
(2016) 11 AP CK 0065

In the Andhra Pradesh High Court

Case No : Writ Petition No. 35782 of 2016

K. Venkata Raju Engineering and Contractors (P) Ltd.

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 30-11-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2017) 2 ALT 94

Hon'ble Judges : P.Naveen Rao, J.

Bench : Single Bench

Advocate : Sri O. Manohar Reddy, Counsel, for the Petitioner; GP for Roads and Buildings (AP), for the Respondents

Final Decision : Disposed Off

Judgement

P.Naveen Rao, J.—Petitioner company is engaged in construction activity and has executed number of works in various States in India and works belonging to Central Government. It is registered as special class contractor in Andhra Pradesh i.e., eligible to do work of above Rs.10 crores. Vide G.O.Rt. No.329, Transport, Roads and Buildings (Roads.III) Department, dated 04.06.2016, Government accorded administrative sanction for the work of construction of High level Bridge across river Vamsadara connecting Vanitamandalam village in Polaki Mandal to Shalihundam Tourist place in Srikakulam district for an amount of Rs.7,200 lakhs. The 3rd respondent herein issued a tender notification No.NIT No.3166/EPC/ DCE(R)/EE(R)/DEE-II/AEE-II/2016, dated 19.09.2016. Petitioner is aggrieved by the tender conditions with regard to technical criteria, such as, the bidder as Prime Contractor should have completed at least one similar bridge work not costing less than Rs.20.00 crores., i.e., construction of a Vehicular Road Bridge on Pile foundations with PSC superstructure adopting precast girder launching technique in superstructure across drains, canals, creeks or rivers during the last five financial years updated by giving 10% simple weightage per year to bring it to 2016-17 price level and

having experience in constructions on EPC/ Turnkey system during the last five financial years. Contending that these are unreasonable restrictions, petitioner made a representation to the 3rd respondent on 04.10.2016. As there was no response from the department, he made a further representation on 15.10.2016. Again a detailed representation was made to the Hon''ble Minister for Transport, Roads and Buildings Department on 15.10.2016 and a copy was given to the 2nd respondent on the same day. Alleging that there is no reply to his representation and challenging unreasonable restrictions, this writ petition is filed.

2. Heard Sri O.Manohar Reddy, learned counsel for petitioner and learned Government Pleader for Roads and Buildings (AP) for respondents and with their consent the writ petition is disposed of finally.

3.1. Sri Manohar Reddy submitted that G.O.Ms.No.94, Irrigation and CAD (PW-COD) Department, dated 01.07.2003 contains detailed instructions for preparation of realistic estimates, with regard to qualification criteria to be fixed for awarding Government contracts, the bid capacity etc. The said conditions, mentioned in the G.O., are being followed in respect of all the contracts including EPC contract by all departments of the Government for awarding civil engineering works including R and B department. The eligibility criteria prescribed in the tender notification is contrary to G.O.Ms.No.94, dated 01.07.2003. He would contend that there is no justification on the part of 2nd and 3rd respondents in prescribing different technical criteria and also stating that the bids of the joint venture are not acceptable. A uniform procedure has to be followed in fixing the eligibility criteria for all the works in the State of Andhra Pradesh. The eligibility conditions prescribed in the present tender are entirely different from criteria fixed in the work of improvement to road from Nuvvalarevu to Manchineellapeta from Km 0/0 to 2/0 including construction of HLB across salt creek in KM 1/0 with a linear water way of 420 meters in Srikakulam District, made in November, 2015. No rationale in prescribing the technical qualification and financial criteria. In similar nature of works called by the other departments in the State of Andhra Pradesh including R and B department in other districts, nowhere such a condition is prescribed. Even the Central Government Departments i.e., Ministry of Road Transport and Highways and National Highway Authority have not prescribed the requirement of experience in EPC work.

3.2. He would submit that the terms of contract are tailor made to suit select bidders and paving way for them to form a ring and thereby the Government has to expend more money for the work and it is a drain on public exchequer.

3.3. The right to participate in the tender floated by the Government is a fundamental right and by reason of the action of 2nd and 3rd respondents the right of the petitioner to participate in the tender is lost. The action of the 2nd and 3rd respondents is not legal and the same is arbitrary and violative of Article 14 of the Constitution of India.

