

(2014) 12 OHC CK 0062

In the Orissa High Court

Case No : Writ Petition (Civil) No. 22973 of 2014

Manaranjan Sahoo

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2015 Ori 30

Hon'ble Judges : Amitava Roy, C.J.; Dr. Akshaya Kumar Rath, J

Bench : Division Bench

Judgement

Amitava Roy, C.J.—The validity of the Invitation for Bids (for short hereinafter called "IFB") with Bid Identification No. MBD-15/2014-15 issued by the Executive Engineer, Mahanadi Barrage Division, Cuttack for execution of the works as enumerated therein is challenged in this petition.

2. We have heard Mr. S.S. Das, Senior Advocate for the petitioner and Mr. B.N. Bhuyan, learned Addl. Government Advocate for the State-opposite party.

3. The petitioner has introduced itself to be a Small Scale Industrial Unit involved in manufacturing and processing of Milled Steel Grill, Gate, Steel Door, Window, Rolling Shutter, Iron Post, Steel Trusses, Water Tank, Water Tanker, Screw Gear Shutter, Irrigation Shutter, Gear Box, Driver and Non-drive Pulley, Coupling, Steel Structural Mechanical Job Work, Worm Pinion Type Gear Box, Walkway Bridge Rope Drum. It has claimed to be enrolled with the District Industries Centre, Cuttack and with the expertise earned from execution of various works of manufacturing and installation of irrigation Gates and other fabrication works has asserted that it has established itself as a Small Scale Industrial Unit possessed of special skill and proficiency in such projects. Apart from furnishing the particulars of the works of fabrication and transportation of gates in the earlier years, the petitioner has averred that when tenders for such works are invited, terms and conditions must indicate with legal certainty, norms and bench mark therefor as vagueness or subjectivity may result in unequal and discriminatory

treatment. Referring to various e-procurements notices for the past years prescribing the minimum qualifying criteria for similar works, the petitioner has posted an animated challenge to the impugned IFB with Bid Identification No. MBD-15/2014-15 contending that the same vis-a-vis the minimum qualifying criteria is cagey, deficient, inexpressive and nebulous having the potential of being flexed to foster nepotism and favoritism, anathematic to any public participatory process.

4. Being aggrieved, the petitioner has submitted a representation dated 14.11.2014 before the Chief Engineer, Drainage, Odisha, Gandarpur, Cuttack-3, opposite party no. 3 pointing out the above shortcomings in the impugned IFB/e-procurement notice and has drawn the attention to the instructions earlier issued by the Engineer-in-Chief/Chief Engineer vide letters dated 31.5.2004, 19.4.2006 and 29.5.2207 insisting upon the prescription of suitable qualifying criteria in the Detailed Tender Call Notice (for short "DTCN") and bid documents. That in response to the said representation, the Engineer-in-Chief of the Water Resources Department, Odisha, Bhubaneswar has required the Chief Engineer, Drainage, Gandarpur, Cuttack to examine the matter and adhere to the prevailing norms for invitation of such tenders has been stated.

5. While reiterating above, Mr. Das has insistently argued that the impugned IFB ought to be annulled as the same lacks in legal certainty and denies a level play field to the aspiring bidders. In his endeavour to endorse the impugnement, learned counsel has drawn our attention to relevant excerpts of the past IFBs for similar works as well as to the letters dated 31.5.2004, 19.4.2006 and 29.5.2207 of the Chief Engineer/Engineer-in-charge of the department.

6. Reliance has been placed as well on the decision of the Apex Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, and of this Court in Gyanendra Nath Mohapatra and another Vs. State of Orissa and others, .

7. We have traversed the petition with due reference to the host of documents appended thereto. We have considered the arguments advanced.

8. Noticeably, the petitioner has admitted that though in Clause-4(A) and (B) of the INFORMATION AND INSTRUCTION TO TENDERERS of the impugned IFB, there is a mention about the qualifying criteria, the IFB by itself is silent about the same. Thus, according to him the same is in departure from the conditions of the IFB of the previous years vis-a-vis the qualifying criteria.

9. Be that as it may, in order to better comprehend the remonstrance of the petitioner, it would be appropriate to extract the relevant portion of the IFBs of 2009 to 2015 issued by the department for similar works.

2009-2010

Minimum Qualifying Criteria:

" (A) (a) Satisfactorily completed (not less than 90% of the original contract value) as a Registered SSI Unit/Manufacturer of M.S.S.G. Shutter (prime contractor) of at least one similar work of value not less than Rs. 12.00 lakhs at 2009-10 price level in any financial year during the last 3 (three) years (from 2007-08 to 2009-10).

(b) As the SSI Units/Manufacturers, Processors (by their registration) they shall have to fulfill the credentials and eligibility norms to acquire the status of works contractor to execute agreement in F-2 format.

N.B. Financial turnover and cost of completed work of previous years shall be given weight-age of 10% per year based on rupee value to bring them to current price level of 2009-10.

(B) Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender."

