
(2014) 03 AP CK 0084

In the Andhra Pradesh High Court

Case No : Writ Petition No. 30582 of 2013

M/s. Daulatram Industries

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 4 ALD 50 : (2014) 3 ALT 432

Hon'ble Judges : P. Naveen Rao, J

Bench : Single Bench

Advocate : D. Prakash Reddy, Advocate for the Appellant; S.R. Ashok for the Respondents 1 and 2, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P. Naveen Rao, J.—This writ petition is instituted aggrieved by the action of the respondent/Railways in not awarding the contract of maintenance of RMPU's fitted in Air Conditioned coaches including POH activity at LGD & TPTY shops to the petitioner even though, it was identified as lowest bidder.

2. The facts are in narrow compass. On 26.4.2013 the South Central Railway of the Indian Railways (second respondent) issued tender notice calling for tenders from interested parties for awarding the contract of maintenance of RMPU's fitted in Air Conditioned coaches including POH activity at LGD & TPTY shops. The contract once awarded would be in force for a period of three years and the estimated cost of the tender was Rs. 11,73,11,715/-. Initially, tender notification provided for price variation clause, however, by way of corrigendum issued on 13.5.2013 the price variation clause was deleted. The petitioner as well as the third respondent have submitted their tenders. Tenders were opened on 19.6.2013 and petitioner was announced as lowest bidder. On receiving the intimation that petitioner was identified as lowest bidder, petitioner addressed letter dated 23.8.2013 to incorporate price variation clause as originally notified in the tender notification and renotify the tender. It has followed it up with

further correspondence. Petitioner was not informed about the decision taken on the request made to introduce price variation clause. While petitioner was awaiting response to his letters for introduction of price variation clause, petitioner was informed by letter dated 7.10.2013 returning the FDR submitted by the petitioner towards Earnest Money Deposit. Petitioner avers that ignoring the petitioner's lowest bid, second respondent entered into negotiations for awarding of the contract to the third respondent.

3. The action of the respondents in not awarding the contract to the petitioner though it was the lowest bidder, is assailed on the following grounds:

a) Ignoring the lowest bidder and entering into negotiations with the third respondent whose bid was higher is discriminatory, illegal and violative of Article 14 of the constitution of India and in violative of principles of natural justice and fair play. The absence of response to the petitioner's representations is also arbitrary. The tender process was not transparent.

b) Where a particular mode is prescribed for awarding contract, not following the said mode would vitiate the entire exercise?

c) Assuming that the petitioner's tender was not finalized on account of the subsequent letters written by it on 23.8.2013 and 27.9.2013 for introduction of price variation clause, petitioner contends that the letters addressed by it do not amount to withdrawing from the tender process and therefore on that ground the bid submitted by petitioner ought not to have been ignored.

d) Amendment to the price variation clause by way of corrigendum is illegal.

4. It is categorical assertion of the respondent authorities that the petitioner was not ignored for awarding of the contract even though it was found to be the lowest bidder, on account of his subsequent representations seeking for re-introduction of the price variation clause and renotify the tender. It is the assertion of the respondent/Railways that after opening the tenders, performance report was sought from East Coast Railways and it was noticed that petitioner has not completed the work entrusted to it and due to unsatisfactory performance of the petitioner, the POH work at Mancheswar (MCS) workshop was terminated with forfeiture of proportionate security deposit and that the petitioner did not start the work in two other depots and work was unilaterally stopped by the petitioner and the report submitted by the East Coast Railways showed the performance of the petitioner as not satisfactory and therefore in view of the above past performance of the petitioner, decision was taken not to award the contract to the petitioner and therefore, negotiations were entered with next lowest bidder. As per the rules governing the tender process and the clauses in the tender notification, there is no requirement to communicate refusal or rejection of the application of any tenderer and refunding of the Earnest Money Deposit is only communication to the tenderer that it was found unsuitable or unsuccessful. It is further averred that all aspects of the case including past performance of the petitioner were deliberated upon and discussed

