(2023) 03 CHH CK 0032

In the Chhattisgarh High Court

Case No : Writ Petition (Civil) No. 4776 Of 2022

J.P. Drags APPELLANT

Vs

State Of Chhattisgarh RESPONDENT

Date of Decision : 10-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 12, 14

Citation : (2023) 03 CHH CK 0032

Hon'ble Judges : Arup Kumar Goswami, CJ;Rakesh Mohan Pandey, J

Bench : Division Bench

Advocate : Fouzia Mirza, Shobhit Mishra, Raghvendra Pradhan, B. P. Sharma, M. L. Sakat, Raja Ali, Nikhil Parakh

Final Decision : Disposed Of

Judgement

1. By way of instant petition, the petitioner has challenged the action of respondent authorities, whereby the respondent authorities, in violation of the Request For Empanelment (hereinafter referred to as RFE) Guidelines issued by the Department of Social Welfare, Govt. of Chhattisgarh, have declared the respondent No. 3 as successful L-1 bidder.

2. The matter in brief, is that, the petitioner was L-3 bidder in the bidding invited by respondent No. 2 through online mode on 21.06.2022 for supply of Motorized Battery Operated Tricycles for the Persons with Disabilities (for short, 'PwDs') within the State of Chhattisgarh in the prescribed format for empanelment. Respondent No. 3 was successful L-1 bidder in the tender No. 107649 dated 24.08.2022. Earlier, an interim order was passed restraining issuance of work order till the next date of hearing. The said order has been extended from time to time till its final hearing. The petitioner has sought relief for quashing of the decision of the respondent authorities in holding respondent No. 3 as successful L-1 bidder and to issue a fresh tender RFE.

3. The chronology of events is as under:-

(i) On 24.06.2022, tender was floated only for empanelment of manufacturers/ distributors for supply of motorized battery operated tricycle to the PwDs, within the State of Chhattisgarh.

(ii) Day of 25.08.2022 was fixed for bid submission start date (online). Bid submission due date (online) was on 25.09.2022 at 11:59 pm.

(iii) Day of 26.09.2022 was scheduled for opening of Bid at 11:00 am and date of presentation was on 26.09.2022 at 3:00 pm. Financial Bid was on 27.09.2022 at 11:00 am.

4. The pre-qualification criteria as described in clause-2 of the RFE, dated 24.08.2022, is reproduced herein below:-

"(I) To be eligible under the contract, the intending Bidders should meet the following mandatory minimum eligibility criteria:-

[A] Average Annual Turnover: Minimum average annual gross turnover of the bidder shall be INR 1 Crore or more during any three complete financial years out of FY (i.e. 2019-20, 2020-21 & 2021-2022). (Audited balance sheet duly signed by CA should be enclosed).

Annual turnover is total certified payments received for contracts in progress or completed during the financial year.

The Bidder must ensure that he/they submit a copy of Income Tax Return along with Income Computation Sheet for last 3 financial years (i.e. 2019-20, 2020-21, & 2021-2022). Copy of audited/C.A. Certified balance sheet and Profit & Loss Account must also be attached.

Note:** [Valid MSME UAM/NSIC/ Start-up certificate holders will be exempted from Average Turnover.]

[B] Registration of Company: The bidder must be a legal entity (company/ partnership firm/proprietorship firm/LLP) registered for last 03 years from the date of issue of this RFE.

[C] The organization must have experience of supply of Motorized Battery Operated Tricyle for at least 3 (three) years in Govt. Department.

[D] The Bidder must have a local office and service center within the State of Chhattisgarh. Valid Gumasta license for same shall be submitted.

[E] The organization must have valid registration of GST and PAN Card in India.

[F] The participating bidders must have a minimum experience of one large scale project of similar nature with any State or Central Government.

[G] The organization must have completed fully or partly similar Project with at least one project of value not less than Rs. 50 Lakh or more.

[I] The organization should not have been blacklisted by the Central

Government, State Government, PSU and Government Bodies.

[J] Any applicant during last two financial years should neither have failed to perform any agreement nor have been expelled/ terminated from any project or agreement.

[K] The organization should have ISO Certification.

5. In pursuance of the tender dated 24.08.2022, three bidders, namely, G.H.M. Works Pvt. Ltd, Kaviraa Solution and the present petitioner submitted their respective bids. The respondent No.3 submitted its proposal for RFE on 24.09.2022. The bids were opened on due date and given time and respondent No. 3 was found to be the successful L-1 bidder, whereas, petitioner has been declared L-3. Though, the number of tricycles which is to be supplied to the respondent authorities is not given in the RFE, the successful bidder has to supply two types of tricycles:

(1) Simple tricycle and

(2) Tricycle with sun roof.

