

(1998) 04 OHC CK 0005

In the Orissa High Court

Case No : Original Journ. Case No. 17903 of 1997

Modern Malleables Ltd. and Another

APPELLANT

Vs

Grid Corporation of Orissa Ltd. and Another

RESPONDENT

Date of Decision : 07-04-1998

Acts Referred:

Constitution of India, 1950 — Article 299

Citation : AIR 1998 Ori 183 : (1998) 86 CLT 338 : (1998) 2 OLR 157

Hon'ble Judges : S.N. Phukan, C.J.;C.R. Pal, J

Bench : Division Bench

Advocate : J. Patnaik, for the Appellant; R.K. Rath, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Phukan, C.J.—In this writ petition, the petitioners have challenged the rebid notice dated 5-12-1997 inviting tenders.

2. Facts of the case, briefly stated, are thus:--

The Government of India received a loan from the Asian Development Bank (for short, "ADB") towards the cost of Power Efficiency (Sector) Project. It was intended that a part of the proceeds of such loan would be applied to eligible payments under Contract for Supply of Tower structures and fixtures, power conductor and insulator and hardwares for different transmission line scheme in Orissa. Therefore, notice dated 1-12-1995 (Annexure 1) was issued by the Grid Corporation of Orissa (for short, "the Gridco"). We are concerned with serial No. 2 of the statement ICE for the present purpose, which runs as follows:--

Name of the package Quantity Bid Security Last date and time for sale of bidding documents Last date and time of submission of bid.

Power Conductor LOT-1(A)

AAAC Moose Lot-1(R) 171 KMs. Rs. 16,11,260/- or E.Q.U.S. Dollars. 3-2-96 12 hrs. 3-2-96 13 hrs.

AAAC Zebra 518 KMs.

LOT-II ACSR Moose 1218 KMs. Rs. 26,89,600/- or E.Q.U.S. Dollars

The qualifying requirement for bidders ACSR/ AAC Conductors has been annexed to Annexure 1. Clause 1.0 provides that the bidder should be a manufacturer or authorised representative of manufacturer(s) of ACSR/AAAG Conductor who has an established manufacturing facility or facilities to manufacture ACSR/AAAC conductor. It also provides that a bidder may tender for more than one lot of conductors, but he shall not be awarded contracts by the owner for more than the total amount of conductors for which he would be qualified on the basis of the experience described above.

3. The petitioners gave bids for the above items and an order was placed with them on 31 -10-1996 for Lot No. II, namely, ACSR Moose conductor, but their tender for Lot No. I was rejected. Thereafter, the Gridco issued rebid notice on 5-12-1997, and being aggrieved, this writ petition has been filed.

4. According to the petitioners, this rebid notice has been issued to frustrate the recommendation of the Chief Engineer of the Gridco to award the supply order in favour of the petitioners. It has also been urged that cancellation of the original bid of the petitioners was only in order not to award the said Lot in favour of the petitioners and it was done without offering the petitioners an opportunity of hearing. The rebid notice has also been challenged on the ground that no reasons were assigned as to why the petitioners' original bid was rejected. Another ground of challenge is that though in the rebid notice it was mentioned that it was being issued to encourage more participants to offer bids, the qualifying requirement was restricted to manufacturers of AAAC conductors, thereby eliminating the authorised representatives of manufacturers to participate in the bid. It has also been urged that as the petitioners had made the original bid in the capacity of authorised representative of manufacturers of ACSR conductors, the aforesaid qualifying requirement was fixed in the rebid notice to eliminate the petitioners from making their bid. Malice has also been attributed. According to the petitioners, petitioner No. 1 is engaged in the business of tendering and supplying AAAC/ ACSR/ AAC type of conductors and is the authorised representative of one or more of the manufacturers of the conductors, and petitioner No. 2 is one of the principal officers and authorised representative of petitioner No. 1 company, Violation of Article 12 of the Constitution has been pleaded.

5. In the counter affidavit filed by the opposite parties, it has been stated that the original tender was for two Lots and the Gridco placed orders with the petitioner for Lot No. II. According to the opposite parties, the requirement of All Aluminium Alloy Conductor could not be fulfilled by the petitioners for which both on commercial as well as technical grounds, their offer was rejected for Lot No. I, and for that matter, all offers were rejected in respect of that item. It was so decided by the Task Force of the Gridco being advised by the ADB as well as the

