
(2014) 07 JH CK 0033

In the Jharkhand High Court

Case No : Writ Petition (Civil) No. 2845 of 2014

CWE-SOMA Consortium

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 3 AJR 741 : (2015) 1 JLJR 34

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Ajit Kr. Sinha, Sr. Advocate, Advocate for the Appellant; Mukesh Kumar Sinha, Advocate, Ajit Kumar, AAG and Rajesh Kumar, GP-V, Advocate for the Respondent

Judgement

Rakesh Ranjan Prasad, J.

C.A.V. On 16/06/2014

1. The Executive Engineer, Water Resources Department, Government of Jharkhand, invited item rate bids for construction of Kharkhai Dam at Icha with all control gates and its allied works including Civil, Mechanical (with design of gates), Electrical and SCADA system under SMP on 28/02/2014, through e-procurement from eligible and approved contractors. Since the project was for more than Rs. 250 Crores, terms and conditions of it were in accordance with Standard Bidding Documents (SBD). A pre bid meeting held on 24/03/2014, in which 10 persons, including the petitioner, had participated. In the meeting question over the work and also conditions of the NIT were invited, which were duly answered by the Chief Engineer, Icha Galudih Complex. Adityapur, Jamshedpur. In course of pre bid meeting when it was found that there has been departures relating to the terms and conditions of the NIT from the clauses of Standard Bidding Documents (SBD) which had never been approved by the Department, it was informed to the Chief Engineer and was requested to issue necessary corrigendum to the tender notice, so that the tender be in accordance

with SBD. That was replied with by letter dated 02/04/2014 (Annexure-C to the Counter Affidavit), whereby justification was given by the Chief Engineer by stating that the work was of specific and urgent nature and that apart due to other reasons, the clauses were inserted so as to ensure appropriate and smooth implementation of the work in time.

Pursuant to that NIT, three tenderers namely M/s. CWE-SOMA Consortium, Hyderabad (the petitioner), M/s. IL & FS Engineering and Construction Company Limited, Hyderabad as well as M/s. Navyuga Engineering Co. Limited, Hyderabad, participated in the tender process by submitting their bids. After receiving papers, a meeting was convened by the Departmental Tender Committee (DTC) on 02/06/2014, for taking decision upon pre qualification bid. In that meeting held on 02/06/2014, only the petitioner was found to be the responsive, whereas other two bidders were found to be non-responsive. The Tender Committee having found that only one bidder has been found to be responsive, a decision was taken in terms of clause 4.18 (d) of the Central Vigilance Commission (CVC) guidelines to cancel it and to go for re-tender to make the process of tender more competitive. Being aggrieved with that decision, the petitioner has come to this Court by filing this writ application.

2. Mr. Ajit Kumar Sinha, learned senior counsel appearing for the petitioner submits that out of three bidders, the petitioner was found to be responsive, whereas other two bidders were found to be non-responsive and, therefore, it was assumed by the Tender Committee to be a case of single tender and, thereby, a decision was taken to cancel it and to go for another tender to make the process of tender more competitive. That decision taken by the Tender Committee taking the case of single tender is against the CVC norms as in terms of clause 4.2 of the CVC guidelines, single tender happens to be that tender when there happens to be invitation to one firm only. Further, learned counsel by referring to clause 4.17 of the CVC guidelines, submits that in a case single quote or a single valid acceptable quote is received against limited tender or open tender, this results into a single Vendor situation but it shall not be treated as procurement against single tender enquiry and, thereby, it needs to be processed further.

In order to buttress his stand, those clauses, which were referred to, read as follows:-

"4.2 Single Tender.-As per note 27 of Annexure to Rule 102 (I) of GFR, "invitation to one firm only" is called Single Tender. Single Tendering for non PAC items may be resorted to only on the grounds of urgency or operational or technical requirements. The reasons for single tender enquiry (STE) and selection of a particular firm must be recorded and approved by the CFA prior to single tendering. Purchases on STE basis should be made from reputed firms after determining reasonableness of rates. However, when defence PSUs/OFB have specifically developed an item for the department of defence or have taken TOT, such sources could be treated at par with the PAC firms.

4.17 There are cases when only a single quote or a single valid acceptable quote is received even against LTE or OTE, this results in a single vendor situation indicating lack of competition. These cases will not be treated as procurement against Single Tender Enquiry and shall be progressed as an LTE or OTE case as applicable."

