 has also filed a counter affidavit denying therein the allegation of the petitioner that opposite party No. 4 was not eligible for giving the offer. It was also stated that the evaluation of the quotation was made in

accordance with the norms and directions prescribed by the World Bank and Government of India and the petitioner's bids were never the lowest, It was also averred that opp. party No. 1 duly followed the guidelines and instructions of the World Bank in the matter of evaluation of the bids and in deciding the grant of the contract in favour of opp. party No. 4. The said opp. party No 4 further stated that the Government of India with the concurrence of the World Bank accorded approval of award of contract in favour of opp. party No 4 and it is only there after State Government executed the contract.

5. An additional affidavit was also filed by opp. parties 1 and 2 stating therein that the World Bank reviewed the evaluation papers and came to a conclusion that the petitioner's bid had several deficiencies and communicated the same to the opp. parties 1 and 2 and called for a discussion and finally the World Bank authorities confirmed that the bid of opp. party No. 4 is the lowest responsive bid.

6. Though initially Mr. Rath appearing for the petitioner had raised several contentions assailing the award of contract in favour of opp. party No. 4, but finally stuck to one submission, namely, evaluation made by the Committee got vitiated by taking into consideration the sales tax payable on the materials which was specifically prohibited to be taken into account under the "Instruction to Bidders" and, therefore, the ultimate decision approving the contract in favour of opp. party No. 4 and awarding the same on such vitiated evaluation cannot be sustained in law.

Learned Advocate General appearing for opp. parties 1 and 2 on other hand, contended that the petitioner's bid having been found to be not substantially responsive was liable to be rejected by the purchaser as stipulated under Clause 24.4 of the "Instructions to Bidders" and, therefore, the petitioner has no locus standi to assail the validity of the award of contract in favour of opp. party No. 4. He further contended that the evaluation made by the Committee was in accordance with the guidelines issued by the World Bank and the same was made on consideration of germane materials and therefore, cannot be said to have been vitiated on any score and at any rate, the bid of opp. party No. 4 having been found to be lowest that was recommended by the Committee for acceptance and after discussion, the World Bank authorities also accorded their approval and, therefore, the contract was executed.

7. Mr. R. K. Mohapatra appearing for opp. party No. 4 apart from reiterating the contentions raised by the learned Advocate General also contended that in accordance with the terms and conditions of acceptance of the bid being subject to approval of the World Bank and the World Bank having approved the bid of the opp. party No. 4, the writ petition is not maintainable in the absence of the World Bank as a party to the lis. He also urged that the petitioner, bidder having contacted the purchaser though prohibited under Clause 26 of the "Instructions to Bidders" his bid was liable to be rejected in accordance with Clause 26-2.

8. In view of the rival stands taken by the parties, three questions arise for our

consideration ; .

(i) Can the petitioner's bid be held to be substantially "non- responsive and was it liable to be rejected on that score and In fact has it been rejected on that score ?

(ii) Did the Procurement Committee take into consideration some materials which were prohibited to be considered under the Instructions to Bidders" and thereby has the process of evaluation become invalid and consequently has the approval of the World Bank also become invalid ? and

(iii)The contract in question being entered into subject to the approval of the World Bank and the approving authority not being made a party, is the writ application table to be dismissed on that score ?

9. Coming to the first question, it is necessary to notice the relevant clauses of Instructions to Bidders" annexed as Annexure 3. Clause 24 of the Instructions provides for preliminary examination. Under Clause 24-1, the purchaser will examine the bids to determine whether they are complete, whether any computational error have been made, whether required sureties have been furnished, whether the documents have been properly signed and whether the bids are generally in order. Clause 24-2 enables a bidder to rectify some arithmetical errors, and if it also appears that if the supplier does not accept the correction of the errors, then the bid will be rejected. Clause 24-3 provides that prior to detailed evaluation under Clause 25, the purchaser will determine the substantial responsiveness of each bid to the Bidding documents. It further indicates that a substantially responsive bid is one which conforms to all the terms and conditions of the bidding documents without material deviations and the purchaser's determination of a bid's responsiveness is to be based on the contents of the bid itself without recourse to extrinsic evidence. Clause 24-4 provides that a bid determined as not substantially responsive will be rejected by the purchaser and may not subsequently be made responsive by the bidder by correction of the non conformity. Clause 24-5 authorises the purchaser to waive any minor informality or non-conformity or irregularity in a bid which does not constitute a material deviation. Clause 24 in its entirety is extracted herein below for better appreciation of the points in issue :

"24. Preliminary Examination.

24-1. The purchaser will examine the bids to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed, and whether the bids are generally in order.

24-2. Arithmetical errors will be rectified on the following basis. If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected. If the supplier does not accept the correction of the

errors, its bid will be rejected. If there is discrepancy between words and figures the amount in words will prevail.

