
(2014) 12 DEL CK 0085

In the Delhi High Court

Case No : Writ Petition (Civil) 8090/2014 and CM No. 18881/2014

GVR Infra Projects Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-12-2014

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2014) 12 DEL CK 0085

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Rajiv Nayar, Sr. Advocate, Pragyan Sharma, Tareha A. Khan, Niyati Kohli and Nitikesh, Advocate for the Appellant; Vikram Jetly, CGSC, Ravi Gupta, Sr. Advocate, Meenakshi Sood and Mukesh Kumar, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petitioner impugns a communication dated 11.11.2014 issued by respondent no.2 (hereafter referred to as the "impugned communication") whereby the petitioner was informed that its financial bid submitted for securing the contract in question had not been opened. The petitioner was informed that its bid was not considered as the World Bank had sanctioned procedures against the petitioner w.e.f. 09.04.2014 and had temporarily suspended the petitioner from participating in projects aided by the World Bank.

2. The petitioner challenges the aforesaid action of respondent no.2 - National Highway Authority of India (hereafter referred to as the "NHAI") principally on the ground that the reason for disqualifying the petitioner from participating in the bid was extraneous to the criteria as specified in the bid documents. The petitioner further alleges that action of disqualifying the petitioner is discriminatory as the NHAI had permitted other participants, who had been similarly disqualified by the World Bank, to participate in bids invited by the NHAI.

3. The principal question to be addressed is whether the action of the NHAI in disqualifying the petitioner is arbitrary and discriminatory and as such, violative

of Article 14 of the Constitution of India.

4. Briefly stated the relevant facts necessary for considering the above controversy are as under:

4.1. The NHAI floated a tender for engineering, procurement and construction for "Improvement/Augmentation of 2 laning with Paved Shoulders from Km 94.000 to Km 174.000 (Design Chainage from Km 94.000 to Km 174.000) of Karaikudi " Ramanathapuram section of NH-210 including 500 m on Sh. 35 " Madurai Road (near Devakottai Rasta Railway Station) in the State of Tamil Nadu [Total Design Length 80.000km] under NHDP Phase-III" (hereinafter referred to as the "Project") .

4.2. The NHAI had adopted a two stage bidding process for selection of bidder. The first stage was a qualification stage to screen the applicants who were qualified to submit the bid. For this purpose, the NHAI issued a Request For Qualification (hereafter referred to as the "RFQ") . The other stage was a bid stage, where the financial bids of the short listed qualified bidders was to be comparatively evaluated. In response to the RFQ, the petitioner submitted its application on 19.03.2014. This application was accepted. The NHAI, by its communication of 16.07.2014, informed the petitioner that it had qualified alongwith 13 other applicants and invited the petitioner to submit its financial proposal. The NHAI also issued a Request For Proposal in July 2014 (hereafter referred to as "RFP") , inter alia, specifying terms and conditions and instructions for bidders. The petitioner submitted its financial bid on 17.10.2014 alongwith the bid security for an amount of Rs. 2.90 crores in the form of a bank guarantee.

4.3. The NHAI proceeded to open all bids, however, the petitioner's financial bid was not opened and the petitioner was excluded from being considered for execution of the project.

4.4. The petitioner, vide letters dated 18.10.2014 and 27.10.2014, sought the reasons for being excluded from participation in the tender. The impugned communication was sent by the NHAI in response thereto.

4.5. The impugned communication disclosed that the petitioner was held to be ineligible for participating in the contract on account of proceedings initiated by the World Bank against the petitioner in respect of another project (i.e. India Karnataka Municipal Reform Project) .

5. Apparently, the World Bank had issued a notice sanctioning proceedings against the petitioner on 09.04.2014 and had temporarily suspended the petitioner from participating in projects that were funded by the World Bank. The petitioner has appealed against this decision to the Sanctions Board of World Bank in accordance with the prescribed sanction procedures and the said appeal is pending consideration.

6. The petitioner submitted that the sanction imposed by the World Bank was limited only to contracts, which were funded by World Bank and the action of the

NHAI in disqualifying the petitioner from participating in the project was wholly arbitrary and contrary to its bid documents. The petitioner also pointed out that similar sanctions have been imposed by the World Bank on companies including M/s. L&T Infrastructure Development Project Limited (hereafter "L&T") and M/s. CES Limited and the NHAI had awarded contracts to the said entities.