3. By referring to the aforesaid two clauses, learned counsel further submits that the Tender Committee instead of resorting to the clause 4.17, resorted to clause 4.18 that deals with the matter relating to re-tender, which can be resorted to on amongst other in a situation where there has been lack of competition. The said clause 4.18 reads as follows:-

4.18. Re-tendering-Re-tendering may be considered by the TPC/CFA with utmost caution, under the following circumstances:

- (a) Offer do not confirm to essential specification.
- (b) Wherever there are major changes in specification and quantity, which may have considerable impact on the price.
- (c) Prices quoted are unreasonably high with reference to assessed price or there is evidence of a sudden slump in prices.
- (d) There may be cases when the lack of competition is due to restrictive specification, which do not permit many vendors to participate. The CFA must consider if there are reasons for review of specification of the item to facilitate wider competition. Re-tendering will be done only after approval of IFA and CFA in all cases.

4. By referring to said clause learned counsel submits that the Tender Committee simply by assuming the case as that of single tender on account of only one bidder being found responsive, has taken a decision in terms of clause 4.18(d) of the CVC guidelines, but the impugned order (Annexure-3) never does indicate that on account of restrictive specification made under the NIT there has been lack of competition, rather the impugned order does suggest that since only one bidder was found to be responsive, it was considered to be a case of single tender and, hence, decided to go for re-tendering which is absolutely unjustified, arbitrary and illegal as in such case it cannot be taken to be a case of single tender in terms of the clause 4.17 of the CVC guidelines and, thereby, the authority should have proceeded with the matter relating to tender instead of cancelling it.

In this regard, it was further submitted that in same and similar situation the same Tender Committee processed the matter of tender when only one bidder was found to be responsive, which is evident from the decision taken by the same Tender Committee vide orders dated 28/02/2014, 24/02/2014 and again on 28/02/2014, as contained in Annexure-1 series to the supplementary affidavit. Thus, it was submitted that the decision taken by the Tender Committee, as contained in Annexure-3 and 6, is not only contrary to the CVC

guidelines but is also discriminatory and, thereby, that decision deserves to be set aside.

5. As against this, Mr. Ajit Kumar, learned Additional Advocate General appearing for the State submits that since the terms and conditions of the NIT was never in consonance with the SBD guidelines a direction was given to the Executive Engineer to issue corrigendum by making the terms and conditions in consonance with the terms and conditions laid down under SBD. But, it was never done as a result of which only one bidder, the petitioner, was found to be responsive and it happens so because some of the conditions were too stringent to have more than one responsive bidder. Therefore, on account of condition being stringent when none was found responsive other than the petitioner, decision was taken in terms of clause 4.18(d) to go for re-bidding for making it more competitive.

Learned counsel in order to establish his case referred to two conditions 4.5 (A) and (a) and also 4.5 (A)(c), which read as follows:-

4.5(A) To qualify for award of the contract, each bidder in its name should have in the last five years as referred to in Appendix.

(a) Achieved a minimum annual turnover (in all classes of civil engineering construction works only) amount indicated in Appendix in any one year. (usually not less than one & half times the estimated cost of the project may be kept. However, for Turnkey & other projects where completion period is two years or more, the annual turnover may be kept as per the requirement upto 1.50 x Estimated cost/years of completion of project).

(b).....

(c) executed in any one year, the minimum quantities of the following items of work as indicated Appendix.

- cement concrete (including RCC and PSC) cum

- earthwork in both excavation and embankment (combined quantities) cum

- cum

- Cum

(usually 50% of estimated quantity. However, for Turn-key & other projects where completion period is two years or more as per the requirement may be kept as Estimated quantity/years of completion of project.)

6. By referring to those clauses, it was submitted that in the NIT, those clauses were made more stringent, by adding additional qualification to the effect that the quantity of work shown should have been done in one project whereas it is otherwise in SBD clause and further to the effect that the work should have completely been done and not 50% work, which would be evident from the

corresponding clauses made in the NIT in clauses 10 and 14, which reads as follows:-

10. Quantity involve in the works which is mentioned below considered for evaluation of BID.

*In a single project in any one year of last five year.

14. The bidder should have successfully completed a DAM/Barrage having the minimum contract value equivalent to the bid value of single project as a prime contractor in a period of 5 years. (From 2008-09 to 2012-13).

7. By referring to those two clauses, it was submitted that the qualification, which was added to the effect that in a single project in any one year of the last five year, makes it more stringent. Same is the case with the other clauses and, thereby, on account of these stringent clauses, the bidders other than the petitioner was not found responsive as on account of that other could not participate and, thereby, decision taken for going for re-bidding can never be said to be arbitrary, illegal or malafide.