Method of technical evaluation is also prescribed in the RFE. The technical specification of the tricycle is appended as Annexure-C along with RFE.

6. The rates quoted by the bidders are as under:-

Bidders

Quote for Simple

Tricycle

Quote for Sun

Roof Tricycle

L-1 Bidder -

Kaviraa Solutions

Rs.45,000/-

Rs.47,500/-

L-2 Bidder - GHM Works PVT

LTD

Rs.45,000/-

Rs.62,000/-

L-3 Bidder - JP DRAGS

Rs.51,000/-

Rs.56,400/-

7. As the bid of Respondent No.3 was the lowest one, its bid was accepted by respondent No. 2. The petitioner has not arrayed L-2 bidder as party respondent and the petitioner has not made any prayer to award contract to it, but prayer has been made to direct respondent No. 2 to invite a fresh tender.

8. The learned counsel for the petitioner would submit that respondent No. 3 could not fulfill the pre-qualification criteria as mentioned in the clause - 2 of the RFE. These are - average annual turnover; experience of supply of motorized battery operated tricycle for at least 3 years in Government Departments; and lastly the bidder must have service centers within the State of Chhattisgarh. She would further submit that these deficiencies go to the root of the case, but the respondent No.2, ignoring the above mandatory criteria accepted the bid of respondent No.3. To buttress her contention, she has placed reliance on the documents submitted by respondent No.3 in the bidding process. According to clause 2 (i) [A] of the pre-qualification criteria, bidders must have enclosed audited balance sheet duly signed by Chartered Accountant (for short, C.A.), showing minimum average annual gross turnover of INR. 1 Crore or more during any complete 3 Financial Years out of Financial Years - 2019-20, 2020-21 & 2021-2022. A certificate has been submitted by the respondent No.3, issued by its C.A., according to which turnover of M/s. Kaviraa Solution in the F.Y. 2020-21 was Rs.1,11,51,209.33/- and in the F.Y. 2021-22 it was Rs.1,78,62,560.00/-. She would further submit that a certificate was issued by Mahila Arthik Vikas Mahamandal (for short, 'Mahamandal') dated 30.04.2021 according to which cost of its bid was total Rs. 5,75,25,000/-, which is contrary to the certificate issued by the CA of respondent No.3. She would further submit that pertaining to experience clause, the respondent No. 3 has supplied tricycle to Yashswini Loksanchalit Sadan Kendra, Yavatmal on 03.06.2020. Thereafter, on 30.04.2021, 885 Electrical tricycles were supplied to Mahamandal, where same institution has issued a certificate, showing supply of 298 tricycles by respondent No. 3. Letter dated 12.05.2021 shows that order was placed by Mahamandal on 12.06.2021 for supply of 162 units of E-tricycles. She also submits that the respondent No. 3 has supplied tricycles in the year 2020 and 2021 only and thus, mandatory criteria of supplying the tricycle for at least 3 years in Government Department is not fulfilled. With regard to next contention, she would submit that respondent No. 3 has submitted document on 24.09.2022 to the effect that its service centers are situated at 5 places in Maharashtra and there is proposal to set up service centers in State of Chhattisgarh at 24 places, whereas, as per clause 2 [D] the bidder must have a local office and service center within the State of Chhattisgarh. Thus, this criteria is also lacking, she contends. She has placed reliance upon the judgment passed by the Hon'ble Supreme Court in the matter of Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and Others (2016) 8 SCC 446.

9. In turn, counsel for the respondents No. 1 and 2 would submit that

distribution of motorized battery operated tricycle is to be financed by the State Government through its instrumentalities and the distribution of such tricycle is free of cost to the beneficiaries. As such, the whole scheme is purely a welfare scheme with a benevolent object. To implement the above scheme, RFE was introduced and applications were invited from intending bidders from 25.08.2022 and the last date for submission of bid was 25.09.2022.

10. An objection was raised by the petitioner to the effect that the respondent No. 3 does not fulfill the criteria given under the Clause - 2-C, 2-D, and 2-H of the RFE. It is further stated by the learned counsel for the State that earlier technical specification was 36/48V 350 Watt BLDC Hub Motor, but after receiving objection from the petitioner, it was modified to 36/48V 250 Watt BLDC Hub Motor. He would further submit that the State has taken care of compliance of the criteria given in RFE. The respondent No.3 made lowest bid and it is a manufacturer of tricycles; therefore, it has been awarded the tender. He has placed reliance upon the decision of the Hon'ble Supreme Court in the matter of N.G. Projects Limited v. Vinod Kumar Jain and others (2022) 6 SCC 127 and would submit that courts must realize their limitations and the unwarranted consequences which needless interference in commercial matters could cause. In contracts involving technical issues, the courts should be even more reluctant because as Judges do not have the necessary expertise to adjudicate upon technical issues. It is also held in the judgment in para-23 that "the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer".