24-3. Prior to detailed evaluation, pursuant to Clause 25 the purchaser will determine the substantial responsiveness of each bid to the Bidding Documents. For purposes of these clauses a substantially responsive bid is one which conforms to all the terms and conditions of the Bidding documents without material deviations. The purchaser's determination of a bid's responsiveness is to be based on the contents of the bid itself without recourse to extrinsic evidence.

24-4. A bid determined as not substantially responsive will be rejected by the purchaser and may not be made responsive by the Bidder by correction of the non-conformity.

24-5. The purchaser may waive any minor informality or non-conformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any bidder."

Learned Advocate General appearing for opposite parties 1 and 2 and Mr. Mohapatra appearing for opposite party No. 4 with reference to Annexure-D/1 contended with vehemence that in view of the deficiencies and non-conformities, notice by the World Bank Authorities under Annexure-D/1, the petitioner's bid cannot but be held to be not substantially responsive in accordance with Clause 24-4 of the "Instructions to Bidders" and, therefore, on that ground it could have been excluded from consideration and in this view of the matter, even if the process of evaluation is vitiated on any score, the same should not be interfered with by this Court in exercise of its extraordinary jurisdiction at the behest of the petitioner whose bid itself was not substantially responsive. It is no doubt true that under Annexure-D/1 the World Bank authorities had indicated that Chandrakant's (petitioner's) bid had several deficiencies but they also noticed that the Evaluation Committee considered Chandrakant's bid to be responsive and wanted to discuss this matter at New Delhi. Thus the question of rejecting the bid on the ground that it is not substantially responsive does not arise. The power of rejecting the bid on the ground that it is not substantially responsive lies with the purchaser in view of Clause 24.4 of the "Instructions to Bidders". But at the same time Clause 24.5 enables the purchaser to waive minor informalities or nonconformities or irregularities in a bid and only when a bid is found to be eligible for evaluation after preliminary examination under Clause 24, the evaluation and comparison takes place under Clause 28. The purchaser, here in the present case, the State of Orissa did not reject the petitioner's bid on the ground that it is not substantially responsive and on the other hand, the bid of the petitioner was found to be eligible for evaluation and comparison. In the circumstances, the so-called non-conformity or irregularity in the petitioner's bid as pointed out by the World Bank Authorities under Annexure-D/1 must be deemed to have been waived by the purchaser in accordance with his power under Clause 24.5 of the "Instructions to Bidders" and in fact the petitioner's bid was considered by the Purchase Committee for the purpose of evaluation and

comparison. Even the World Bank Authorities also did not indicate under Annexure-D/1 to exclude the petitioner's bid from consideration. There has also been no specific order either of the Purchase Committee or of the World Bank Authority rejecting the petitioner's bid on the ground that it is not responsive. Even in the original counter affidavit filed on behalf of the opp. parties 1 and 2, the State did not take the stand and in our view rightly. In the aforesaid premises it is difficult for us to accept the contention of the learned Advocate General that the petitioner has no locus, standi to assail the valuation made and consequential award of contract in favour of opp. party No. 4 as the petitioner's bid itself was not substantially responsive and on that ground was liable to be rejected. On the other hand, the petitioner's bid having been taken into account by the purchaser for the purpose of evaluation and comparison, the petitioner has the right to assail the evaluation thus made and the consequential contract thus awarded.

10 Coming to the second question, the entire argument of Mr. Rath, the learned counsel for the petitioner is based upon Clause 25-2 of the "Instructions to Bidders". The said Clause 25-2 is extracted here in below in extenso:

"25.2. The purchaser's evaluation of a bid will exclude and not take into account :

(a) In the case of goods manufactured in the purchaser's country, sales and other similar taxes, which will be payable on the goods if a contract is awarded to the Bidder.

(b) In the case of goods of foreign origin offered from abroad, customs duties and other similar import taxes which will be payable on the goods if the Contract is awarded to the Bidder."

According to Mr. Rath, in view of Clause 25-2(a), the purchaser's evaluation of a bid will exclude and not take into account sales or of her similar taxes which will be payable on the goods if a contract is awarded to the Bidder. But admittedly the purchaser having taken into consideration the sales tax payable on the goods, the consideration is vitiated. Mr. Rath, the learned counsel for the petitioner, refers to paragraph-7 of the counter affidavit filed on behalf of opp. parties 1 and 2 whereunder it has been admitted that the comparison of the rates of different bids was taken by taking into consideration of the unit price, tax, transportation, packing and forwarding and insurance charges, it would be appropriate for us to extract paragraph-7 of the counter affidavit of opp. parties 1 and 2 ;

"7. That in reply to para-3(c) it is submitted that for comparing the rates of the bids Sections 11-2 and 25 of the Introduction Part of the bidding document are very much relevant. After establishing the responsiveness of the bidders, comparison of the rates of the different bids was taken up, taking into consideration of the unit price, tax, transportation, packing and forwarding and insurance charge. Therefore there is no question of inflating the rate of any party as the rates have been compared pursuant to Clauses-25-4 and 11.2 of

Introduction Part of bidding document. It is submitted that the purchasers will always pay the manufacturing cost, transportation cost and the taxes taken together for any transportation."