2010-2011

Minimum Qualifying Criteria"

"(A) (a) Satisfactorily completed (not less than 90% of the original contract value) as a Registered SSI Unit/Manufacturer of M.S.S.G. Shutter (prime contractor) of at least one similar work (hydraulic gate work) of value not less than Rs. 30.00 lakhs at 2010-11-price level in any financial year during the last 3 (three) years (from 2007-08 to 2009-10).

(b) As the SSI Units/Manufacturers, Processors (by their registration) they shall have to fulfill the credentials and eligibility norms to acquire the status of works contractor to execute agreement in F-2 format.

N.B. Financial turnover and cost of completed work of previous years shall be given weight-age of 10% per year based on rupee value to bring them to current price level of 2010-11.

(B) Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for

completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender."

2011-2012

Minimum Qualifying Criteria"

"(A) (a) Satisfactorily completed (not less than 90% of the original contract value) as a Registered SSI Unit/Manufacturer of M.S.S.G. Shutter (prime contractor) of at least one similar work (hydraulic gate work along with sand blasting and painting) of value not less than Rs. 30.00 lakhs at 2011-12 price level in any financial year during the last 3 (three) years (from 2008-09 to 2010-11).

(b) As the SSI Units/Manufacturers, Processors (by their registration) they shall have to fulfill the credentials and eligibility norms to acquire the status of works contractor to execute agreement in P1 format.

N.B. Financial turnover and cost of completed work of previous years shall be given weight-age of 10% per year based on rupee value to bring them to current price level of 2011-12.

(B) Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender."

2012-2013

Minimum Qualifying Criteria"

"(A) (a) Satisfactorily completed as a Registered Manufacturer and SSI Unit (prime contractor) of at least one similar hydraulic gate work of value not less than Rs. 30.00 lakhs at 2012-13 price level in any financial year during the last 5 (five) years (from 2007-08 to 2011-12).

(b) As the SSI Units/Manufacturers, (by their registration) they shall have to fulfill the credentials and eligibility norms to acquire the status of works contractor to execute agreement in P1 format.

(B) Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender.

(b) The firm must possess liquid assets or credit facilities of not less than twenty percent (20%) of the amount put to tender and furnish the Credential from any Nationalized Bank/Scheduled Bank along with the bid against the specific work by mentioning the name of the work and tender identification no.

(C) If the bid has been invited in a common notice for different works, the bidder must demonstrate having experience and resources sufficient to meet the aggregate of the qualifying criteria for the individual contracts.

(D) Sub-contractor's experience and resources shall not be taken into account in determining the bidder's compliance with the qualifying criteria."

2013-2014

Minimum Qualifying Criteria"

"(A) (a) The Registered Manufacturer/SSI Unit as a prime contractor having experience in execution of irrigation gate works must have satisfactorily completed at least one similar type of work involving repairing of wheels of barrage gates of value not less than Rs. 31.00 lakhs at 2013-14 price level in a single Agreement in any financial year during the last 5(five) years (from 2008-09 to 2012-13).

(b) As the SSI Units/Manufacturers, (by their registration) they shall have to fulfill the credentials and eligibility norms to acquire the status of works contractor to execute agreement in P1 format.

(B) Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender.

(C) If the bid has been invited in a common notice for different works, the bidder

must demonstrate having experience and resources sufficient to meet the aggregate of the qualifying criteria for the individual contracts.

(D) Sub-contractor's experience and resources shall not be taken into account in determining the bidder's compliance with the qualifying criteria."

The bidder is required to upload the scanned attested copy of the authentic work performance completed as well as ongoing works duly certified by the concerned Executing Authority of Govt./Semi Govt./Govt. Undertakings in support of such experience as mentioned in Clause. 4A. The bidder shall have to produce the original documents in support of scanned copies and statements uploaded in the portal for verification on demand after opening of the technical bid. Failure to produce the Original documents within the scheduled time will result in non-consideration of the tender.

The work performance certificate should be furnished in the prescribed format as per Annexure-A & B."

2014-2015

Minimum Qualifying Criteria"

"(A) (a) The Registered Manufacturer/SSI Unit as a prime contractor having experience in execution of irrigation gate works.

Each bidder should further demonstrate:

(a) The bidder should produce documentary evidence regarding availability of required machinery and equipment for execution of the work (either owned in his name or obtained on hire purchase scheme or by hiring for other reputed firms/contractors' firm). If the machinery is to be procured from specific period for completion of the work on hire/rental basis then a copy of registered MOU must be attached. The list of machineries and equipments owned/hired by the bidder should be furnished in the prescribed format as per

Form-D and Annexure-C and D. Failure to attach the documentary evidence in support of ownership and availability of required machineries will result in non-consideration of tender.

(b) If the bid has been invited in a common notice for different works, the bidder must demonstrate having experience and resources sufficient to meet the aggregate of the qualifying criteria for the individual contracts.

(c) Sub-contractor's experience and resources shall not be taken into account in determining the bidder's compliance with the qualifying criteria."