8. From the submissions advanced on behalf of the State, it does appear that the decision for cancelling the present tender and also for going for re-bidding, as has been taken under orders dated 02/06/2014 and 06/06/2014 is on account of the fact that the conditions of the NIT were so stringent that a good number of participants could not participate and that out of three participants only one, the petitioner, was found to be responsive. But from the decision taken by the Tender Committee in its meetings dated 02/06/2014 and 06/06/2014, it never appears that the Members of the Tender Committee took decision for cancelling and re-bidding on account of clauses being stringent, rather on account of the fact that out of three participants only the petitioner was found to be responsive whereas the order says that other participants were found to be non-responsive in the light of the clause 4.A(b) and 4.A(c).

9. Thus, from the orders referred to above, it does appear that the decision was taken for cancelling the tender and to go for re-tendering as the petitioner was only found to be the responsive bidder.

Therefore, the question does arise as to whether in that event tender is liable to be cancelled so that the Department may go for re-bidding?

Answer to it seems to be embedded in clause 4.17 of the CVC guidelines. From perusal of this clause, which has been quoted above, it does appear that in case of single valid acceptable quote being received against open tender indicating therein the lack of competition, still it would not be treated to be a single tender and, therefore, in this kind of situation, as per the guidelines it is to be processed with but the Tender Committee in stead of resorting to that clause, has resorted to clause 4.18(d), which though does stipulates that if there has been lack of competition due to restrictive specification prohibiting the vendor to participate, the Department can go for re-bidding, but it was not the situation that on

account of those two clauses only the petitioner could participate rather other two also participated.

10. Moreover, as I have already stated that the Tender Committee has never taken decision for canceling the tender on account of lack of competitiveness for the reason that specification what has been laid down were more stringent. In absence of such decision of specification being stringent, the clause 4.18 cannot be resorted to, rather the Tender Committee should have resorted to the clause 4.17 and should have processed the matter further as it distinctly stipulates that in such situation tender may be processed.

11. Since the decision has not been taken by the Tender Committee for cancelling the tender on account of specification being stringent, I need not to go into that question. But, since the issue has been raised, I propose to deal with that also. According to the learned Additional Advocate General the specification laid down in the bid papers was not in consonance with the clause made under SBD, but the clauses under the bid documents need not to be necessarily in consonance with the SBD as it appears from the office memorandum dated 07/05/2014, as contained in the last part of Annexure-8, issued by the CVC, which does stipulates that pre qualification criteria may not be too stringent to restrict the entry of bidders but at the same time it does stipulates that the Organization may suitably modify the guidelines for specialize job/work if considered necessary.

12. It has been noted above that in a pre bid meeting when it was found that some clauses relating to the qualification are stringent, the Executive Engineer was advised to go for amendment of those clauses by issuing corrigendum but then it was explained by the Executive Engineer through his letter dated 02/04/2014 (Annexure-C to the Counter affidavit) that the nature of work was so specific and the time was so short that those conditions were required to be made. Thereupon, no further direction seems to have been issued in this regard. Therefore, the authority now can not be allowed to raise that issue. Moreover, this plea cannot be allowed to be raised in this writ application as pre qualification criteria being stringent were never the ground for cancelling the tender as well as for going for re-bidding in view of the decision rendered in a case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , holding therein that during judicial review action is to be judged by the reasons stated while making the order and not by the supplementary reason supplemented through affidavits.

In spite of coming to such conclusion question does arise as to whether in the facts and circumstances, the Court should interfere by invoking the extra ordinary jurisdiction as enshrined under Article 226 of the Constitution?

Their Lordships, in number of cases, decided by the Hon''ble Supreme Court, have been pleased to laid down the guidelines as to under what situation the Court should interfere with the matter relating to the process of tender. One of

the such case is Jagdish Mandal Vs. State of Orissa and Others, ", wherein Their Lordships have come to the following conclusion:-

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is sound. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(I) whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached."

(ii) whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action".

13. Regard being had to the facts and circumstances as stated above, the action of the respondents seems to be quite arbitrary as in similar situation, instances of which have been given herein before the same Tender Committee having found only one bidder as responsive has processed further the matter of tender, whereas in the instant case, decision has been taken to cancel the tender and to

go for re-bidding. In a situation, which seems to have been admitted by the State that on account of revision of the schedule rate of the articles, the estimated amount would go higher and, thereby, decision taken by the authority is against the public interest and, therefore, I do consider it to be a fit case for interference.

14. Accordingly, the decision taken vide order dated 02/06/2014, as contained in Annexure-3 and also the decision taken vide order dated 06/06/2014, as contained in Annexure-6, are hereby set aside.

In the result, this application stands allowed.