

(2018) 02 OHC CK 0024

In the Orissa High Court

Case No : 20832 of 2017

M/s. International Trade Link

APPELLANT

Vs

State of Odisha and others

RESPONDENT

Date of Decision : 02-02-2018

Acts Referred:

Constitution of India, Article 21A, Article 227 - Right to education. - Power of superintendence over all courts by the High Court
General Clauses Act, 1897, <a href=45

Citation : (2018) 02 OHC CK 0024

Hon'ble Judges : Vineet Saran, B.R. Sarangi

Bench : Division Bench

Advocate : B.K. Sharma, A.U. Senapati, S. Palei, S.K. Singh, S. Das, A.K. Pandey, P.K. Mohanty, D.N. Mohapatra, J.Mohanty, P.K. Nayak, S.N.Dash, P.K. Pasayat, P.Mohanty, A.K. Budhia, A.K. Parida, P.K.Rath, R.N. Parija, A.K. Rout, A.Behera, S.K. Behera, A.K. Behera,

Final Decision : Dismissed

Judgement

1. Odisha Primary Education Programme Authority (OPEPA) through its State Project Director, pursuant to a policy decision taken by the

Government of Odisha, invited tender from eligible bidders vide tender call notice no. 5914 dated 31.07.2017 for supply of (1)0 AIR(SC)hool

Bags and (2) Reading Writing Materials (RWM) for students from Class-I to V of Government and Government aided0 AIR(SC)hools for the

year 2017-18. The detailed bid document was made available in the website of OPEPA and it was indicated that interested and eligible

agency/firm may download bid document from website and apply accordingly. It was also indicated that the corrigendum/addendum, if required,

would be uploaded in the said website, therefore, potential bidders were

requested to remain in continuous touch with the said website.

Subsequent to issuance of the notice inviting tender, a corrigendum was issued on 19.08.2017 with certain addendum. In respect of the first item,

i.e., supply of 0 AIR(SC) hool bags, which is the subject matter of dispute in the instant writ petition, all total 29 firms, including the petitioner,

responded to the said tender. The tender evaluation committee held its meeting on 29.08.2017 for opening of the bids, preparation of evaluation

sheet for appraisal, evaluation and approval by State Level Purchase Committee (SLPC) towards procurement of 0 AIR(SC) hool bags. During the

course of meeting, it was unanimously opined that the offer of 10 firms would not be taken into consideration for participating in the financial bid, as

they could not fulfil all conditions of the tender. Then, the samples of those 19 firms, which had been qualified on preliminary ground, were

physically verified by the technical members of the Directorate of Export Promotion and Marketing (EPM), Odisha, who opined that out of those

19, only 4 firms, namely, M/s. Mayank Associates, Bhubaneswar; M/s. Madhusudan Textile Industry (P) Ltd., Cuttack; M/s. International Trade

Link, Kolkata; and M/s. Odisha Consumer Cooperative Ltd. Baripada, Mayurbhanj had submitted their samples as per specification mentioned in

the bid documents, and so far as rest 15 firms are concerned, there were some drawbacks in their samples. All other members of the committee

verified the samples visually and observed that visual checking of samples cannot be treated as cent percent correct, unless it is tested in the

laboratory. The quality of 4 samples qualified by the technical members of EPM, Odisha seemed to have some deviation and accordingly, without

opening the financial bid, it was decided to cancel the tender, as per the provisions of tender call notice dated 31.07.2017. The petitioner, being

one of the eligible bidders, which had been technically qualified, seeks to challenge the said decision dated 29.08.2017 in cancelling the tender,

hence this application.

2. Mr. B.K. Sharma, learned counsel appearing for the petitioner vehemently contended that no justifiable reason has been assigned in cancelling

the tender. Once technical members of the Directorate of EPM, Odisha had opined that 4 firms submitted the samples as per specification

mentioned in the bid document, the tender evaluation committee should not

have sat, as an appellate authority, over the findings of the technical members, especially when none of the tender conditions stipulates so. It is further contended that the only reason, which has been assigned by the technical evaluation committee, is that the quality of four samples qualified by the technical members of the EPM, Odisha, seems to have some deviation, but no elaboration has been made with regard to exact deviation so as to justify cancellation of tender. Similarly, the view of the tender evaluation committee, that checking of the samples by the technical members which was done physically and visually, was only a presumption, and its consequential decision that the visual checking of samples cannot be treated as cent percent correct unless it is tested in the laboratory, is not supported by any of the conditions stipulated in the tender document. If such theory of laboratory test is introduced, it would amount to changing the rules of the game after it is started, and it can safely be presumed that such change has been made to suit a particular player. It is further contended that once the technical evaluation has been made, which was assigned to technical members of Directorate of EPM, the tender committee should have honoured their opinion, instead of taking a contrary view, as it has no expertise in the said field. Therefore, the financial bid of the petitioner, which had been qualified in technical bid, ought to have been opened. As such, the order dated 29.08.2017 cancelling tender call notice dated 31.07.2017 cannot sustain in the eye of law. To substantiate his contention he has relied upon the judgments in *M/s. Shree Ganesh Construction v. State of Orissa and Others*, 2016 (II) OLR 237 and *Gangadhar Jena v. State of Odisha*, 2017 (II) ILR -CUT -763.