Power Finance Corporation, The opposite parties have stated that the qualifying requirement for All Aluminium Alloy Conductor is clearly mentioned in the bid document. The technical specification vide clause 5.2.1 clearly states that bidders offering materials not type tested will be rejected. Since the All Aluminium Alloy Conductor was not type tested, the bid of the petitioners was rejected in respect of this item. The technical specification contained in clause 5.2.1 has been filed as Annexure-A to the counter. This was a part of the tender document. It has also been stated that the petitioners were fully aware that they had not submitted tender in respect of the lot in question in accordance with the bid document and, therefore, they cannot make any grievance now against the rejection order. Though the petitioners have submitted that the Chief Engineer wrote the letter vide Annexure 5, according to the opposite parties, he is not the authority to decide acceptance or rejection of any tender as the entire project has been financed by the A.D.B. through Power Finance Corporation, and the Task Force of the Gridco is the decision making authority. It has been further stated that Annexure 5 was meant to be considered by the Contract Scrutiny Committee, of which the Chief Engineer was the Chairman. The Contract Scrutiny Committee decided for retendering the lot in question and accordingly recommended the matter to be placed before the Purchase Sub-Committee. The Purchase Sub-Committee also rejected the offer of the petitioner in its meeting held on 17-5-1997. The extract of the proceeding has been filed as Annexure D to the counter. According to the opposite parties, finally, the entire matter went before the Task Force of the Gridco comprising of the Board of Directors. After reconsideration of all the materials, it was decided to retender for the lot in question. Copy of the proceeding of the Task Force is at Annexure E to the counter. The opposite parties have stated that the petitioners were given opportunity to participate in the retender for which the Gridco communicated letters dated 5-12-1997 and 17-12-1997 to the petitioners vide Annexure 6 and 8 respectively, but the petitioners did not submit any fresh bid. The opposite parties have taken the stand that even in the tender notice vide Annexure-1, it has been specifically mentioned in para 9 that the owner is not bound to accept bids, and, without assigning any reasons, the owner can withdraw or cancel the invitation for bids.

6. Before examining the submissions made by the parties, let us state the law regarding the power of writ court in examining matters of rejection/ acceptance of any tender. In the land-mark decision in *Tata Cellular Vs. Union of India*, the apex Court classified the grounds of challenge in such matters, and held :--

"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."

Relying on the aforesaid decision, this Court in *Dr. Pradeep Rao v. State* 1997 (1) OLR 142 has held that the action of the State, the instrumentality, any public authority or person whose actions bear insignia or public law element or public character are amenable to judicial review and the validity of such action would be tested on the anvil of Article 14 of the Constitution. It has also been held that keeping in view the limited scope of judicial review in administrative matters, it is to be seen how far the orders passed by the authorities can be maintained on the touchstone of sustainability.

In another decision in *Executive Engineer, Sundargarh R. and B. Division and Others Vs. Mohan Prasad Sahu*, , a learned single Judge of this Court held that the competent authority reserves the right not to accept the highest or all bid, and the bid can be rejected without assigning any reason to the bidder concerned, but the accepting authority must record his reasons in writing for not accepting the same.

Reference may also be made to a recent decision of this Court in *Rashtriya Pari Yojana Nirman Nigam Limited Vs. Orissa Water Supply and Sewerage Board and Others*, . A Division Bench of this Court held (At pp 14-15):--

"(1). "Judicial review" as the words imply, is not an appeal from a decision, but a review of the matter in which the decision was made.

(2) It is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. The Court 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.

(3) The Court must, while adjudicating validity of an executive decision grant a certain measures of freedom of play in the hands of the executive. The problems of the Government are practical ones and may justify the action. Mere errors of the Government are not subject to judicial review.

(4) Courts stand between the executive and the subject alert to see that discretionary power is not exceeded or misused.

(5) If the power has been exercised on a non consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous, and if a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.

The authority must genuinely address itself to the matter before it, and it must not act under the dictates of another body or disable itself from exercising a discretion in each individual cases. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the latter and must not act arbitrarily or capriciously. In other words, Court has to see whether there was a failure to exercise discretion and excess or abuse of discretionary power."

In the aforesaid case, this Court refused to interfere as it was of the view that the decision of the Orissa Public Works Department that the tender of the petitioner was not workable and it may leave the work after completion of the civil work is purely a technical one and it is for the experts to decide the same.

In another decision of this Court in *M/s. Parsman Pharmaceuticals v. State of Orissa* (1998) 85 C LT 21, a Division Bench of this Court had the occasion to consider this aspect of the matter. The Court took note of the fact that invariably a tender call finalised by a public body is challenged by the parties who would not succeed in getting their offer accepted. It is the settled position of law that jurisdiction of the writ Court is to find out whether the decision making process is valid and proper or deficient and defective and, if so, to what extent, and accordingly to decide the dispute. After taking into consideration various decisions of the Apex Court as well as this Court the Court summarised the broad principles in the following words :--

"(i) The State or any public authority under the control, management or supervision of the State is subjected to the writ jurisdiction relating to any executive decision taken.