7. The learned counsel for the NHAI referred to clause 2.16 of the RFP and submitted that RFP had expressly stated that the NHAI was not bound to select the pre-qualified applicants for the bid stage and reserved all rights to reject any or all applications or bids without assigning any reason. He further referred to clause 2.1.18 of the RFP which expressly provided that any entity which had been barred by Central/State Government or any entity controlled by it would also be ineligible to submit its bid. He submitted that the World Bank being an international body that is closely associated with Central/State Government for funding various projects, would also be included in the said clause for the purpose of disqualifying a bidder.

8. I have heard the learned counsel for the parties.

9. It is settled law that a State is free to enter into contract with any person and there is no vested right with any person to enter into a contract with a State or its agencies. However, it is equally well settled that all actions of the State must be informed by reason should not be arbitrary or unreasonable. In the present case, the NHAI could not be faulted if it decided not to accept participation of any entity, in the tendering process, which was otherwise disqualified from participating in the tenders floated by any other institution such as the World Bank. It is open for the NHAI to specify the necessary qualification criteria for participating in the tenders floated by it, provided the same are germane to the question of execution of the contract. The Supreme Court in the case of Tata Cellular Vs. Union of India, had referred to various earlier decisions and culled out the following principles:-

"(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 have the 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 fair play 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."

10. In the aforesaid perspective, the decision of the NHAI to exclude persons, who had been barred by the World Bank, could not be assailed as arbitrary or unreasonable, in the event the same was included as a part of the eligibility conditions specified in the RFQ/RFP.

11. However, in the present case, the NHAI had issued an RFQ/RFP specifying the eligibility criteria that was required to be fulfilled by the applicants. The NHAI had further expressly included conditions, which disqualified applicants from participating in the bid if they had otherwise been barred from participating in contract with certain other entities or had been subjected to any penalties or had been expelled from any public project. Clause 2.1.18 and 2.1.19 of the RFP are relevant and are quoted below:-

"2.1.18 Any entity which has been barred by the Central/ State Government, or any entity controlled by it, from participating in any project, and the bar subsists as on the date of Application, would not be eligible to submit the BID, either individually or as member of a Joint Venture.

2.1.19 The Bidder including individual or any of its Joint Venture Member should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Bidder including individual or any of its Joint Venture Member, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Bidder including individual or any of its Joint Venture Member."

12. A plain reading of the aforesaid clause indicates that the NHAI had thought it fit to prescribe stringent conditions for disqualification. But, the NHAI had not thought it fit to include disqualification by any of the international bodies as a criteria for disqualifying any applicant. The obvious conclusion is that the NHAI did not intend to disqualify an applicant if it was otherwise not disqualified as per the conditions specified in the RFQ/RFP.

13. The respondent's contention that the World Bank should be considered as State or Central Government as referred in clause 2.1.18 is clearly not sustainable. The World Bank, cannot by any stretch, be considered as State or Central Government or an entity controlled by the Central/State Government.

14. Thus, clearly, a disqualification by the World Bank would not disentitle any applicant from bidding for a project floated by the NHAI in terms of the NHAI's

bid documents.

15. The next aspect to be considered is whether an applicant could be disqualified on the basis which was not expressly stated in the bid documents.

16. In my view, although the bid documents may provide exhaustive conditions, the right of a State or its agency to disqualify and not consider a bid of a particular applicant would not be fettered. In given circumstances, it would be open for a State to reject a bid. However, the same cannot be arbitrary, whimsical, capricious or mala fide. In the normal circumstances, the agency should strictly follow the bid documents to eliminate any arbitrariness. In *Indian Railway Catering and Tourism Corporation Limited and Another Vs. Doshion Veolia Water Solutions (P) Limited and Others*, , the Supreme Court held as under:-

"37. ..Since IRCTC did not clearly stipulate in the instructions to bidders or in the special terms and conditions or in the prescribed price schedule or in any other part of the tender documents that a tenderer will not offer any discount on the prices quoted by him and if any such discount is offered the tender will be rejected, the offer of discount on the price made by Ion Exchange cannot be treated to be in breach of the essential terms or conditions of the tender documents. To hold that the State or its agencies can reject a tender for breach of a term or condition in the tender document, which is not explicit in the tender documents, is to give room to the State or its agencies to arbitrarily reject tenders even where the clear terms or conditions of the tender documents are complied with."