11. Learned counsel for the respondent No. 3 would submit that on 27.09.2022, bid was opened and the respondent No. 3 was declared as L-1. The writ petition was filed on 05.11.2022 and during this period, the Directorate, Social Welfare Department, Raipur (CG) and the respondent No. 3 entered into service agreement. He would further submit that respondent No.3 has already manufactured 200 numbers of battery operated tricycle with or without sunroof and the same are ready for delivery.

He would further submit that the respondent No.3 has a valid start-up certificate of Ministry of Micro, Small and Medium Enterprises (for short, 'MSME'), and therefore, it was exempted from average turnover requirement given in the Clause-2 of RFE. He would further submit that the respondent No. 3 is having Udyam registration certificate issued by the Government of India and therefore, there was no need for submission of audited balance-sheet. With regard to experience, he would further submit that for the last three years, tricycles have been supplied to the Government Departments i.e. Government of Maharashtra undertaking Mahila Arthik Vikas Mahamandal and Yashaswini Lok Sanchalit Sadhan Kendra, Yavatmal, and certificates have been issued by the said institutions. He would further submit that the service stations have been proposed at as many as 24 district headquarters of the State of Chhattisgarh, and thus the respondent No.3 fulfills all the eligibility criteria given in the RFE. He also has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of N.G. Projects Limited (supra).

12. We have heard learned counsel for the parties and perused the complete record submitted by the respondents No. 1 and 2 with regard to the tender process.

13. Now, we will determine the first issue with regard to average annual turnover. Though, the required average annual turnover must be INR 1 crore or more during any three complete financial years according to criteria given in RFE, as respondent No. 3 is having MSME UAM/NISC/Start-up certificate, therefore, it was exempted from having prescribed turn over. Thus, the first ground taken by the counsel for the petitioner is not made out.

14. The second issue is with regard to pre-qualification criteria i.e clause 2 (i) [C], which says that the organization must have experience of supplying of Motorized Battery Operated Tricycle for at least 3 years in Government Department. In this regard, from the documents annexed by the respondent No.3 itself vide Annexure R3-4, it appears that the respondent No. 3 has supplied tricycles to Yashswini Loksanchalit Sadan Kendra, Yavatmal and a certificate has been issued in this regard on 03.06.2020, but neither the number of tricycles nor the date of delivery is mentioned on it. Another certificate has been issued by Mahila Arthik Vikas Mahamandal dated 12-06-2021, according to which 162 units of tricycles have been supplied to the institution by the respondent No. 3. Last certificate issued by Mahila Arthik Vikas Mahamandal, dated 21.05.2021 shows that order was placed for supply of 298 tricycles. Same institution has placed an order on 30.04.2021 for supply of 885 numbers of tricycles. From the documents annexed by the respondent No.-3, it is apparent that in the year 2020 and 2021 only, the tricycles have been supplied to only two institutions of the State of Maharashtra, whereas, the criteria under clause – 2 (i)[C] of RFE for experience of supply of Motorized Battery Operated Tricycle for at least 3 years in the Government Departments is a must. From the documents annexed by the respondent No.3 itself, it is discernible that respondent No. 3 is not fulfilling the criteria 2 (i)[C] regarding experience of supply.

15. Next issue is regarding local office and service centers within the State of Chhattisgarh. Clause -2 (i) [D] says that the bidder must have local service center within the State of Chhattisgarh. Vide letter dated 24.09.2022, the respondent No. 3 has proposed 24 service centers at 24 district headquarters but at present, there is no service station situated in the State of Chhattisgarh. There are only 5 service stations which are situated in the State of Maharastra at Yavatmal, Darwah, Ner, Digras and Buldhana. From the documents of respondent No. 3, it appears that the respondent No. 3 has not set up any service station within the State of Chhattisgarh which is a mandatory requirement. Therefore, this criteria of RFE is also lacking.