(ii) While exercising the writ power, the Court is to find out whether the decision making process has proceeded on the basis of principle of law and reasonableness and the principle of natural justice was duly complied with.

(iii) Whether the action of the State or the public authority was done in safeguarding and due regard to the public interest.

(iv) Whether the State or the public authority granted equal treatment and made a fair play in the whole of the transaction.

(v) Whether the State or the public authority acted mala fide in dealing with the subject.

(vi) Deviation, if any, made is whether illegal, or irregular and in that connection, whether allowances can be made in favour of executive discretion."

7. Situated thus, we have to decide whether the decision making process was arbitrary or illegal and whether any illegality or procedural impropriety was committed, and whether there was any irrationality in rejecting the bid of the petitioners.

8. Before this Court, material objects, i.e., AAAC Moose and ACSR Moose, were produced. According to Mr. Palnaik, learned counsel for the petitioners, these items were similar except the length and two caps on both the ends. This is vehemently opposed by Mr. Rath appearing for the opposite parties. This is purely a technical matter and it is not the function of this Court to decide whether both the items are same. But, from the tender notice, we are prima facie satisfied that the two items are separate; otherwise it would not have been shown in two lots in the tender notice. Therefore, this submission of the learned counsel for the petitioner is rejected.

9. According to Mr. Patnaik, the tender of the petitioners was rejected on the ground that type test report, as required under clause 5.2.1 was not submitted along with the tender and this is not the correct procedure, as type test can be done only after the manufacturing process starts. It has also been urged that the petitioner duly filled in type test charges and where it is to be conducted. This document is available in the volume supplied and flag-marked by the petitioners.

10. For this purpose, we may refer to clause 5.3.1 of type tests vide Annexure A to the counter and also clause 4.0 of the qualifying requirement for bidders, as enclosed to Annexure 1 to the writ petition. Clause 5.2.1 runs as follows :--

"5.2.1 Bids offering materials not type tested will be rejected. In case the material of the type and design offered has already been type tested the supplier shall furnish four sets of type test reports along with the offer. These tests must have been conducted not later than five years from the date of opening of bids. In case these type tests are conducted earlier than five years, all the type tests as per the relevant standards shall be carried out by the successful bidders in the presence of purchaser's representative at free of costs. The purchaser reserves the right to demand repetition of some or all the type tests in the presence of the representative of the owner. For this purpose the supplier may quote unit rates for carrying out each type test. For any change in the design, type already type tested and the design, type offered against this specification, the purchaser reserves the right to demand repetition of tests without any extra cost."

Clause 4.0 of the qualifying requirement for bidders reads thus :--

"4.0 To conduct tests for product offered, the bidder/Manufacturer shall have adequate facilities in his works or shall arrange such tests in other recognised laboratories/Institutions. The Bidder shall indicate clearly where he proposes to conduct tests for the products offered by him. The Bid shall include complete details of testing facilities available at the manufacturer's work."

11. Mr. Patnaik submits that unless offer is received, the conductors cannot be

manufactured and tested, and, therefore, rejection of the tender of the petitioners, for the lot in question was not just and proper inasmuch as after the orders are received, type tests are done as per programme, to which reference has been made earlier. In this connection, reference has been made to clause 4.0 of the qualifying requirement of bidders.

12. On the other hand, Mr. Rath, learned counsel for the Gridco, has submitted that in view of clause 5.2.1 of the type tests, type test has to be conducted. Clause 4.0 of the qualifying requirement for bidders would come only when offer is accepted and goods are manufactured and thereafter tests are to be conducted.

13. The condition laid down in clause 5.2.1, as quoted above, is absolutely clear. If materials not type tested are given along with the bid, the bid has to be rejected. That apart, the test must have been conducted not later than five years from the date of opening of the bid. It is not disputed that no test report was submitted, as required under clause 5.2.1. Therefore, at the outset, the bid of the petitioners for the lot in question could have been rejected.

Reading clause 4.0 of the qualifying requirements for bidders and other papers submitted along with the tender document, we hold that subsequent tests have to be conducted of the conductors to be supplied by the person whose bid has been accepted and conductors are manufactured. We, therefore, reject the contention of Mr. Patnaik.

14. Regarding recommendation of the Chief Engineer in Annexure 5, recommending the case of the petitioner, we find from Annexure C to the counter that the Chief Engineer was the Chairman of the Committee and he himself rejected the offer. We quote below the relevant portion of the proceeding :--

"M/s. Modern Malleables are not satisfying the Qualifying Requirements as stipulated in our specification since they do not manufacture the equipment/material of the type specified i.e. they do not manufacture All Aluminium Alloy Conductor, which is obvious from the non-submission of the type test certificate from any testing laboratory or test house. Thus, their bid is not worth further evaluation and stands rejected."

