
(2014) 01 P&H CK 0097

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 23123 of 2013 (O and M)

M/s. Anuj Creations

APPELLANT

Vs

Director General, State Transport Haryana and Managing
Director, Haryana Roadways Engineering Corporation and
Others

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 01 P&H CK 0097

Hon'ble Judges : Sanjay Kishan Kaul, C.J.;Augustine George Masih, J

Bench : Division Bench

Advocate : Gaurav Mohunta, for the Appellant; Satyawan Ahlawat, Advocate for Respondent No. 1, Mr. Raj Mohan Singh, Advocate for Respondent No. 2 and Mr. Sanjay Vashisht, Advocate for respondents No. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, C.J.—The Haryana Roadways Engineering Corporation, Gurgaon (for short, "HREC") floated a tender for fabrication of all metal bus bodies and job work in the month of June, 2013. These tenders were opened on 20.6.2013. However, M/s. Ganesh Enterprises made a complaint on account of its inability to participate in the tender for shortage of time amongst others on 21.6.2013. The Director General, State Transport, Haryana nominated the General Manager, Haryana Roadways, Rewari to conduct an enquiry on 3.7.2013 and post the enquiry, the tender allotment was scrapped. It is the say of the petitioner that one of the findings arrived at was that M/s. Dinesh Enterprises, respondent No. 3 herein, did not fulfil the requisite qualifications. A fresh tender was, thus, floated in August, 2013 with the last date for filing the tenders on 10.8.2013. Now, the petitioner complained on 12.8.2013 that it was not permitted to submit a tender before the last filing date of 10.8.2013. This tender was also scrapped.

2. A fresh tender was once again floated in September, 2013 fixing the last date as 10.9.2013 for submission of tenders on which date the technical bids were opened. On 13.9.2013, the petitioner claims to have made a complaint regarding the eligibility of respondent No. 3. Despite this, the financial bids are stated to have been opened on 27.9.2013 and on 1.10.2013 the Board of Directors approved the allotment of the tender in favour of respondent No. 3.

3. The petitioner filed Civil Writ Petition No. 22103 of 2013, inter alia, making a grievance about the non disposal of its representation as also against the allotment of the tender which was disposed of on 5.10.2013 with direction to the respondent-authorities to decide the representation submitted by the petitioner within one week and not to allot the tender to respondent No. 3 till this representation was decided and for a week thereafter. However, the tender is stated to have been allotted to respondent No. 3 on 5.10.2013 itself.

4. In pursuance to the aforesaid orders, the General Manager of HREC being respondent No. 2 considered and rejected the representation of the petitioner on 14.10.2013. The present writ petition has been filed under Article 226 of the Constitution of India aggrieved by this decision and seeking quashing of the award of the tender to respondent No. 3, which according to petitioner, does not fulfil the eligibility requirements as per Clause (1).

5. In order to appreciate the controversy, we reproduce the eligibility criteria of the tender as under:--

1. Eligibility

1. The tenderer should have at least two criteria years experience of fabrication of various types of bus bodies.

2. Tenderer should possess Provident Fund Account No. and ESI Number (Proof to be attached with tender documents).

3. Tenderer should have capacity to fabricate minimum 50 numbers of bus bodies per month and shall submit the following documentary evidence in support of the same:--

a) Copy of work orders against which tenderer had fabricated the bus bodies.

b) Detail of EPF & ESI deposit of the employees who were engaged with him for fabrication of bus bodies.

c) Details of TDS and Service Tax deposited during last 2 financial years.

d) Copy of balance sheet duly signed by CA for the last 2 financial years.

4. Tenderer will be required to submit copy of his registration certificate as per rules. Further tenderer should get licence holder under the Contract Regulation & Abolition Act, 1970 after getting the contract.

6. It is the case of the petitioner, by relying on the enquiry report qua the earlier

endeavour to float the tender, that the respondent No. 3 did not fulfil Conditions No. 1 to 3 of the eligibility criteria. It is alleged that respondent No. 3 had fabricated a fake experience certificate issued by respondent No. 4/Mohindra Coach Factory Private Limited. The General Manager, Haryana Roadways, Rewari while submitting the enquiry report dated 19.7.2013 qua the complaint of M/s. Ganesh Enterprises observed that he had visited the Mohindra Coach Factory Private Limited at Jaipur and checked the documents regarding experience certificate issued to M/s. Dinesh Enterprises/respondent No. 3. It was found that only work worth Rs. 97,150/- had been done by respondent No. 3 during the period 31.3.2011 to 26.2.2013 for all types of bus bodies job work. Not only that, respondent No. 4 did not allot the work for full bus body at one time to respondent No. 3 as per statement given on behalf of respondent No. 4 and no service tax or TDS had been deducted from respondent No. 3.

