(2016) 09 OHC CK 0008

In the Orissa High Court

Case No : W.P. (C) No. 6311 of 2016

M/s. Baba Lingaraj Enterprises Pvt. Ltd. APPELLANT

Vs

The Odisha Small Industries Corporation Ltd. RESPONDENT

Date of Decision : 14-09-2016

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2017) 1 BC 478

Hon'ble Judges : Mr. Vineet Saran, CJ. and Dr. B.R. Sarangi, J.

Bench : Division Bench

Advocate : Mr. A.K. Parija, Senior Advocate with Mr. B.P. Das and S.N. Das, Advocates, for the Petitioners; Mr. R.K. Rath, Senior Advocate with Mr. J. Mishra and P.C. Das, Advocates, for the opposite Party No. 2; Mr. M. Kanungo, Senior Advocate with Mr. Rakesh Sahu,

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J. - The Managing Director of Odisha Small Industries Corporation Ltd., a Government of Odisha Undertaking issued tender call notice no. 509 dated 22.01.2016 published in local daily AFR newspaper inviting tenders in sealed cover for Contract Operated Stock at/in and around Tangi (Cuttack)?cum-Handling Contractor for transportation, handling, storage and de coiling, straightening, cutting, bending and bundling of Tata Tiscon Coils/Rebar manually/mechanically, and a corrigendum was also issued to the said tender call notice. The date and time of sale of tender documents was fixed to 23.01.2016 (11.00 a.m.), the last date of submission of tender documents was fixed to 15.02.2016 up to 2.00 p.m. and the date and time of opening of the said tender was fixed to 15.02.2016 at 2.30 p.m. Pursuant to such tender notice, petitioner no.1- M/s. Baba Lingaraj Enterprises Pvt. Ltd. through petitioner no.2, its Managing Director submitted its tender papers along with others. The tender evaluation committee evaluated the technical bids on 15.02.2016 at 3.30 p.m. and prepared a statement in respect of compliance of terms and conditions on 03.03.2016. The minutes of the meeting held on 03.03.2016 were forwarded to the Managing Director of opposite party no.1-Corporation for his approval with a note concerning non-compliance of certain terms of the Notice Inviting Tender (NIT) by opposite party no.2-M/s. Kandoi Transport Ltd., Cuttack, as detailed at serial no.18 of the said minutes. The Managing Director, instead of passing any order, directed to call all the bidders on 10.03.2016 at 12.30 p.m. for opening of financial bid. Pursuant to the same, on 10.03.2016 a meeting was held and opposite party no.2 was selected for operation of the contract by issuing a letter of intent (LOI) on 11.03.2016. The petitioner no.2 applied for copies of the documents relating to tender process under Rights to Information Act on 17.03.2016, which were granted by the opposite party no.1 on 05.04.2016. Consequently, the present writ petition was filed on 08.04.2016 challenging the letter of intent issued in favour of opposite party no.2 dated 11.03.2016.

2. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. B.P. Das, learned counsel for the petitioners strenuously urged before this Court that Annexure-8, the letter of intent (LOI) dated 11.03.2016 for Contract Operated Stockyard at Tangi, has been issued in favour of opposite party no.2 without adhering to the provisions of the tender conditions, as opposite party no.2, having no experience certificate for two consecutive years during the preceding five years in operating identical activities for handling of minimum 50000 MT of iron and steel material per annum, was not entitled to get the same. He specifically contended by referring to the office note of opposite party no.1-Corporation, that the Managing Director has not considered the report of the technical committee dated 03.03.2016 either by approving or disapproving the same, and without assigning any reason straight away passed an order to call them (bidders) on 10.03.2016 at 12.30 p.m. for opening of financial bid. On 10.03.2016, an intimation was issued to petitioner no.1, by referring to a telephonic intimation dated 09.03.2016, to participate in the price bid opening of the tender on the very same day at 12.30 p.m.. As a matter of fact, no such telephonic intimation had been received on 09.03.2016, but the letter dated 10.03.2016 had been received by the petitioner on 10.03.2016 at 1.38 p.m. from the official e-mail, and by the time it was received the price bid had already been opened and opposite party no.2 had been selected. Therefore, the action of the authority being arbitrary, unreasonable and contrary to the conditions stipulated in the tender documents, the letter of intent dated 11.03.2016 issued in favour of opposite party no.2 is liable to be quashed.

