
(2009) 12 GAU CK 0006
In the Gauhati High Court
Case No : Writ Petition (C) No. 312 of 2009

Hightension Switchgears Private Limited	APPELLANT
Vs	
State of Tripura and Others	RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2006) 1 GLT 684

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Advocate : Somik Deb, for the Appellant; J. Majumder, D.K. Biswas and P.K. Biswas, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—The Respondent No. 4, in his capacity as the Executive Engineer, Government of Tripura, Resource Division, Panchamukh, Agartala, for implementation of the "Drinking Water Supply" Scheme in Tripura issued Press Notice Inviting Tender (for short, PNIT) from the eligible bidders for procuring supply of UPVC pipes of different diameters and pressure. In the NIT, though the estimated cost was not mentioned, the earnest money was shown as Rs. 26,45,213.00 which was one percent of the estimated cost value, as per Clause 14.1 (Preparation of tender) of the Tripura PWD Works Manual. The Petitioner being a manufacturer of the items, in respect of which the NIT was issued, submitted two tender forms. After opening the bids, submitted by the respective bidders, all the bids were found defective. Therefore, the Petitioner and other bidders were directed to submit additional documents, particulars to establish their eligibility. Accordingly, the Petitioner submitted supplementary documents regarding his financial capacity, which stood at Rs. 10,02,94,291.33 as per the certificate issued by the Chartered Accountant. After considering the documents submitted by the Petitioner and the other bidders, in respect of their technical bids, the official Respondents eliminated the Petitioner from participating in the

price bid on the ground of financial incompetence.

2. According to the Petitioner, as the bids submitted by the tenderers were not in conformity with the terms and conditions of the NIT and in view of the non-mentioning the estimated cost of the work, the elimination of the Petitioner was illegal, arbitrary and perverse. It is contended that as the Respondent-authority allowed the Respondent Nos. 4, 5 and 6 to participate in the price bid by illegally eliminating the Petitioner from participating in the said bid. Being aggrieved by the said action, the Petitioner has come up with this writ petition seeking following reliefs by invoking the writ jurisdiction of this Court:

(i) Issue Rule calling upon the Respondents and each one of them to show cause as to why a Writ of Certiorari and/or in the nature thereof shall not be issued quashing/setting aside the impugned Press Notice Inviting Tender dated 17.6.2009 (Annexure-P/1) and the DNIT dated 10.7.2009 (Annexure-P/2) issued for supply of UPVC pipes of different diameters and pressure for DWS Scheme in Tripura with Coupler and Solvent Cement for the year 2009-10 and the step(s) taken in furtherance thereof;

(ii) Issue Rule calling upon the official Respondents and each one of them to show cause as to why a Writ of Mandamus and/or in the nature thereof shall not be issued directing/mandating them to forthwith issue Work Order in favour of the Petitioner in furtherance of the impugned Press Notice Inviting Tender dated 17.6.2009 (Annexure-P/1) and the DNIT dated 10.7.2009 (Annexure-P/2) issued for supply of UPVC pipes of different diameters and pressure for DWS Scheme in Tripura with Coupler and Solvent Cement for the year 2009-10 and the step(s) taken in furtherance thereof;

(iii) Issue Rule calling upon the official Respondents and each one of them to show cause as to why a Writ of Certiorari and/or in the nature thereof shall not be issued mandating/directing them to revoke/rescind the impugned Press Notice Inviting Tender dated 17.6.2009 (Annexure-P/1) and the DNIT dated 10.7.2009 (Annexure-P/2) issued for supply of UPVC pipes of different diameters and pressure for DWS Scheme in Tripura with Coupler and Solvent Cement for the year 2009-10 and the step(s) taken in furtherance thereof;

(iv) Issue Rule calling upon the Respondents and each one of them to show cause as to why a Writ of Prohibition and/or in the nature thereof shall not be issued restraining/prohibiting them from acting in any manner in furtherance of the impugned Press Notice Inviting Tender dated 17.6.2009 (Annexure-P/1) and the DNIT dated 10.7.2009 (Annexure-P/2) issued for supply of UPVC pipes of different diameters and pressure for DWS Scheme in Tripura with Coupler and Solvent Cement for the year 2009-10 and the step(s) taken in furtherance thereof;

(v) In the ad-interim and thereafter, on

hearing the parties, an order in terms of prayer

(ii) and (iv) above;

(vi) Call for the records appertaining to this petition;

(vii) After hearing the parties, be pleased to make the Rule absolute in terms of i, ii, iii and iv above;

(viii) Costs of and incidental to this proceeding;

(ix) Any other reliefs) as to this Hon"ble High Court may deem fit and proper.