7. The petitioner pleads that despite a representation dated 13.9.2013 that respondent No. 3 did not fulfil the technical qualifications, the financial bids were opened on 27.9.2013 where respondent No. 3 was the lowest bidder for both Tata as well as Ashok Leyland. The petitioner was the next lowest bidder for Ashok Leyland while respondent No. 4 was the next lowest bidder for Tata and since respondent No. 3 did not qualify the eligibility parameters, the technically qualified petitioner and respondent No. 4 ought to have assigned the tender.

8. The petitioner has pleaded that the decision of respondent No. 2 was motivated as he had allotted the tender on 5.10.2013 to respondent No. 3 on the same date when the writ petition had been disposed of. The fact that the earlier tenders were also cancelled is cited as material in support of the same.

9. In order to appreciate the merits of the complaint of the petitioner qua non eligibility of respondent No. 3 and the decision taken thereon, it is necessary to look into the said decision dated 14.10.2013 (Annexure P-6) which has been impugned in the present writ petition. A detailed order has been passed noticing the factual matrix which led to the decision. It has been explained that once it was found that the complaint of M/s. Ganesh Enterprises qua lack of time period in submitting forms was found to be true, the earlier tender process was scrapped and a new tender was floated. The records show that the order of re-tendering was not issued due to lack of experience of the firm M/s. Dinesh Enterprises, but on account of non-supply of tender forms well in time.

10. Insofar as the issue of eligibility of M/s. Dinesh Enterprises/respondent No. 3 is concerned, it has been stated that in the year 2010-2011, only job work had been assigned to M/s. Dinesh Enterprises, whereas, the complete bus body fabrication work had been allotted to M/s. Simran Enterprises. M/s. Simran Enterprises could not fabricate the required number of bus-bodies well in time and, therefore, the additional work of fabrication of complete bus bodies was entrusted to respondent No. 3 during the said year. Thus, the experience certificate issued for fabrication of full body for the year 2010-2011 by the HREC was correct based on the actual work done by respondent No. 3.

11. The bids made in June, 2013 were found to be in order only qua two firms, namely, the petitioner and the respondent No. 3. The petitioner-firm was found to be the lowest in rates for fabrication of Leyland work and that work had been allotted to the petitioner on 27.6.2013. Respondent No. 3 was found to have quoted the lowest rates for work of fabrication of Tata bus and, therefore, that work had been allotted to respondent No. 3 on 27.6.2013. However, on the complaint received from M/s. Ganesh Enterprises, the re-tendering was directed for 12.8.2013 but the petitioner firm could not submit tender well in time. It is in these circumstances that the re-tendering of the same was done for 10.9.2013 when once again a written complaint was received from the petitioner. Notices were issued to all concerned on the petitioner's complaint and written replies were received whereafter personal hearing was given to the petitioner-firm. It was after complete verification that the concerned Committee found that all the three bidders, namely, petitioner, respondent No. 3 and respondent No. 4 were technically qualified to participate in the financial bids which resulted in the opening of the financial bids. Since respondent No. 3 was the lowest for the body of Tata and as well as Leyland bus chassis, the said work was allotted to respondent No. 3 while the petitioner was allotted the job work for components for which it had quoted the lowest rates.

12. A written statement has been filed by respondent No. 2 to meet the allegations set out in the petition. It has been alleged that the correct facts have not been set out in the petition. It is the say of respondent No. 2 that when on 20.6.2013 the tender was called for fabrication of Tata and Ashok Leyland full bus body and allied assignments, four tender forms were sold to the prospective bidders, but only three participated - petitioner, respondent No. 3 and M/s. Manu Enterprises. The third participant was disqualified on account of depositing the technical bid and financial bid in the same envelope. The experience certificate of respondent No. 3 was to be verified by a duly constituted committee comprising of the Works Manager and the Bus Body Designer of the HREC, Gurgaon. The experience certificate was found to be genuine according to a report submitted by the Committee on 22.6.2013 and, thus, the respondent No. 2 informed the Committee to meet on 27.6.2013 for processing the financial bids when two financial bids were opened in the presence of the concerned officials. Respondent No. 3 was the lowest tenderer for Tata full bus body fabrication while the petitioner was found to be the L-1 in Ashok Leyland full bus body fabrication and allied assignments were allotted to both the aforesaid firms. At that stage, no objection was raised by the petitioner in respect of the experience certificate of respondent No. 3. Both the firms were allocated the work orders and they started their job assignments. However, while the respondent No. 3 started its work of body fabrication, the petitioner did not start the work because of its huge pending assignments arising out of the previous tenders. Those assignments are stated not to be yet completed. It is only on 21.6.2013 that the complaint of M/s. Ganesh Enterprises was filed before respondent No. 2.

