

(2013) 10 SHI CK 0019
In the High Court Of Himachal Pradesh
Case No : CWP No. 6928 of 2013-C

M/s. Himachal Techno Engineers and Others	APPELLANT
Vs	
State of Himachal Pradesh and Others	RESPONDENT

Date of Decision : 04-10-2013

Acts Referred:

Citation : (2013) 10 SHI CK 0019

Hon'ble Judges : A.M. Khanwilkar, C.J.; V.K. Sharma, J

Bench : Division Bench

Advocate : Sumit Raj Sharma, for the Appellant; Shrawan Dogra, Advocate General, Mr. Romesh Verma, Anup Rattan, Additional Advocate Generals and Mr. J.K. Verma, D.A.G., for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, C.J.—Heard counsel for the parties. This petition takes exception to the tender process commenced on the basis of Annexure R-4. The challenge in this petition is to the condition specified in the tender document regarding qualification of the bidder. The same reads thus:-

10.8. Qualification of the Bidder.

Only those contractors will be allowed who have experience of having successfully completed similar works (means any work including component of any of the five schedules of work of this project) in IPH Department or in other PHE & Irrigation Department of State Govt. or Govt. of India during last 7 years ending March, 2012 and should also satisfy following conditions:

A contractor/firm would be considered pre-qualified for the work if;- (a) The bidder has completed three similar works costing each not less than 25% of the given estimated cost during the last 7 years ending March, 2012. Or

(b) The bidder has completed two similar works costing each not less than 35% of the given estimated cost during the last 7 years ending March 2012.

Or

(c) The bidder has completed one similar work costing each not less than 70% of the given estimated cost during the last 7 years ending March 2012.

Note:- (Completed work means work physically completed more than 90%)

2. According to the petitioners this condition is inconsistent with the condition specified in the previous tender process in spite of being the same work, which was abandoned by the Authorities. The same reads thus:-

New Rule 7 shall be added as under:-

Criteria for pre-qualification:

Prequalification bids will be invited in financial and technical terms in case of such works which are of specialized nature and require high technical skill or specific machinery/equipment e.g. Major/Minor irrigation/DWSS, Sewerage Treatment Works, Flood Protection Works etc. Apart from this, pre-qualification shall be resorted to in all such projects which cost Rs. 2.00 crore and above for assessing financial soundness/capacity of contractors/firms.

A contractor/firm would be considered pre-qualified for the work if he has successfully executed or is executing or has been provided three works of 1/4th value during the last three years in relevant trade. In case of such firms/contractors who could not succeed in securing job even after this serious participation in tender process during the above period, he may be asked to furnish the details of such work with amount in which he has participated and also furnish his financial capability to execute the intended work. In such case the amount of each work for which he had unsuccessfully quoted, should not be less than 50% of the cost of the work for which he is seeking pre-qualification.

OR

A contractor/firm would be considered pre-qualified for a work if:-

(i) The bidder must have completed three similar works costing each not less than 60% of the given estimated cost or

(ii) The bidder must have completed two similar works costing each not less than 70% of the given estimated cost or

(iii) The bidder must have completed one similar work costing not less than 80% of the given estimated cost.

(iv) The bidder should satisfy the Engineer-in-Charge that it does not have more than two incomplete works of similar nature as per eligibility criteria of any Government Department/undertaking.

3. The fact that in the fresh tender process, stringent qualification condition has been incorporated cannot be the basis to assume that the same is unreasonable

or has been so incorporated with a view to favour any particular person or to exclude the petitioners before this Court. No allegation regarding malafide exercise of powers has been made out in the petition and cannot be enquired into as no person, at whose behest such malafide decision has been taken, has been named as party respondent. Vague assertion made in the petition, therefore, cannot be taken forward.

4. The moot question is: whether the conditions specified in the impugned tender document can be said to be unreasonable, illegal or unconstitutional as such. The explanation offered by the respondents, on affidavit, is that, the Authority having realized that in the earlier tender process, the qualification condition specified was not in conformity with the guidelines of Central Vigilance Commission, which are not only fair but essential to secure transparency in the process, decided to abandon the earlier tender process and incorporated new condition as specified in the guidelines of Central Vigilance Commission, keeping in mind that the project value was above Rs. 30 crores.

5. The difference in the pre-qualification criteria as per the notification of the Government of Himachal Pradesh, dated 18th August, 2011, in contradistinction to the pre-qualification criteria as per Central Vigilance Commission guidelines, has been highlighted in the affidavit, dated 11th September, 2013. It is not the case of the petitioners that the stand so taken in the reply-affidavit regarding the difference between the criteria provided in the Government notification and the Central Vigilance Commission guidelines is incorrect.

6. As aforesaid, the respondents decided to invoke and follow the guidelines of the Central Vigilance Commission for the proposed work to observe transparency and fairness in the tender process and including because of its high value. We fail to understand as to how that can be taken exception to by the petitioners simply because they do not fulfill the qualification provided in the Central Vigilance Commission guidelines.

7. The only legal argument that impressed us was that the notification, dated 18th August, 2011, purports to amend the statutory Rules of 1993. That position was noted in our order, dated 13th September, 2013. In response thereto, the respondents have filed affidavit, dated 1st October, 2013, sworn by the Additional Chief Secretary (I & PH), to the Government of Himachal Pradesh and have placed on record notification dated 11th November, 1993 as Annexure R-1 to the said affidavit. On plain reading of the said notification, it is evident that it is not statutory Rules, but issued in exercise of executive powers of the State. We are, therefore, not impressed with the argument of the petitioner that in the light of the said notification it was not open to the Authority to change the qualification condition unilaterally.

8. Notably, it is not the case of the petitioners that the qualification condition specified in the impugned tender document is, in any way, lower than the benchmark noted in the purported Rules of 1993. It is always open to the Authority to

change the tender condition in the successive tender process including the qualification requirement, if the situation so warrants. That is the subjective satisfaction of the Authority on technical matters. The learned Advocate General has justly invited our attention to the exposition of the Apex Court in Villianur Iyarkkai Padukappu Maiyam Vs. Union of India (UOI) and Others, in particular, paragraph 167 onwards, which has taken the view that the policy decision and economic tests determined by the Authorities, judicial review thereof is very limited. No case for judicial review of qualification condition has been made out, which may warrant its judicial review. The legal question raised by the petitioners about the authority to alter the qualification condition, as aforesaid, is untenable.

9. We may place on record that the counsel for the petitioners, at the outset, requested us for time to file rejoinder. However, the question as to whether the notification, dated 11th November, 1993, are statutory Rules or issued in exercise of executive power needs no rejoinder-affidavit as it can be decided on the basis of the said document itself i.e. Annexure R-1. In addition, we thought it appropriate to reject the request for adjournment being satisfied with the submission of the learned Advocate General that the tender process is being unnecessarily delayed on flimsy and untenable grounds agitated by the petitioners in this petition. Taking overall view of the matter, this petition is devoid of merits and the same is dismissed, so also the pending application(s), if any.