3. Per contra, Mr. Milan Kanungo, learned Senior Counsel appearing along with Rakesh Sahu, learned counsel for opposite party no.1 tried to justify the order in annexure-8 dated 11.03.2016 with regard to issuance of letter of intent in favour of the opposite party no.2, and stated that no illegality or irregularity has been committed in making such selection so as to warrant interference of this Court in exercise of its extraordinary jurisdiction.

4. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. P.B. Behera, learned counsel for opposite party no.2 stated that opposite party no.1, having

considered the tender documents and being satisfied that opposite party no.2 has complied with all the requirements of the tender conditions, has issued the letter of intent vide annexure-8, therefore, no illegality or irregularity has been committed by opposite party no.1 in issuing such letter of intent. Hence, it is urged that the selection of opposite party no.2 is wholly and fully justified.

5. We have heard learned counsel for the parties. Pleadings of the parties having been exchanged, with their consent the matter is disposed of at the stage of admission.

6. It is not disputed that opposite party no.1 issued a tender call notice inviting tender from eligible tenderers by issuing an advertisement published in daily news paper dated 23.01.2016. It is also not disputed that a corrigendum was issued to such advertisement. The tender call notice was issued for the "Contract Operated Stock at/in and around Tangi (Cuttack) ? cum - Handling Contractor for transportation, handling, storage and de coiling, straightening, cutting, bending and bundling of Tata Tiscon Coils/ Rebar manually/mechanically". Clause-2 of Invitation to Tenderer, deals with eligibility of tenderers. Sub-clause (vi) of Clause-2 reads as follows:

"(vi) Experience certificate for at least two consecutive years during preceding 5 years in operating identical activities such as transporting & handling of minimum 50000M.T. Iron & Steel material per annum is to be submitted being duly certified by the agency for whom the bidder is/has done the job."

Clause 17 of the Invitation to Tenderer states that the sealed envelope no.1 shall contain the documents, as enumerated in sub-clause (a) to sub-clause(g), the relevant clause essential for consideration, which are extracted hereunder:

"(f) Experience certificate for at least two consecutive years during preceding 5 years in operating identical activities such as handling of minimum 50000 M.T. Iron & Steel material per annum is to be submitted being duly certified by the agency for whom the bidder is/has done the job.

(g) If the tenderer qualifies after opening of envelop No. 1 i.e. Technical bid then his envelop No.2 will be opened or otherwise his envelop No.2 i.e. financial bid will not be opened for consideration.

Important : Please note that the rates should not be indicated in any of the documents contained in envelop no.1

In absence of any relevant document as mentioned above the tender shall be considered as nonresponsive."

Similarly, clause-18 speaks about sealed envelope no.2 which deals with price bids. The clause dealing with "opening of tenders" states as follows :

"Opening of tenders :-

i) Tender Opening Committee constituted by the Managing Director shall open the envelope No.3 submitted by all the tenderers at the scheduled time. Names, address and signatures of the persons present at the time of opening of tenders along with the names and firms of the Companies i.e. such persons are representing shall be recorded.

ii) Envelope No.1 shall be opened for all the tenderers. It would be seen as to whether all the tenderers have submitted the EMD and cost of the downloaded tender documents if applicable. In case any Tenderer fails to submit the EMD and the cost of the downloaded tender documents, the tender submitted by such tenderers shall be rejected. The technical bids contained in envelope No.1 will be taken up next for evaluation and verification.

iii) The envelope No.2 containing the price bid shall be opened at a later date for such tenderer who are considered to be technically qualified for the job. The date and time of opening of the price bid shall be intimated to all the tenderers who qualify.

iv) OSIC reserves the right to accept or reject any or all tenders without assigning any reason thereof."

Similarly, the clause dealing with "method of evaluation & award of contract" reads as follows;

"method Of Evaluation & Award Of Contract :

The contract is to be awarded to a single contractor based on L1 rate taking composite of all the offered rates of constituent services into consideration. OSIC reserves the right to negotiate the price offered by the successful bidder for downward revision. In no case the negotiation can be made for upward revision of the offered rates."