The bidder is required to upload the scanned attested copy of the authentic work performance completed as well as ongoing works duly certified by the concerned Executing Authority of Govt./Semi Govt./Govt. Undertakings in support of such experience as mentioned in Clause. 4A. The bidder shall have to produce the original documents in support of scanned copies and statements uploaded in the

portal for verification on demand after opening of the technical bid. Failure to produce the Original documents within the scheduled time will result in non-consideration of the tender.

The work performance certificate should be furnished in the prescribed format as per Annexure-A & B.

N.B. In case of non-disclosure/hiding of information on any existing commitments and ongoing works to mislead the Tender Inviting Authority, if detected later, then tender will be liable for rejection.

The contractor/firm has/have to furnish Affidavit along with the Bid in support of authenticity of the tender documents/blacklisting/validity of registration certificate etc. as per Annexure-E."

10. A plain perusal of the above texts would reveal that though in the previous years, there was a requirement of satisfactory completion of at least one similar work of the valuation to the extent as mentioned therein, in the impugned IFB, such a disclosure in Clause 4(A)(a) of the INFORMATION AND INSTRUCTION TO TENDERERS has not been insisted upon. The minimum qualifying criteria as per this clause stipulates that the Registered Manufacturer/SSI Unit as a prime contractor ought to have experience in execution of irrigation gate works. However as admitted by the petitioner and rightly rest of the narrative in Clause-4(A) of the INFORMATION AND INSTRUCTION TO TENDERERS read as a whole along with the Annexures A, B, C, D and E do demonstrably bring out all relevant information with regard to nature of the similar works executed, percentage thereof completed satisfactorily, time taken in such execution, list of equipments and machineries owned/hired by the bidder, authenticity of the tender documents etc. In other words, disclosures by the tenderer as per the requirements of Clause 4(A) read with Annexures A, B, C, D and E would authenticate with sufficient clarity and details of the work performance in similar projects, experience gained, efficacy and competence as well as credibility of the tenderer so as to enable the authority concerned to have an objective, wholesome and vivid assessment of the tenderers to facilitate a fair and rational appraisal of their comparative suitability for final selection.

11. In the face of the insistence in the Detailed Tender Call Notice with regard to good infrastructure, credentials, experience in the manufacturing, fabrication and erection of irrigation gates for execution of gate-works, with definite proof thereof from the appropriate authority, we are left unpersuaded that the impugned IFB/DTCN is vague and legally uncertain as alleged.

12. In addition thereto, it is also apparent from the Form-P1 referred to in the IFB that all tenderers are required to submit a list of works which are in hand at the time of submitting their tenders. The list of works are required to be submitted in the proforma by the Executive Engineer under whom those have been executed in order to judge the past performance vide Works Department Circular No. 15443 dated 1.8.2005.

13. True it is, that as is evident from the letters dated 31.5.2004, 19.4.2006 and 29.5.2207 of the Chief Engineer (Mechanical) and Office of the Engineer in chief, Water Resources Department, having regard to the nature of the works involved, suitable qualifying criteria like (1) Satisfactory completion of at least one or two numbers of similar type of gate works of suitable/equal value in single agreement, (ii) the annual financial turnover in respect of Gate works executed along with infrastructure, expertise and experience of firms and SSI had been insisted upon, we are of the comprehension that the impugned IFB with the enjoinders incorporated therein do not compromise with these essentialities to the detriment of successful and quality execution of the works.

14. Hon"ble Apex Court in Reliance Energy Ltd. & anr. vs. Maharashtra State Road Development Corporation Ltd. & ors. supra did propound that in order to provide a level playing field to all the bidders, norms prescribed ought to indicate the bench mark with clarity and consequently ensure legal certainty in the process.

15. The principles governing the judicial review of administrative decisions are no more res integra and have been concretized by a plethora of decisions. As authoritatively proclaimed by the Hon"ble Apex Court in Tata Cellular Vs. Union of India, , in exercising the power of judicial review, the Court does not sit as a court of appeal over administrative decisions and further the terms of invitation to tender is not open to judicial scrutiny because the invitation to tender is in the realm of contract and the decision to that effect is made qualitatively by the experts.

16. In Air India Ltd. vs. Cochin International Airport Ltd. & ors, AIR 2000 SCW 351, the Court must exercise its discretionary power under Article 226 of the Constitution of India with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. It was held that the Court should always keep larger public interest in mind in order to decide whether its intervention is called for or not and that only when in the event of overwhelming public interest if the Court is of the opinion that its intervention is warranted, it ought to intervene.

17. Judged on the above touchstone, we are of the unhesitant opinion, having regard to the imperatives of the impugned IFB/DTCN, that the plea of vagueness and legal uncertainty as perceived by the petitioner is unsustainable in law and in facts.

18. In our estimate thus, no interference with the impugned IFB/DTCN and the process initiated thereby is called for in exercise of this Court's power of judicial review.

19. The petition is thus dismissed.