We find that in the meeting, the cases of other tenderers namely, M/s. Galada, M/s. Shen Zen, were also considered. The tender of M/s. Galada, though lowest, was rejected as per the advice of A.D.B. and Power Finance Corporation, who asked the Gridco to reconsider the bids after declaring M/s. Galada non-responsive due to high import component. Regarding the tender of M/s. Shen Zen, it was found that in the conductor, the aluminium purity is 99.95%, which in fact, is purity of pure aluminium and not that of All Aluminium Alloy. Further, the firm had not furnished the DC resistance test report, stress/strain test report, and ultimate tensile strength test report. Therefore, the quality of the material could not be ascertained and so it was rejected. Thus, all the tenders were rejected after due consideration. As we are not sitting as appellate authority, we

are of the opinion that the bids including that of the petitioners were considered in depth and rejected after recording proper reason. Therefore, it cannot be said to be arbitrary.

15. Learned counsel for the petitioners has referred to clause 5.1.1 of the tests, which runs as follows :--

"Type tests shall mean those tests, which are to be carried out to prove the design, process of manufacture, and general conformity of the material to the specification. These tests shall be carried out on samples prior to commencement of commercial production against the order. The Bidder shall indicate his schedule for carrying out these tests in the offer."

We have already stated that this clause will apply only after work order is placed and conductors are manufactured. This clause will not apply to the sample of conductor which is given at the time of submitting the bid.

16. Regarding the rebid notice in question, it is submitted by Mr. Patnaik that though it was issued with intention to get more bids, in fact, less bids were received. According to Mr. Patnaik, for purchase of such types of materials, wide publicity throughout the world should have been made. In reply, Mr. Rath has submitted that as the entire project is funded by the A.D.B. through the Power Finance Corporation, which is owned by the Government of India, Gridco is acting purely on the advice and guidance of the A.D.B. As the conductors are sophisticated instruments, the action of the Gridco in selecting only manufacturers to give bid cannot be faulted. Though less number of bids were received after issuance of rebid notice, it cannot be said to be arbitrary or illegal as it is entirely for the opposite parties to decide on this matter.

17. In the first notice inviting tenders, it was restricted to manufacturers or authorised representatives of manufacturers of conductors. According to Mr. Rath, the petitioners are neither manufacturers nor authorised representatives of manufacturers for the lot in question. Therefore, they are not qualified to submit bids. According to Mr. Patnaik, if the first bid of the petitioners for both the lots would have been accepted, they would not have been deprived of the chance to submit their bid in response to the rebid notice. In fact, even in the first notice inviting tenders, it was restricted to manufacturers only inasmuch as the authorised representative should be of a manufacturer. Therefore, by not allowing the authorised representatives of manufacturers, the action cannot be said to be arbitrary. The manufacturer, if the petitioners represent any, could have submitted tender directly in response to the rebid notice for the lot in question. Therefore, the contention of Mr. Patnaik has no force.

18. Mr. Patnaik has referred to a decision of the Apex Court in *Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others*, . That case related to grant of lease for liquor distillery. It is the settled position of law that liquor contract stands on a different footing than other contracts. Therefore, this decision is not relevant for the present purpose.

19. Another decision to which reference has been made by Mr. Patnaik is that of *Rashbihari Panda etc. Vs. State of Orissa*, . We find that the State of Orissa in exercise of powers conferred by Section 10 of the Orissa Kendu Leaves (Control of Trade) Act, 1961 decided to invite offers for advance purchase of Kendu leaves only from persons who purchased those leaves from individual units during the previous year and who acted as purchasers without default and to the satisfaction of the Government and the method of sale by open competition was given up. The Apex Court held that the action of the Government was not valid in law as it violated the fundamental rights of the petitioner. This case is distinguishable inasmuch as the tender related to an Act of the State Legislature whereas in the case in hand there is no such legal provision. Therefore, this decision is of no help to the petitioners.

20. Mr. Rath has placed reliance on a decision of the apex Court in *Krishnan Kakkanth Vs. Government of Kerala and others*, . The Apex Court, inter alia, held that fundamental rights under Article 19 is not absolute but are subject to reasonable restrictions. It was also held that reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed. In other words, while deciding reasonableness of restriction, the guiding factor is public interest. We need not take into consideration the ratio laid down in this decision as we have already stated the law regarding the powers of writ Court while dealing with matters of contract.

21. For the reasons stated above, we do not find that there was any fault in the decision-making process. The action of Gridco was for safeguarding its interest and with due regard to public interest. It granted equal treatment and made a fair play in the whole of the transaction. There was no mala fide or deviation which can be said to be illegal or irregular. The writ petition has no merit and the same is accordingly dismissed. Costs on the parties.

C.R. Pal, J.

22. I agree.