A committee comprising of seven members having expertise in their fields, was constituted for evaluation of technical bids of the tenderers. The technical bids were opened on 15.02.2016 and the committee members after verifying the original documents unanimously took a decision, which was forwarded for approval of the tendering authority. In the minutes of the meeting of the technical evaluation committee dated 03.03.2016, at serial no.18, it was noted as follows:

"Sl. No.

Requirement

Decision of the Committee

18

Experience certificate for two consecutive years during preceding 5 years in operating identical activities for minimum 50000 MT iron & steel per annum.

Kandoi Transport Limited : The bidder has not submitted any experience certificate of identical activity for consecutive 2 years during preceding 5 years. They have only undertaken transportation work for different industries especially aluminium industries. Therefore they only possess a partial experience as the proposed work involves both transportation as well as handling activities like transportation, handling, storage, decoiling, straightening, cutting, bending and bundling. Other 3 bidders have shown experience as per eligibility criteria."

The minutes of meeting of the technical evaluation committee were endorsed to the Managing Director for approval on 08.03.2016, where specific suggestion was given that the findings of the committee against serial no.18 of the minutes at page 417/C may be seen. But the Managing Director passed an order on 10.03.2016 to the following effect:

"We may call them on 10.03.2016 at 12.30 PM for opening of financial bid."

The order was passed on 10.03.2016 and on 11.03.2016 in Annexure-8 the letter of intent was issued in favour of opposite party no.2 stating inter alia that the work order would be issued after compliance of all terms and conditions laid down in the tender documents within one month of issuance of the letter of intent, failing which the letter of intent would stand cancelled and the EMD deposited would be forfeited without assigning any reason thereof.

7. From the above analysis, it would be evident that pursuant to the order dated 10.03.2016 passed by the Managing Director, petitioner no.2 was intimated only on 10.03.2016 in his email, which was received at 1.38 hours, and by the time the same was received, the price bids were already opened. Therefore, the petitioner no.1 has been deprived of participating in the process and is grossly aggrieved by the said decision making process of the authority concerned.

8. The scope of work has been specifically indicated in the tender call notice, meaning thereby, the bidders should have got at least two consecutive years experience during preceding five years in "identical activities" such as handling of minimum 50,000 MT of iron and steel material per annum being duly certified by the agency for whom the bidder has done the job. The opposite party no.2 has got experience in transportation, handling and storage, but it has no experience in compliance of clause 2(vi) so far as de coiling, straightening, cutting, bending and bundling of Tata Tiscon Coils/Rebar manually/mechanically are concerned. The "identical activities" meaning in clause-2(vi) refers to the scope of the work as mentioned in the tender call notice in its entirety and not only in transportation, handling and storage. Thereby, the application so submitted by opposite party no.2 should have been rejected due to non-compliance of the provisions contained in clause-2(vi) of the tender call notice.

9. As per clause 17(f), which refers to the condition of experience of operating "identical activities", also refers to the scope of the work for which the tender has been invited. As per clause- 17(g), if the tenderer qualifies after opening of envelope no.1, i.e., technical bid, then envelope no.2 will be opened. In absence of any relevant document, as mentioned therein, the tenders shall be considered

as non-responsive.

10. The technical committee evaluated the documents submitted by the tenderers and in its meeting dated 03.03.2016, has specifically stated at serial no.18 that opposite party no.2 has not submitted any experience certificate of "identical activities" for consecutive two years during preceding five years. It has only undertaken transportation work for different industries, especially aluminium industries. Therefore, it only possesses a partial experience, as the proposed work involves both transportation as well as handling activities like transportation, handling, storage, de coiling, straightening, cutting, bending and bundling, whereas other three bidders have shown experience as per eligibility criteria. In view of the evaluation of the tender committee of the technical bids, the bid submitted by opposite party no.2 being a non-responsive one, in view of clause-17(g), it could not have been considered for envelope no.2, the price bid.