3. Challenging the Petitioner's claim, the State Respondents have submitted a counter affidavit. In the counter affidavit aforesaid, it is stated that, in view of mentioning of the earnest money, which was one percent of the estimated cost value of the work, no gross illegality was committed by not mentioning the estimated cost in the tender notice. It is stated in the counter affidavit, that the value of the cost of the work can be reasonably estimated by the tenderers, dealing with the tender items and that as none of the bidders could fulfil the tender conditions, for qualifying for their participation in the price bid opening, the Chief Engineer analysed and evaluated the bids under the scope of Sub-clauses 9.1, 20.1 and 21.2 of the Draft NIT and invited the Petitioner and the private Respondents for ascertaining their bid capacity by giving equal opportunity to all of them. Accordingly, all the bidders including the Petitioner attended the office of the Chief Engineer and produced the supplementary documents in support of their claim. It is contended, by the answering Respondents, in the said affidavit, that by way of such clarification, all the bidders came to the same level in respect of all the points except for bid capacity and that on the basis of the additional documents submitted by the bidders and on proper evaluation, it was found that during the year 2006-07, the Petitioner executed maximum value of supply work amounting to Rs. 10.11 crores. Accordingly, giving ten percent weightage per year on the said amount, it is contended, that the current price of value of work done by the Petitioner came to Rs. 13.45 crore only which was much less than the value of the works done by the Respondent Nos. 5, 6 and 7. The value of the work done by the Respondent No. 5 during the year 2008-09 was found to be Rs. 72.26 crores, while value of the works done by the Respondent Nos. 6 and 7 was found to be Rs. 899.57 crores and Rs. 48.86 crores respectively. In view of the above, as the estimated cost of the work was Rs. 26.45 crores, the Petitioner could not fulfil the requirement for "price bid" capacity and as such he was not found suitable for participating in the "price bid". The contesting Respondents further contended that the Petitioner having ailed to qualify for the bid. There was no violation of any right of the Petitioner or miscarriage of justice and as such he was not entitled to get the relief claimed for. The non-official Respondent No. 6 has also contested the Petitioner's claim by filing an affidavit-in-opposition. In the said affidavit, the answering Respondent No. 6 stated that the writ Petitioner participated in the tender process with full knowledge of the contents of the NIT and the DNIT and as such, he having participated in the entire process, cannot

challenge the same on the ground of vagueness of the VIT or any omission to indicate the estimated cost of the work.

4. I have heard Mr. Somik Deb, learned Counsel appearing for the Petitioner. Also heard Mr. J. Majumder, learned Counsel, appearing for the Respondent Nos. 1 to 4, Mr. D.K. Biswas, learned Counsel, appearing for the Respondent No. 6 and Mr. P.K. Biswas, learned Counsel, appearing for the Respondent No. 7.

5. Mr. Somik Deb, learned Counsel appearing for the Petitioner has submitted that the official Respondents committed illegality on three counts i.e. firstly, by non-disclosing the estimated cost of the work which made the NIT vague, secondly, by allowing the bidders to submit additional documents violating the terms and conditions of the NIT and thirdly, after receipt of the tender bids, in view of the terms of the NIT, the Chief Engineer had no authority to receive supplementary documents and to allow the non-official Respondents to participate in the price bid. In reply to the said argument advanced by Mr. Deb, learned Counsel, Mr. J. Majumder, learned Counsel for the official Respondents, submitted that, in view of mentioning of the earnest money, which was one percent of the estimated cost, there was no vagueness in the NIT and that by fixing the earnest money, the value of the work was made known to all. He further submitted that for any clarification in this regard, the Petitioner was at liberty to approach the authority and that no prejudice was caused to the Petitioner in participating the tender process. Referring to the "qualification criteria", as mentioned at Clause 3.3 of the NIT, the learned Counsel, for the official Respondents, submitted that a bidder, in order to participate in the price bid, must satisfactorily complete, as a prime contractor, similar works of value not less than the amount put to bid (at current price level) at least any one year and, therefore, as the Petitioner, in spite of giving equal opportunity, failed to establish his financial capacity, no illegality or violation of natural justice in respect of the Petitioner was committed.

Referring to the decision held in the case of Bachhittar Singh Vs. The State of Punjab, Mr. Somik Deb, learned Counsel, appearing for the Petitioner, submitted that as the Manual was prepared with the approval of the Council of Ministers and the same not being accepted by the Governor of the State, it cannot be treated to be an action of the State. In the above referred case, it was held:

we may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advices of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State.

