
(1997) 03 SC CK 0196
In the Supreme Court Of India
Case No : 5540 Of 1997

Hindustan Construction Co. Ltd.

APPELLANT

Vs

National Highways Authority of India and Others

RESPONDENT

Date of Decision : 25-03-1997

Acts Referred:

Citation : (1997) 90 CompCas 372

Hon'ble Judges : S. C. Agrawal, J;G. T. Nanavati, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

S.C. Agrawal, J.—This petition for special leave to appeal against the judgment of the Delhi High Court dated March 6, 1997, arises out of the award of a contract for construction of roads on the national highway in West Bengal by the National Highways Authority of India, respondent No. 1 herein.

2. The Asian Development Bank (ADB) had sanctioned a loan of US dollars 245 million for the purpose of execution of certain National Highway Development Projects under the loan agreement dated March 22, 1995 ; the Ministry of Surface Transport of the Government of India was appointed as Project Executing Agency and the Ministry of Surface Transport had entrusted the task of execution of the projects to respondent No. 1. In September, 1995, respondent No. 1 invited bids for construction of roads on the National Highways in West Bengal for two alternative types of pavements (i) rigid (concrete), and (ii) flexible (bituminous). The petitioner as well as respondent No. 4 were among the bidders who had submitted their bids in response to the said invitation. The bid of the petitioner was the lowest among the bids for the rigid pavement while the bid of respondent No. 4 was the lowest among the bids for the flexible pavement. By resolution dated March 9, 1996, respondent No. 1 gave its approval for the bid of the petitioner for the rigid pavement but in the said resolution it was further resolved as under :

It was, however, decided that if the bank and the Government decide that the work is to be executed with the flexible pavement option then the lowest evaluated bid amounting to Rs. 1,610,795,084 was of M/s. B.S.C.-R.B. M.-PATI (vide enclosure VII enclosed). Both the evaluated options should be sent to ADB for consideration.

3. The ADB, however, wanted the said recommendation to be reviewed and resubmitted by respondent No. 1 after obtaining a second bid evaluation report in the light of a matter referred to in their letter dated May 9, 1996. The chairman of respondent No. 1 in his letter dated May 8, 1996, stated that the bid evaluation report and the contract award recommendations submitted by respondent No. 1 have been reviewed and he felt that the same is in conformity with the provisions of the bidding document. It was further stated that if ADB still felt that re-evaluation of the bids was necessary the bank may engage a consultant and advise respondent No. 1 in the matter. It appears that the ADB did not favour acceptance of the rigid pavement option and thereupon the flexible pavement option was accepted and the contract was awarded to respondent No. 4. The writ petition filed by the petitioner to challenge the said award of contract to respondent No. 4 was dismissed by a learned single judge of the High Court and the Letters Patent Appeal filed against the judgment of the learned single judge has been dismissed by the Division Bench of the High Court by the impugned judgment (see page 354 supra). Before the learned single judge the communication of the ADB dated October 10, 1996, was placed wherein the ADB has given the reasons why it was in favour of acceptance of the flexible pavement option as against the rigid pavement option. In the impugned judgment, the High Court has said that having regard to the said reasons the decision of respondent No. 1 in awarding the contract to respondent No. 4 does not suffer from the vice of arbitrariness so as to call for interference.

4. Shri F. S. Nariman, learned senior counsel, appearing for the petitioner, has submitted that in the documents for invitation of bids it is clearly indicated that the employer (respondent No. 1) was to take the decision in the matter of acceptance or rejection of bids and reference is made to the following clauses in the documents for invitation of bids :

33.1 Subject to Clause 34 the employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who had offered the lowest evaluated bid price provided that such bidder has been determined to be (i) eligible in accordance with the provisions of Sub-clause 31(i) and (ii) qualified in accordance with the provisions of Clause 5.

34. The employer's right to accept any bid and reject any or all bids.

5. The submission is that in the present case it is not respondent No. 1 who has taken the decision but actually it was the ADB which had the final say in the matter of taking the decision and that this fact was not made clear in the

invitation for bids and the tenderers did not know that the final decision will be taken by respondent No. 1 with the concurrence of the ADB. The learned Attorney-General as well as Shri D.D. Thakur, the learned senior counsel appearing for the respondents, have however, pointed out that it was expressly stated in the documents relating to the limitation for bids that the contract is for a project funded by the loan received from the ADB and it was implicit that it will be governed by the guidelines governing the advancement of loans by the ADB which require :

(c) Proposal for award.-As soon as the bids received have been evaluated, approval of the bank should be obtained to the proposal for award of contract before a contract is awarded or a letter of intent is issued.

6. The submission is that in view of the said guidelines the action of respondent No. 1 in awarding the contract to respondent No. 4 cannot be held to be vitiated.

7. Having regard to the facts and circumstances of this case we are not inclined to interfere with the decision of respondent No. 1 in awarding the contract to respondent No. 4 in the present case. But at the same time we are of the view that in future whenever contracts are to be awarded by the State for any of its undertakings in respect of projects which are financed by international financing institutions, e.g., the World Bank or the ADB, care should be taken to indicate in the documents inviting tenders that the decision to award the contract would be taken with the concurrence of the financing agency if it is so required under the loan agreement. The SLP is disposed of accordingly.