17. It is settled law that all actions of the State must be informed by reason; this is an essential facet of Article 14 of the Constitution of India. Viewed in this perspective, the action of NHAI to disqualify an applicant from participating in a bid on the basis that sanctions have been imposed by the World Bank, cannot per se be faulted. Surely, an action by a State not to award a contract to a person who has been debarred from participating in contracts by the World Bank cannot be stated to be without good reason. However, such reason would cease to be a good reason if the same is applied whimsically in some cases and not in others. Any criteria that the NHAI deems fit and relevant must be applied uniformly and it would not be permissible for any State agency to pick and choose the qualification criteria at its whim. It is well settled that in such cases an action of a State, which may otherwise be pursuant to a valid policy, would be struck down if it is enforced/applied in an arbitrary manner.

18. The Supreme Court in the case of *Natural Resources Allocation, In Re: Special Reference No. 1 of 2012*, held as under:-

"The legality and constitutionality of policy is one matter, and the manner of its implementation quite another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem."

19. The World Bank had initiated action to impose sanctions against L&T and L&T had been suspended from participating in any project funded by the World Bank on 31.03.2012. The petitioner has placed a copy of the decision of the Sanctions Board issued on 07.03.2013 which indicates that effective 31.03.2011 L&T and any other entities directly or indirectly controlled by L&T were debarred from being awarded any additional contracts with the World Bank Finance Projects pending the final outcome of the sanctions proceedings. The said proceedings had culminated in punitive measures which included disqualifying L&T from participating in preparation or implementation of any World Bank Finance Project for a period of six months effective 07.03.2013. Concededly, the NHAI had awarded a contract to L&T on 31.03.2012 pursuant to an RFP that was issued on 15.02.2012. The learned counsel for the NHAI had sought to distinguish the case of L&T on the ground that the bid was awarded to L&T prior to the final order issued by the Sanctions Board on 07.03.2013. This contention is, clearly, fallacious as L&T had incurred the disability from participating in World Bank Project on 31.03.2011 and the final order issued on 07.03.2013 also records the same. At the material time, L&T's position was identical to the current position of the petitioner; a final order has not been passed as yet and the petitioner's appeal is pending before the Sanctions Board of the World Bank. The petitioner has been temporarily suspended by the World Bank just as L&T was on 31.03.2011.

20. In the case of M/s. CES Limited, the World Bank had barred M/s CES Limited from participating in any contract on 02.08.2013 for a period of five years. According to the NHAI, this period could be converted to a conditional debarment at the end of 24 months, if M/s. CES Limited complied with certain conditions imposed by the World Bank. Thus, admittedly, M/s. CES Limited was debarred from participating in any project funded by the World Bank in 2014, and yet the M/s. CES Limited has been awarded several contracts by the NHAI. The learned counsel for the NHAI had sought to distinguish the case of M/s. CES Limited by stating that M/s. CES Limited was a consultant and not involved in physical construction activity. In my view, this is a distinction without a difference as it has no nexus with the object of disqualifying a bidder. Indisputably, a bidder is disqualified on account of any action taken by another agency as it is thought that the bidder may not be fit to be awarded a contract on account of his antecedents. A bidder may be disqualified as an employer may decide not to associate a bidder on account of its conduct even as a punitive measure. In either case, the nature of work performed by a bidder is not relevant for the purpose of enforcing this criteria.

21. The position that emerges is that the NHAI has in its past dealings not considered the sanction by the World Bank to be relevant for the purpose of considering the eligibility of bidders. The NHAI has also not included this as a disqualifying criteria in its RFQ/RFP.

22. In the above context, it would be patently arbitrary if the NHAI is permitted

to follow a policy of pick and choose. The NHAI cannot consider the disqualification by the World Bank as a reason to disallow participation by bidders and ignore the same with respect to others. Such action by a State agency cannot be countenanced and would be clearly violative of the equal protection clause, Article 14 of the Constitution of India.

23. Clause 2.16 of the RFP permitting the NHAI to reject any bid without providing any reason, would not in any manner permit the NHAI to act whimsically or in an arbitrary manner.

24. Admittedly, the petitioner has lost its opportunity to participate in the contract for the project. It is further stated that the petitioner has been unable to participate in other bids that had been opened till 18.11.2014. However, it is stated that there are several other bids that have been invited and which are currently being processed and the decision of the NHAI to disqualify the petitioner would also affect those bids.

25. In the given circumstances, the present petition is disposed of by directing that the NHAI would permit participation of the petitioner in all bids where bid documents have been issued without expressly specifying that bidders would be disqualified from participating in the bid if they were otherwise rendered ineligible to participate in the World Bank financed projects on account of sanctions imposed by the World Bank. In the event, the NHAI considers the aforesaid eligibility criteria to be necessary, it would be open for NHAI to, clearly, specify the same in its bid documents and implement the same uniformly.

26. The pending application stands disposed of. No order as to costs.