In support of his contention, that the authority cannot re-evaluate the bids by inviting additional documents, materials etc, the learned Counsel for the

Petitioner relied on the decision held in the case of Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, The above referred case relates to holding of recruitment test after short listing the candidates. The question came up before the Apex Court in the said case was whether short listing could be done by holding a written test when there was no provision to that effect in the statutory rules. Another related question was whether select list could be prepared solely on the interview or marks both for written test as well as interview ought to have been taken into consideration. The High Court as well as the Administrative Tribunal held that marks for both the test and interview could be taken into consideration. The Hon'ble Apex Court while upholding the decision of the High Court and the Tribunal observed that the State authority has no other option but to screen the candidates on the basis of the written examination. It was held:

In our opinion, however, even in absence of statutory provision, such an action can always be taken on the basis of administrative instructions--for the purpose of elimination and short listing of huge number of candidates provided the action is otherwise bona fide and reasonable.

Here the test to be applied was whether action was bona fide or reasonable. Applying the said principle, it is found that there is nothing on record to find that the act of the Respondent-authority was not bona fide and reasonable. The Respondent-authority while eliminating the Petitioner from participating in the price bid had given him sufficient opportunity to substantiate his financial capacity as per terms of the NIT. Therefore, I find no sufficient reason to hold that the Respondent-authority committed any illegality by allowing the Petitioner and other bidders to submit additional documents, particulars etc. in support of their eligibility. Mr. Somik Deb, learned Counsel for the Petitioner referring to the PWD Manual, which indicated the earnest money as one percent of the estimated cost value (14.1), submitted that the said Manual not being issued under the authority of the Governor, cannot have the statutory effect. There is no doubt that the PWD Works Manual is a substitute of rules/principles/guidelines for conducting the business in a uniform way and the same has been accepted as guiding principles in tender process. The said Manual has not been challenged in this writ petition. Though, the PWD works Manual was not a statute, the same was used for performing the business of the PWD uniformly and transparently. Therefore, mentioning of 1 % (one percent) earnest money is known to all concerned since long. Hence, I find no reason to believe that the same caused any prejudice to the Petitioner.

6. Mr. P.K. Biswas, learned Counsel for the Respondent No. 7, while joining with the learned Counsel for the official Respondents, submitted that in view of the provisions laid in Clauses 16.1, 19.1, 20 and 22 of the NIT, the authority committed no illegality by seeking further clarification, documentary proof as well as particulars in respect of technical bid. It is submitted that equal opportunity was given to all the bidders, including the Petitioner and that the Petitioner failed

to establish his financial capacity which was a pre-condition for participating in the price bid as per Clause 3.3 of the NIT.

7. Mr. D.K. Biswas, learned Counsel, appearing for the Respondent No. 6, submitted that no fundamental right of the Petitioner was violated by the impugned action of the authority and that he was given equal opportunity for establishing his eligibility to participate in the price bid. Referring to the Press Notice Inviting tender dated 17.6.09, the learned Counsel submitted that a pre-bid conference was held in the office of the Executive Engineer on 18.7.09 at 1200 hours for clarification of any doubt regarding prospective tenders on any condition of the contract, specification etc. and that in view of the above provision, the Petitioner was very much at liberty to obtain all necessary clarifications. It is further submitted that as the Petitioner, after obtaining all necessary clarifications, participated in the said tender process and got eliminated due to his failure to establish his financial capacity, he cannot stall the process causing prejudice to the public interest Scheme for which the bids were invited. It is also submitted that in view of the principles of waiver and acquiescence, the Petitioner having participated in the tender process knowing fully well about the terms and conditions of the NIT and having failed to establish his eligibility, in spite of giving of opportunity, cannot challenge the process by exercising the writ jurisdiction of the Court.

8. The learned Counsel, for the Petitioner, referring to the case of *Sri Dilip Kumar Datta v. State of Tripura and Ors.*, reported in (1986) 1 GLT 367, further submitted that in view of the violation of the terms and conditions of the tender notice, the Respondent-authority committed illegality by allowing the private Respondents to participate in the price bid and that this action on the part of the Respondents was illegal in the eye of law. In deciding the said case, it was observed that the authority cannot introduce new facts into the tender notice, more particularly after the tenders are submitted and the same are opened. Agreeing with the judgment written by the Hon'ble Mr. Justice S.N. Phukan, Hon'ble Mr. Justice R.K. Manisena Singh observed:

Tender form provides terms and conditions of tender in respect of the work. The CPWD Manual, for short, the Manual as applicable to Tripura provides for processing for the acceptance of the tender. If a tenderer does not satisfy one of the terms and conditions of the tender, the tender shall not be entitled. Therefore, the terms and the conditions and rules under the Manual are not idle rituals.