3.4. While conceding the power to the respondents to fix the eligibility criteria, he would submit that the criteria fixed should satisfy the test of reasonableness and ought not to be arbitrary. The similar nature of work done in other contracts i.e., lumpsum, item rate basis, etc, is no way different from doing the work in EPC. The only difference is that in EPC relates to Engineering Procurement and Construction and in respect of the other works, the standard plans are prepared by the Government and the contractor has to prepare and submit the plans for approval for construction. There is no basis for the 2nd and 3rd respondents to fix impugned criteria in the eligibility conditions. He submitted that similar conditions were prescribed about 3 years back in respect of two works and only one contractor qualified and both the works were awarded to the same contractor in Srikakulam District and the present tender conditions are fixed in such a way that the existing contractor alone would be the beneficiary.

4.1. Learned Government Pleader submitted that the technical and financial requirements of the present work are entirely different as this work require an altogether different expertise. The Government of Andhra Pradesh took a decision to introduce internationally recognised and proven EPC methodology for execution of projects of such large size and technical complexities and notified in G.O.Ms. No.50 dated 02.03.2009. G.O.Ms.No.94 does not prescribe any eligibility criteria for EPC form of contracts. It mainly deals with the registration of contracts in various categories and matters related to lump sum/item wise contracts where the departments invite tenders only after detailed survey, investigations and designs including drawings are finalized. As against this, EPC contract involves preconstruction activities such as survey, detailed investigation, finalization of designs and drawings including proof checking through IITs, which is a long process, whereas a lump sum/item wise contract does not involve the above preconstruction activities. He would submit that two similar works were sanctioned on two different rivers i.e., (1) construction of High Level Bridge across River Nagavali connecting Narayanapuram with P.J.Peta in Srikakulam District, cost of which was estimate as Rs.34.20 crores; and 2) construction of High Level Bridge across river Vamsadhara at KM 0/0 of Komanapalli Sarubujji road in Srikakulam District, cost of which was estimated as Rs.48.60 crores on EPC/Turnkey basis stipulating certain conditions. As per G.O.Ms. No.329, dated 04.06.2016 for the present work, same conditions have been adopted.

4.2. He would submit that when works of high technical complexities are involved, it is for the employer to get the best of services and the Government interest is paramount. In the process, it can prescribe eligibility criteria in order to achieve best services. More stringent eligibility criteria is prescribed only to ensure that the State would secure the services of a contractor whose performance has been time tested and the contractor utilizes the latest technology available to implement the project. He justifies the Government decision by also referring to similar eligibility criteria prescribed in the tenders floated by GHMC on 18.09.2015 and 13.05.2016 and the conditions of 50% similar work experience for EPC contracts floated by NHA.

4.3. This bridge is to come on Vamsadhara river which is Perennial River and requires adoption of latest techniques for tackling foundations, substructure and superstructure under flowing water conditions. It is not a decision taken in haste. Detailed exercise was undertaken before deciding to fix the criteria. He would submit that enough safe guards are incorporated in the tender process to ensure that no financial loss would be caused to State. On the contrary, there would be more accountability of contractor in executing the work. State expects that construction companies having experience in EPC contracts should be able to handle better the superior technical complexities in a work of this nature.

5. It is settled principle of law, needs no reiteration that it is for the employer to prescribe the conditions to execute a work and Courts cannot ask the employer to change the requirements or to prescribe/relax certain conditions as Court deems as valid. In matters concerning prescription of tender conditions and awarding of contracts, in long line of precedents, Supreme Court has laid down the parameters of judicial review. A brief parade of precedent decisions is necessary to test the contention of petitioner.

6.1. By long line of precedents, the scope of judicial review against administrative decisions is well settled. Court can undertake judicial review of an executive decision on grounds of illegality, irrationality, and procedural impropriety. The writ Court is required to consider whether the decision making process satisfies the test of reasonableness, fairness, non-arbitrariness and whether authority lacks competence.

6.2. In *Asia Foundation and Construction Ltd. v. Trafalgar House Construction Ltd.* (1) (1997) 1 SCC 738, while referring to guidelines laid down in *Tata Cellular v. Union of India* [(1994) 6 SCC 651], Supreme Court held as under:

"9. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651] this Court has held that:

"The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it."

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

(emphasis supplied)

6.3. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* (2006 10 SCC 1, Supreme Court elaborated on these three parameters. Supreme Court observed:

65. In other words, to characterise a decision of the administrator as irrational the court has to hold, on material, that it is a decision so outrageous as to be in total defiance of logic or moral standards. Adoption of proportionality into administrative law was left for the future.