11. The expert opinion of the technical committee meeting held on 03.03.2016 had been endorsed to the Managing Director for approval on 08.03.2016, as is evident from the note-sheet of opposite party no.1, which has been filed as Annexure-5 to the writ petition, being obtained by the petitioners under the provisions of the Right to Information Act. The Deputy General Manager (C)/M.D. has made a specific endorsement that findings of the committee against serial no.18 of the minutes at Page-417/C may please be seen and submitted the same for perusal and order. In view of such endorsement, the tender document submitted by opposite party no.2 being a non-responsive one in view of the provisions contained under Clauses-17(g) of the tender call notice, instead of considering the same, the Managing Director without assigning any reason thereof passed a bald order stating "we may call them on 10.03.2016 at 12.30 P.M. for opening of financial bid". Such endorsement, the Managing Director has given on 10.03.2016. Even though the Managing Director had given his endorsement on 10.03.2016, without approving or disapproving the suggestions given by the Deputy General Manager (C)/MD dated 08.03.2016, the tenderers had been called to participate in the price bid on 10.03.2016 at 12.30 pm. Though it is stated that petitioner no.1 had been intimated telephonically on 09.03.2016, the same has been emphatically disputed by it, and effectively petitioner no.1 had received the intimation on 10.03.2016 at 1.38 pm in the official e-mail ID enclosing a letter of invitation to participate in the price bid, which was to be held on 10.03.2016 at 12.30 p.m. By the time such communication had been received, the price bids had already been opened.

12. As would be evident from the comparative statement, which has been annexed as part of Annexure-7, a comparative assessment was made on the price bids and it was found that the price quoted by opposite party no.2, having no experience in respect of the work at serial nos.2 and 4, was much less than the price quoted by others including the petitioner. Specifically, opposite party no.2 had quoted the rate of Rs.599.50 per MT as compared to Rs.780.00 MT quoted by petitioner no.1. On the next day of opening of the price bid, i.e., on

11.03.2016 a letter of intent was issued in favour of opposite party no.2 for operation of the contract, wherein it was stated that the work order shall be issued after compliance of all terms and conditions laid down in the tender within one month of issue of the LOI, failing which the letter of intent shall stand cancelled and the EMD deposited by opposite party no.2 shall be forfeited without assigning any reason thereof. The office note - sheet annexed as annexure-5 clearly indicates that the Managing Director, without considering the suggestion given by the Deputy General Manager(C) with regard to the finding of the committee against s. no. 18 of the minutes, which was placed before him for perusal and order, passed an order stating that "we may call them on 10.03.2016 at 12.30 p.m. for opening of financial bid".

13. In the counter affidavit filed by opposite party no.1, though an attempt has been made to substantiate the action of the Managing Director by explaining the reasons, but the same cannot be taken into consideration at this stage. Opposite party no.1 being a public authority cannot play fast and loose with the power vested in it, and the persons to whose detriment orders are made, are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what order the authority is making. The Managing Director being a public authority cannot and could not have passed the order in the note-sheet of the file in a cryptic manner without considering the suggestion given by the Deputy General Manager (C) dated 08.03.2016 and, more particularly, the Managing Director is the approving authority on the decision of the committee constituted for consideration of the technical bid as well as financial bid. So, at the stage of consideration of the technical bid if certain shortcomings were noticed by the technical committee and had been placed before the Managing Director, who is the approving and disapproving authority, without considering the same and without assigning any reason the Managing Director would not have passed an order to the effect "we may call them on 10.03.2016 at 12.30 p.m. for opening of financial bid", which is totally an outcome of non-application of mind and, as such, amounts to arbitrary and unreasonable exercise of power by the Managing Director.

14. In Commissioner of Police, Bombay v. Gordhandas Bhanji, (1951 (SLT Soft) 47 : AIR (39) 1952 SC 16.), the apex Court held as follows:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself"

Similar view has also been taken by the apex Court in Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1977 (SLT Soft)370 : AIR 1978 SC 851.), (Bhikhubhai Vithlabhai Patel & Ors. v. State of

Gujarat & Anr. AIR 2008 SC, 1771.), Pancham Chand & Ors v. State of Himachal Pradesh & Ors.,(IV (2008) SLT 234 : II (2008) ACC 391 (SC) AIR 2008 SC 1888.)

15. In view of the facts discussed above, particularly the noting given by the Managing Director, and law laid down by the apex Court in the aforementioned cases, we are of the considered view that the Managing Director having acted without application of mind, arbitrarily and unreasonably, which violates Article 14 of the Constitution of India, the consequential letter of intent (LOI) issued by him in annexure-8 dated 11.03.2016 in favour of opposite party no.2, M/s. Kandoi Transport Ltd. cannot sustain in the eye of law and, as such, the same is hereby quashed.

16. The writ petition is accordingly allowed. No order as to cost.