16. It was submitted that the respondent No.3 is not engaged in manufacturing

of Motorized Battery Operated Tricycle. From the Goods and Services Tax certificate of the respondent No. 3, it appears that the company is engaged in business of wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packing for retail sale for medical, surgical, dental or veterinary purposes, adhesive dressings and other articles having an adhesive layer. The document annexed by the petitioner shows that the respondent No. 3 is actually not engaged in the manufacturing of Motorized Battery Operated Tricycles. One more issue which catches the eye is that though the respondents No. 1 and 2 had modified the power of motor from 36/48V 350 Watt BLDC Hub Motor to 36/48V 250 Watt BLDC Hub Motor, the respondent No. 3 had submitted its bid on 24.09.2022 mentioning the power of motor as 36/48V 350 Watt BLDC Hub Motor, which requires registration according to the provisions of Central Motor Vehicle Rules, 1989. But the respondents No. 1 and 2 had ignored the above discrepancy of the respondent No. 3 for the reasons best known to them.

17. On the basis of the aforesaid materials available on record, before coming to any conclusion, we may have the assistance of the proposition of law laid down by the Hon'ble Supreme Court prescribing the parameters in which the Courts can interfere.

18. In Bakshi Security & Personnel Services (P) Ltd. (supra), Their Lordships of the Hon'ble Supreme Court have held in clear terms that essential condition of a tender has to be strictly complied with. It reads thus:-

14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)

"6. … The requirements in a tender notice can be classified into two categories—those which lay down the essential condi-tions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be re-quired to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compli-ance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in re-lation to compliance with another part of tender contract, partic-ularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds re-laxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without ju-risdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;…”

19. At this juncture, it would be fruitful to take note of the following excerpts from The Silppi Constructions Contractors v. Union of India (2020) 16 SCC 489, wherein the Hon’ble Supreme Court, in para 19 of its judgment observed that courts should exercise restraint while exercising their powers of judicial review in contractual or commercial matters, but at the same time, being the guardian of fundamen-tal rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. It reads as under:-

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid deci-sions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertak-ings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realize their limitations and the havoc which needless interference in commercial mat-ters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudi-cate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnify-ing glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector un-dertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.”

20. In the matter of N.G. Projects Limited (supra), the Hon'ble Supreme Court in para 23 held as under:

"23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issued. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision making process if after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work."

21. In Uflex Ltd. v. State of T.N. (2022) 1 SCC 165 it has been further observed by Their Lordships of the Hon'ble Supreme Court as under -

"2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial pru-dence. To that extent, principles of equity and natural justice have to stay at a distance. [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary griev-ances, 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". [Jagdish Man-dal v. State of Orissa, (2007) 14 SCC 517]

4. In a sense the Wednesbury principle is imported to the con-cept i.e. the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it

was observed in Michigan Rubber (India) Ltd. v. State of Karnataka [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] as under : (SCC p. 229, para 23)

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsi-cally for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consid-eration the national priorities;

(b) Fixation of a value of the tender is en-tirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Govern-ment acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statu-tory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to en-sure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interfer-ence by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

5. One other aspect examined by this Court is whether the terms and conditions of the tender have been tailor-made to suit a person/entity. In fact, this is what is sought to be contended in the facts of the present case by the respondents who were the original petitioners before the Court. In order to award a con-tract to a particular party, a reverse engineering process is evolved to achieve that objective by making the tender condi-tions such that only one party may fit the bill. Such an endeav-our has been categorised as “Decision Oriented Systematic Analysis” (for short “DOSA”). [Misrilall Mines (P) Ltd. v. MMTC Ltd., 2013 SCC OnLine Del 563].”

22. With regard to the decisions relied upon by learned counsel for the respondent No.3, it is to be observed that where tender process and award of contract is vitiated either by arbitrariness or by mala fides or favoritism, the power of judicial review would be permissible.

23. It is no doubt true that the Courts would be slow to interfere in contractual matters unless a clear cut case of arbitrariness or malafide or bias or irrationality is made out. A duty is, however, cast upon the constitutional Courts being the guardian of fundamental rights to exercise power of judicial review when there is arbitrariness, irrationality, malafide and bias.

24. From the above discussed facts and principles of law laid down by the Hon'ble Supreme Court, it appears to us that the process adopted and decision taken by the authorities suffers from arbitrariness and the same was intended to favour the respondent No.3, which did not fulfill the eligibility criteria as discussed above.

25. Hence, we are of the considered opinion that the allotment of tender to the respondent No. 3 is unsustainable under the law. Accordingly, same is set aside. Since the petitioner has not made any prayer to award the contract to it, but has prayed for direction to invite fresh tender, the respondent authorities will now invite tender afresh.

With the aforesaid direction and observation this petition stands disposed of. However, there shall be no order as to cost.