66. In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself. (See *Indian Rly. Construction Co. Ltd. v. Ajay Kumar* [(2003) 4 SCC 579 : 2003 SCC (L and S) 528].)

6.4. On the scope of judicial review on the decisions of executive, more particularly decisions involving technical matters, in *Union of India v. J.O., Suryavamshi* (2011) 13 SCC 167, Supreme Court warned the Courts to resist the temptation to usurp the power of executive. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, Courts should keep off the same [paragraph 18, *Federation of Rly. Officers Assn. v. Union of India* (4) (2003) 4 SCC 289]. Legality of policy and not the wisdom or soundness of the policy, is the subject of judicial review [paragraph 16, *Directorate of Film Festivals v. Gaurav Ashwin Jain* (2007) 4 SCC 737].

6.5. Particularly in the matter of formulating tender conditions, employer has wider latitude and scope of judicial review is minimal. At the threshold, Court cannot interject the tender process on the ground that some of the terms of invitation to tender are not palatable to a contractor.

6.6. A Division Bench of this Court in *Union Of India, South Central Railway,*

Secunderabad And Others v. M/S Laxmi Builders, Secunderabad And Another (6) 2003 10 ALT 1 held that award of the contract is essentially a commercial transaction. In arriving at a commercial decision, considerations, which are of paramount importance, are commercial considerations. Such considerations include the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; and past experience of the tenderer and whether he has successfully completed similar work earlier. The Court must be satisfied that there is some element of public interest in entertaining such a petition. The Division Bench held as under:

"18. When a writ petition is filed challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. "If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. Price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded..... The Court should not substitute its own decision for the decision of an expert evaluation committee."

6.7. In Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664, Supreme Court is pleased to hold,

"229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken.

7. In Life Insurance corporation of India v. Escorts Limited and others (8) AIR 1986 SC 1370 delineated scope of judicial review in contract matters. Supreme Court held as under:

"101. It was, however, urged by the learned counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Article 14 from acting arbitrarily. It was, therefore, under an obligation to state to the court its reasons for the resolution once a rule nisi was issued to it. If it failed to disclose its reasons to the court, the court would presume that it had no valid reasons to give and its action was, therefore, arbitrary. .

While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.."

8. Guided by above principles, it is seen that petitioner opposes prescribing of certain tender conditions which he does not fulfil. It is his foremost contention that these conditions are tailor made to suit a particular contractor and eliminate others from competition. While contending that the conditions imposed are stringent and may result in higher financial liability, it is not explained how these conditions are not useful in ensuring better and higher quality construction and output and how State would be burdened with higher financial liability. It is but stark reality that quality of construction in public works is poor and many constructions are not standing even for half of the period envisaged/planned. If there is greater involvement of contractor, who has to execute the work, it may make him more accountable and may ensure better quality output. It cannot be said that prescription of higher eligibility criteria, experience, etc., are against public interest.

9. Construction of a bridge, more so on a perennial river like Vamshadhara requires lot of technical inputs, analysis and assessment of experts in the concerned field. The State through its various Departments and agencies is best suited to evolve the conditions to execute a work of construction of bridge over a river. The Court is not equipped to assess such requirements. It is not the job of judicial wing of the State to assess what components of a contract are required and what components are not required. In the instant case, previous experience in execution of EPC works and higher financial experience in execution of civil works etc., are prescribed. Even assuming that these conditions are prescribed to suit a particular contractor, it cannot be said that they are so unreasonable and arbitrary for this Court to interfere and ask the employer to redraw the tender conditions. In a given situation, it is permissible to State to prescribe tailor made conditions which may suit a contractor if entrustment of work to a contractor is in larger public interest. It cannot be said that the justification assigned in the counter affidavit to prescribe such higher conditions of eligibility are not valid.

10. Having regard to the above analysis of the legal position and in the facts of this case, I am of the opinion that there is no illegality or procedural irregularity in the tender conditions nor the decision impugned in the writ petition can be classified as irrational or arbitrary for this Court to exercise the writ jurisdiction and nullify the tender process to construct bridge over perennial river. The writ petition is dismissed.

11. Miscellaneous petitions if any pending shall stand closed. There shall be no order as to costs.