In view of the aforesaid statement of the opp. parties 1 and 2, purchaser in this case, we have no manner of doubt that in the matter of evaluation of bid tax was also taken into account though under Clause 25(a), it was to be excluded for the purpose of evaluation. But the further question that arises for consideration is whether on that score it would be appropriate for this Court to quash the entire evaluation and ultimate award of contract in favour of opp. party No. 4, In the event this Court would quash the evaluation thus made the only direction that can be given to the opposite parties is to make a re-evaluation of the matter. Learned Advocate General, in course of his arguments submitted that without taking the sales tax component into consideration the bid of the opp. party No. 4 is much lower than the bid of the petitioner He produced before us a chart indicating the unit cost per set which indicates unequivocally that even without taking into consideration the sales tax payable, the unit cost per set of instrument of opp. party No. 4 is lower than the unit cost per set offered by the petitioner, the difference per set roughly being Rs. 2/- and with the tax component, the petitioners unit cost per set is such higher than that of opp. party No. 4, the difference being Rs. 56/-. This being the position, any direction to the opp. parties for having a fresh evaluation would be a futile exercise. The jurisdiction of this Court under Arts, 226 and 227 of the Constitution is a discretionary jurisdiction which the Court would exercise on equitable consideration. But if the Court is satisfied that no useful purpose would be served by directing re-evaluation of the bids even if there has been some lacunae in the Process of evaluation the Court would be justified in not issuing such direction. Examining the facts and circumstances of the present case and on being satisfied that no useful purpose would be served by requiring the opposite parties to have a fresh evaluation, as is apparent from the calculation and computation submitted to us by the learned Advocate General. We think it appropriate not to interfere with the impugned award of contract even though we agree with the submission of Mr. Rath that the evaluation process was vitiated by taking into consideration the payment of sales tax on the goods to be purchased. Accordingly we are of the considered opinion that the impugned award is not to be interfered with.

11. Coming to the third question, we are also of the opinion that the writ petition would fail since the World Bank which is the approving authority for award of contract has not been made a party to the writ application. In this connection it will be appropriate for us to notice the letter of the Government of India, Ministry of Human Resources Development Department of Women and Child Development dated September, 23, 1992 which has been annexed as Annexure-C/4 to the counter affidavit filed on behalf of opp. party No. 4. Paragraph-4 of that letter stipulates the guidelines on procurement under IERD loans and IDA credits, dividing the procurements under ICB into two categories. The first category is

the contracts which, in accordance with the Loan Agreement, are made subject to Bank's prior review. It is conceded by the parties that on the basis of the amount of money involved in the contract, the same comes under first type of ICB where bids need Bank's prior review. Paragraph-6 (a) of the aforesaid letter is extracted hereinbelow in extenso for proper appreciation of the point in issue :

"6(a) First type of ICB (where bids need Bank's prior review).

After the bids have been received and evaluated, the borrower shall, before a final decision on the award is made, inform the "Bank of the name of the bidder to which it intends to award the contract and shall furnish to the Bank, in sufficient time for its review, a detailed report on the evaluation and comparison of the bids received together with the recommendations for award and such other information as the Bank shall reasonably request. The Bank shall, if it determines that the intended award would be inconsistent with the Loan Agreement or the guidelines, promptly inform the borrower and state the reasons for such determination. The terms and conditions of the contract shall not, without Bank's concurrence, materially differ from those on which bids were asked. Later, 2 conformed copies of the contract are to be furnished to the Bank, promptly after its execution and prior to sending the first reimbursement claim in respect of that procurement."

The aforesaid terms unequivocally indicate that the borrower, after the bids are received and evaluated and before a final decision in the award is made, would inform the Bank in the name of the bidder to which it intends to award contract and then shall furnish to the Bank sufficient time for its review along with the detailed report on the evaluation and comparison of the bids received together with the recommendation for award and such other information as the Bank shall reasonably request and it is only with the review and approval of the World Bank Authority the contract can be finalised and entered into. Since the contract in question could be awarded only with prior approval of the World Bank Authority and in the case in hand, it was entered into only after discussion and approval of the evaluation made by the World Bank Authority, the said World Bank is a necessary party to the writ application and the writ application is liable to be rejected as the World Bank has not been made a party to the writ application,

12. In view of our conclusion on question Nos. 2, and 3, the writ application is dismissed, but in the circumstances, there would be no order as to costs.

D.M. Patnaik, J.

I agree.