13. However, when the complaint was sought to be verified by the officials on

24.6.2013, it was found that no such complaint had been made by M/s. Ganesh Enterprises which actually disowned the complaint and the statement of proprietor of M/s. Ganesh Enterprises Mr. Mahender Singh Rathi was recorded.

14. The financial bid was opened on 27.6.2013 subject to approval of rates by the Board of Directors. However, on enquiry, since it was found that the tender forms were not given in time to the firms, the tender process had been vitiated and it should be in the fitness of things to re-tender and that is how the re-tendering process was done on 12.8.2013. Once again, in this tender, three firms participated being respondents No. 3 and 4 and M/s. Manu Enterprises and the petitioner did not submit its tender form in time, but made a complaint in this behalf and re-tendering was directed. The Committee formed thereafter did not have the respondent No. 2 as a member in view of the earlier allegations of the petitioner which called for the tender on 10.9.2013 when three firms participated being the petitioner, respondents No. 3 and 4. On a complaint by the petitioner, necessary verification was done by giving opportunity to the parties whereafter the decision was arrived at.

15. The annexures to the counter-affidavit show that necessary clarification/substantiation was directed to be obtained regarding the experience certificate of respondent No. 3 from concerned quarter and the General Manager of HREC was requested to submit his comments with regard to the complaint. The Transport Department of the HREC submitted a detailed note regarding the issue of experience certificate for 2010-2011. Tender was allotted by HREC in view of six years experience of respondent No. 3, though its tender for 2011-2012 was cancelled for lack of requisite experience. The tender for 2012-2013 was also opened on the basis of requisite experience. Respondent No. 3 had given a clarification that bus bodies are made at various stages and respondent No. 4 had given it orders for bus bodies fabrication at various stages. A clarification dated 23.9.2013 of respondent No. 4 in support of its experience while clarifying their letter dated 11.7.2013 was, thus, submitted. Respondent No. 4 clarified while using the expression "No work was allotted for full bus body at one time" that what was meant was that complete bus body fabrication is completed stage-wise. Orders for fabrication of bus body for various stages were accordingly given and that respondent No. 3 had more than two years experience with the firm. Qua M/s. N.K. Enterprises, the clarification given was that all the work of the firm was done by it. There was experience of 1 year and 3 months of bus body fabrication in HREC during 2010-2011 and from 27.6.2013 would be three months till opening of the tender. The detailed clarifications, as recorded in the note of HREC, are as under:--

(a) He has been fabricating complete bus bodies at M/s. Mohindra Coach Factory Pvt. Ltd. since last 2.5 years and the clarification in connection with their letter dated 11.7.2013 is enclosed for kind perusal wherein they have clarified that he has been fabricating complete bus bodies with them.

(b) He has been fabricated complete bus bodies under M/s. N.K. Engineers and

Contractor in HREC for more than 6 years. On the same basis, his tender was opened in the year 2010-11 and being lowest quoted firm in 2010-11, he had fabricated bus components along with complete bus bodies in HREC for 1 year and 3 months.

(c) On the basis of above experience, his tender dated 20.6.2013 was again considered wherein his rates for Tata Chassis Bus Body and allied job work was lowest.

2. Regarding clarification of M/s. HREC vide letter No. 15385/Acctt./HREC dated 25.9.13 w.r.t. letter No. 387/FC./HREC dated 23.7.2013 (sic), it has been intimated that M/s. Simran Enterprises was awarded the tender of fabrication of complete bus bodies for the year 2010-11. But he could not fulfil the requirement of buses of HREC. In order to make up the requirement of fabrication of bus bodies, M/s. Dinesh Enterprises was also allowed to fabricate bus bodies parallelly (sic). During the year 2010-11, M/s. Dinesh Enterprises fabricated 40 Nos. of bus bodies successfully and satisfactorily. The detail of 40 Nos. chassis no. on which bus body was fabricated by M/s. Dinesh Enterprises has also been enclosed for information.

(3) Further M/s. Mahindra Coach Factory Pvt. Ltd., Jaipur has enclosed clarification vide letter dated 24.9.13:

(i) Work completion certificates of RSRTC, PUNBUS & APSRTC.

(ii) Copy of TDS Certificate.