by the tender committee before deciding to bye-pass the offer of the petitioner. It is averred that the subject work involves maintenance of roof-mounted AC package units, where any deficiency in proper maintenance would invite severe criticism from the traveling public. It is further averred that performance of Air Conditioning depends substantially upon the maintenance of RMP units and such critical activity cannot be entrusted to a tenderer who is having poor and unsatisfactory track record. It is further averred that improper functioning of RMP units may result in failure of Air Conditioning services on run and cause disruption to train services. Proper maintenance of RMP units is also most essential to prevent any possible case of fire in the coaches which may result in severe damage to both men and property. These are all essential aspects which require consideration and tender committee of experts considered all aspects before ignoring the tender submitted by the petitioner. Recommendations of the tender committee were accepted by the competent authority. Right to reject lowest or any other tenderer is always available to the competent authority and it is left to the competent authority to choose best tenderer. Petitioner was ignored because its past performance was not satisfactory and that was a valid criteria adopted. There was no arbitrary exercise of power or authority by the competent authority.

5. In the reply filed by the petitioner, petitioner endeavored to explain the reasons of his unsatisfactory relationship with East Coast Railways. It is his submission that the petitioner was not at fault and relevant correspondence enclosed to the reply would disclose that due to lapse on the part of the East Coast Railways, petitioner could not complete the contract. It is further emphasized that recently petitioner was also awarded similar nature of contract by the West Central Railway, Jabalpur vide letter dated 16.8.2013. Before ignoring the petitioner, feed-back ought to have been obtained from Coach Rehabilitation Work shop, West Central Railway, Bhopal. Petitioner has also executed similar nature of work earlier and the same was also ignored.

6. Heard learned senior counsel Sri D Prakash Reddy for petitioner and learned senior counsel Sri S.R.Ashok for railways/respondents 1 and 2. None appeared for third respondent.

7. Sri D Prakash Reddy, learned senior counsel submitted that once petitioner is identified as lowest bidder, ignoring the lowest bidder and negotiating with another bidder more particularly when the variation in the offer is very high, was not in public interest and the same is arbitrary and unconstitutional.

8. Learned senior counsel further contended that when the tender notification did not incorporate any clause on past performance, placing reliance on past performance more particularly behind the back of the petitioner and ignoring the petitioner's tender on that ground is erroneous, amounts to arbitrary exercise of power and authority, it is thus illegal.

9. Even assuming that the respondent authorities are entitled to look into past

performance, no such examination could have been done without notice or opportunity to the petitioner. Had an opportunity was afforded to the petitioner, petitioner would have explained the reasons which were germane for non performance of the contract with East Coast Railways. Learned senior counsel contends that there was payment dispute which resulted in petitioner not completing the contract and railways alone were responsible for inviting the disputes.

10. Sri S.R.Ashok, learned senior counsel appearing for railways submitted that merely because the petitioner was lowest bidder, does not automatically enure to the petitioner for awarding of contract. Awarding of contract to lowest bidder is not automatic. In fact, the tender conditions clearly stipulate that competent authority is not bound to accept the lowest tender. It is implicit in the tender conditions that competent authority is entitled to look into past performance before awarding contracts. More particularly the subject matter of the present contract is very sensitive and any amount of leniency in selecting the contractor can be fatal, if such contractor neglects his work or has a scope of under performance. Therefore it is necessary to look into the past performance and thus while looking into the past performance of the petitioner and its track record with the railways, it showed that in similar nature of work petitioner underperformed and has not completed the contract and as assessed by the competent authority of the East Coast Railways his performance was "Not Satisfactory". Thus, while evaluating the tender offered by the petitioner, the three man experts committee having noticed the poor performance of the petitioner with the railways in the recent past, decided not to award the contract to the petitioner, even though he stood as lowest bidder.

11. Learned senior counsel further submitted that as evident from clause 16 and 18 there is no requirement for the competent authority to assign reasons for declining to consider any tender or tenderer and no tenderer can demand explanation for rejection of tender. Therefore no reasons were assigned while returning the EMD submitted by the petitioner. The reasons assigned in the counter affidavit are germane for not considering the petitioner though it was the lowest bidder i.e., its past performance in the similar nature of work in East Coast Railways in the recent past, thus there was no arbitrary exercise of power and authority. There was no malafide exercise of power by the railways in denying to the petitioner and in seeking to award the contract to the third respondent. The decision of the respondent was in public interest.