9. Admittedly, in respect of the present NIT, the authority has not added anything after issuance of the tender notice and also after opening the bids. In the NIT the "earnest money" was clearly shown indicating thereby the estimated cost of the work as per Clause 14.1 of the PWD Works Manual. Therefore, I am of the considered opinion that there was no difficulty in understanding/calculating the value of the work on the basis of the earnest money, which is one percent of the value of the work in view of Clause 14.1. As in the NIT, the earnest money

was specified, which was one percent of the estimated cost value of the work, for a bidder, who had the opportunity of attending a pre-bid conference, as prescribed by the Press NIT, there was no difficulty in understanding the estimated cost of the work. That apart, even if the estimated cost was mentioned, in view of the failure of the Petitioner to establish its financial capacity, even after giving opportunity, he would not have been entitled to get the work in its favour. Hence, I find no force in the contention of the learned Counsel for the Petitioner that any prejudice or violation of the natural justice or infringement of the statutory provisions/rules was committed by not specifically mentioning the estimated cost in the tender notice.

10. Referring to a decision held in the case of *D. Satyanarayan Murty v. Government of Andhra Pradesh and Anr.* reported in AIR 1979 259, learned Counsel for the Petitioner submitted that under the NIT, the Chief Engineer had no original jurisdiction for re-verification of the tenders and to call the bidders to submit additional papers. In the above referred case, the words "subject to control of the Government" was defined and it was held that the said words undoubtedly confer both the appellate as well as revisional jurisdiction on the Government. Admittedly, the Chief Engineer is the controlling officer of the tender inviting officer i.e. the Executive Engineer. Clause 16.1 provides that the technical bids with attested copies of certificates, documents (except the price bid/offer) are to be submitted by the bidder to the concerned Executive/ Superintending Engineer so as to reach before the date of opening of the price bid. Therefore, from the said clause, it appears that all necessary documents, papers in support of the technical bid could be submitted till before the date of opening of the price bid. Further, clause 20 provides that the tender opening authority may call upon any tenderer for clarification of the statements, documentary proof relating to technical bid. Similarly, Clause 19.1 provides that clarifications, particulars, if any, required from the bidders will be obtained by addressing the bidders. Therefore, the NIT provided that, even after submission of the technical bid, it was lawful to call for further particulars, documents, clarifications etc. in respect of the statements made by the bidders.

11. In view of the above provisions, in my considered opinion, the Respondent-authority did not violate the terms and conditions of the NIT by requiring the bidders to furnish clarifications and produce supplementary documents available with them. The learned Counsel for the Petitioner referring to the decision held in the case of *Jaikishan Dass Mull Vs. Luchhimirain Kanoria and Co.*, submitted that as the tender notice was not in prescribed form, the process initiated by the authority was illegal in the eye of law. In deciding the above referred case, the Hon'ble Apex Court held that if a contract is not in a prescribed form as enjoined by bye-law, it would be in contravention of the bye-law. It was held that the contract should contain all the terms and conditions set out in the prescribed form. In the present case, though the PNIT dated 17.6.09 was in prescribed form, the column indicating the estimated cost was not filled up. In the subsequent DNIT dated 10.7.09 there was no column indicating the estimated

cost. In their counter affidavit, the contesting official Respondents clearly stated that, the earnest money being one percent of the estimated cost, the cost of the work was Rs. 26,45,00,215/-. As the bidder had no difficulty in ascertaining the cost of the work, the non-mentioning of the cost of the work did not cause any prejudice to the Petitioner.

12. Mr. J. Majumder, learned Counsel appearing for the official Respondents submitted that as the work, in respect of which the bids were invited, related to public interest i.e. for implementation of a "Scheme for drinking water supply" in the State of Tripura during the financial year 2009-2010, the Respondent-authority, in view of failure of the bidders to fulfill all the terms and conditions of the tender notice, had no other alternative but to invite all the bidders including the Petitioner for consultation and for seeking clarifications regarding their eligibility. Referring to the decision held in the case of B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, the learned Counsel submitted that the Respondent-authority exercised its discretionary power by giving equal opportunity to all the bidders. In the above referred case, it was observed that it can choose its own method to arrive at a decision and it is free to grant any relaxation. It was further held that the State, its corporations, instrumentalities, and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

13. It will not be out of place to mention that in their counter affidavit, the Respondent-authority, while supporting their action, clearly stated that, in spite of giving opportunity, the Petitioner could not establish his financial capability to perform the work. No rejoinder has been submitted refuting the said contention. Therefore, it appears that the Petitioner accepted the said contention made by the Respondents.

14. From the records as well as the arguments advanced on behalf of the parties, it appears that, in spite of giving sufficient opportunity, the Petitioner could not establish his financial capability as required by Clause 3.3 of the NIT. Therefore, non-mentioning of the estimated cost did not cause any prejudice to the Petitioner.

15. Considering the entire facts and circumstances of this case and in the light of the above discussions, I am of the considered opinion that by the impugned action taken by the State Respondent, no statutory rules/law and principle of natural justice was violated requiring interference, in respect of the impugned action, by exercise of discretionary powers under Article 226 of the Constitution of India. Therefore, I find no merit in this writ petition. Accordingly, the same is

dismissed. The interim order passed by this Court shall stand vacated. No cost.