(iii) Intimated that as they are full bus fabricator and charging the VAT, therefore, service tax number is not required.

The findings thereafter recorded are as under:--

The matter has been considered on the basis of clarifications received from various quarters. It has been felt that the condition regarding experience of fabrication of bus bodies/components has been incorporated in the terms & conditions of the tender basically to evaluate the experience of the tenderer in executing the work. M/s. Mahindra Coach Factory Pvt. Ltd., Jaipur has intimated that they are fabricating complete bus bodies in their workshop stage wise and likewise, M/s. Dinesh Enterprises is fabricating complete bus body since April, 2011. Hence this experience is of at least two years on the closing date of tender. Further GM, HREC has intimated that M/s. Dinesh Enterprises was also allowed to fabricate bus bodies parallel in addition to M/s. Simran Enterprises during the year 2010-11 and M/s. Dinesh Enterprises fabricated 40 Nos. of bus bodies successfully and satisfactorily. Hence this experience of minimum two years as per NIT terms. Further M/s. Mahindra Coach Factory Pvt. Ltd., Jaipur has clarified that various shortcomings as intimated to them. Hence in view of the above all the bidders fulfil the terms & conditions of the tender and qualified technically as per NIT terms. Hence their financial bid can be opened accordingly.

16. We are of the view that in consideration of such a tender matter, the Court does not sit as a court of appeal over the decision of the concerned authorities. What is to be seen is whether the award of the tender is as per the terms and conditions of the tender and whether this aspect has been properly scrutinized by the duly constituted Committee. If this test is applied in the present case, we find that there has been a detailed analysis by the Committee about the eligibility of respondent No. 3 and even the complaint filed by the petitioner has been dealt with in detail keeping in mind the material placed on record by respondent No. 3 and the verification carried out thereof. We, thus, find no fault in the process.

17. It is no doubt true that there have been repeated tenders on account of one complaint or the other. The petitioner apparently was satisfied with the tender awarded in June, 2013 where the work was effectively shared between the petitioner and respondent No. 3. That tender was cancelled not on account of any of these two parties, but on account of alleged complaint of M/s. Ganesh Enterprises which also appears to be questionable in view of the verification carried out thereafter. Be that as it may, the process was scrapped only because it was found that there was possibility of lack of participation on account of paucity of time from when the tenders were made available and the last date of submission of tenders. Thereafter, it is the petitioner which failed to participate on account of alleged shortage of time resulting in another scrapping and finally the participation of everyone. The petitioner seeks to take the benefit of certain comments made by a concerned officer while verifying the complaint of M/s. Ganesh Enterprises to seek disqualification of respondent No. 3 for lack of adequate experience. However, these aspects have been re-verified as has been explained above. The whole issue emanated from what was recorded from respondent No. 4 while on visit to its factory. The context in which the statement was made has been explained in the own communication of respondent No. 4 later (which was in fact a competing party). Not only that, while computing the total experience of respondent No. 3, the work actually carried out for HREC has been taken into account since M/s. Simran Enterprises which was awarded the tender could not fulfil the requirements for the year 2010-2011. It is, thus, the matter of computing the total experience of respondent No. 3 to determine whether the necessary eligibility condition was fulfilled or not. The total work exposure of respondent No. 3 has been found sufficient to fulfil the eligibility norms.

18. The aforesaid matter has been reviewed and re-reviewed by concerned Committees and respondent No. 2 was not really involved with the process of tendering in September, 2013 which is the tender in question. It appears that the angst of the petitioner arises from the fact that while earlier in June, 2013 it had got part of the tender work, in view of the re-tendering of September, 2013 the picture is different. This is, however, for no fault of respondent No. 3 who did not complain even qua the June, 2013 tender. The petitioner seeks to somehow disqualify respondent No. 3 on one pretext or the other even though the concerned authorities have found it qualified. The reason is simple - the financial

bids of respondent No. 3 are more competitive.

19. We may note that not only has work been assigned but considerable work has been done according to respondents, though that factor alone would not suffice as we had made clear vide our interims orders that the respondent No. 3 would have to meet the benchmark of the eligibility norms and any work done was at its risk and cost.

20. We are, thus, of the view that the tendering process in question does not call for any interference in exercise of our jurisdiction under Article 226 of the Constitution of India as there is no arbitrariness, illegality or perversity involved in the same. On the other hand, the concerned authorities have duly verified the experience of respondent No. 3 and, undisputedly, the financial terms are the best as offered by respondent No. 3. The petition is, accordingly, dismissed leaving the parties to bear their own costs.