12. The issue for consideration in this writ petition is whether non consideration of the petitioner's bid for awarding of contract though he was lowest bidder by evaluating the past performance of the petitioner behind his back is illegal and amounts to arbitrary exercise of power?

13. A Division Bench of this Court in Union of India (UOI) and Others Vs. Laxmi Builders and Another, 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.

14. In *M/s. Suryodaya Infra Projects (I) Pvt. Ltd. Vs. The National Mineral Development Corporation Limited*, A Government of India Enterprise, Castle Hills, Masab Tank, The National Mineral Development Corporation Limited, A Government of India Enterprise, Donimalai, Iron Ore Mine, P.O. Donimalai Township, Sandur Taluq, Ballari District, Sri B. Srinivasa Raju and *M/s. N.A.P.C. Limited*, learned single Judge of this Court analysed various principles evolved by the Courts in India on various issues concerning awarding of contracts by the State or its instrumentalities. The issues which were considered by this Court relate to tender conditions, evolution of past performance, non communication of the reasons for not considering the tender of a tenderer etc. This Court held as under:

....In cases where the tenderer is neither blacklisted nor is he visited with penal consequences, and the tender is merely treated as defective, there is no need to give an opportunity to the tenderer to show cause at that stage. While an opportunity can be granted to the tenderer to explain the position, failure to do so would not render the decision, to treat the tender as defective, illegal or arbitrary. (para 14)

.....

In the matter of formulating conditions of a tender document, and in awarding a contract, greater latitude is required to be conceded to the State authorities.

Unless the action of the tendering authority is found to be malicious, interference by Courts is not warranted. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, interference by the Court is limited. (para 19)

.....

The limited question that has to be considered in a writ petition filed by the unsuccessful tenderer is whether the authority had acted unreasonably in taking the decision to reject the tender. Before interfering in tender or contractual matters, in the exercise of its power of judicial review, the Court should pose to itself the following questions : i) Whether the process adopted or decision made by the authority is malafide or intended to favour someone or whether the process adopted or the decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226 of the Constitution of India. (para 33)

....

This Court must ever remain conscious that, while exercising its jurisdiction under Article 226 of the Constitution of India, it does not sit in appeal over the decision of the Respondent-Company in rejecting the petitioner's tender. It is only if the decision to reject the tender is so unreasonable, that no reasonable man could have taken such a decision, can the decision be said to be vitiated by arbitrariness violating Article 14 of the Constitution of India.... (para 34)

....Even if the other view, canvassed on behalf of the petitioner, that there is an element of doubt whether it was Prime Constructions (the firm which had hitherto executed works for the respondent company) which had submitted the tender to SAIL, Bhilai which culminated in an order of blacklisting being passed, were to appeal to this Court, there would still be no justification in interfering with the impugned order as the view taken by the respondent-company is also a possible view, and not one which no reasonable man could have taken. (para 34)

15. The tender committee comprises three officers who are experts; they have scrutinized the tenders submitted by all the tenderers including the petitioner and third respondent and having found that petitioner's past performance was not satisfactory made its recommendations to the competent authority to bypass petitioner, which was accepted by the competent authority. The material on record disclose that elaborate exercise was undertaken and all aspects required for evaluation of tenders were considered. All previous assignments of petitioner were within the knowledge of the respondent Railways. Thus, it was a conscious and well considered decision. No allegations of malice on any particular officer are made. It was not a unilateral decision of an officer to select any person of his choice by ignoring the petitioner. In the light of the principles laid down by this Court in the above decisions and in the facts of this case, it cannot be said that

the process adopted and the decision to ignore the petitioner was so arbitrary and irrational. In view of the nature of contract, it is in public interest to take all precautions before awarding the contract. The decision to ignore the petitioner in view of its unsatisfactory performance in the past is in public interest. There was no requirement to communicate reasons for non consideration of the tender submitted by the petitioner and there is no provision for giving an opportunity of hearing while considering the past performance. Impugned decision does not offend the petitioner in any manner; it was not black listed nor it visited with penal consequences. Not affording an opportunity does not vitiate the ultimate decision of the competent authority.

16. Having regard to the above analysis of the legal position and the facts of the case, I am of the opinion that the contentions raised by the petitioner have no merit and hence the writ petition is dismissed.

Sequel to the dismissal of the writ petition, miscellaneous petitions, if any stand dismissed.