3. Mr. A.K. Pandey, learned Standing Counsel for AIR(SC)hool and Mass Education Department contended that since the tender has been floated by opposite party no.2-OPEPA, the State has nothing to do with the same and it is the opposite party no.2 who has to justify its action in accordance with law.

4. Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P.K. Pasayat, learned counsel for opposite party no.2-OPEPA has tried to justify the action taken by the tender evaluation committee in cancelling the tender and contended that opposite party no.2, which is fully controlled and regulated by the Government in AIR(SC)hool and Mass Education

Department, monitors and implements all project work in the State and the AIR(SC) schemes sponsored by the Central Government, as well as the State Government under the Sarva Sikshya Abhijan and right to education. With the funds provided by the Central Government, as well as the matching funds at such proportionate by the State Government, the AIR(SC) schemes are implemented in the State for ensuring the right to education and fundamental rights to AIR(SC) school going children up to the age of 14, as guaranteed under Article 21A of the Constitution of India. The OPEPA, for the purpose of providing AIR(SC) school bags to such AIR(SC) school going children/students of the Government as well as Government aided AIR(SC) schools for the year 2017-18, initiated the tender process, pursuant to which 29 firms/bidders submitted their technical and financial bids after accepting the terms and conditions of the tender call notice. As per Clause-6 of the letter of invitation, OPEPA reserves the right to accept or reject any or all bids/cancel the entire selection process at any stage without assigning any reason thereof. So also in Clause-10 of Section-1 of the Information to the Bidder, OPEPA reserves its right to accept/reject any/all bids or cancel the entire selection process at any stage without assigning any reason thereof. Thereby, the right has been reserved with the tendering authority to cancel the tender process at any stage. After realizing some lapses in the tender process, if the action has been taken to cancel the entire tender process, no illegality or irregularity has been committed by the opposite parties. An evaluation committee was formed at OPEPA level consisting of 12 members including the Chairman, SPD, the members from inhouse as well as outside members from Government in AIR(SC) school and Mass Education Department, Directorate of Elementary Education (O), Directorate of TBPM, Directorate of Printing and Stationery, Directorate of EPM, Odisha. Out of 12 members, only 2 members from Directorate of EPM, Odisha were taken, who within their expertise knowledge, on opening of 29 technical bids and their samples, found at the threshold that 10 of them were not suitable. Thus, they were not considered as they could not fulfill all the conditions of the tender. Out of rest 19 firms, after detailed checking physically/visually, as it was opined by the technical members from the Directorate of EPM, Odisha, only four firms, including the petitioner, were found to have

submitted the samples as per the specification mentioned in the bid documents, but in respect of other 15 firms some drawbacks were found in

their samples. Therefore, the tender evaluation committee came to a conclusion that only on physical, visual and/or manual verification it cannot be

concluded without any laboratory test that the materials of samples could be of best quality and viability. That is why the tender evaluation

committee cancelled the tender process, which is well within the domain of the authority concerned. As such, no illegality or irregularity can be

found with the authority to choose a best person for supply of school bags in a large0 AIR(SC)ale quantity to meet the requirement of the students

of Government and Non-Government aided0 AIR(SC)hools who are prosecuting their studies from Clause-I to Class-V.

5. Mr. P.K. Rath, learned counsel, who has filed an application for intervention on behalf of M/s Odisha Consumers Co-operative Ltd., Baripada,

Mayurbhanj, which is one of the successful bidders along with the petitioner, supported the contention of Mr. B.K. Sharma, learned counsel

appearing for the petitioner.

6. Mr. S. Nanda, learned counsel, who has also filed an application for intervention on behalf of United Sales Corporation, whose tender has been

rejected having not been qualified technically, contended that the action taken by the opposite party-tendering authority is well justified in view of

the fact that Clause-6 of the Letter of Invitation and Clause-10 of Information to the Bidder clearly empower opposite party no.2-OPEPA to

cancel the entire selection process at any stage without assigning any reason and, as such, the reasons assigned in the proceedings dated

29.08.2017 are sufficient compliance of test of reasonableness in action. He further contended that as per Section-21 of the General Clauses Act,

1897 read with Sections 14 and 21 of the Odisha General Clauses Act, 1937, the authority who has got power to issue has also got power to

cancel the tender. The petitioner, having accepted the tender conditions so also the corrigendum/addendum, cannot question the impugned order of

cancellation by way of filing writ application, particularly when the power has been exercised by the competent authority in accordance with the

tender conditions. Furthermore, since there is deviation, as has been mentioned in the proceedings of the tender evaluation committee, thereby the

decision so taken for cancellation of the tender is well justified and, as such, there is no infringement of statutory or legal rights warranting to invoke

the writ jurisdiction. Moreover, in view of Clause-22 of the notice inviting tender, the dispute raised is not amenable to writ jurisdiction under

Article 227 of the Constitution of India, when there is no concluded contract between the parties. In support of his contention he has relied upon

the judgments of the apex Court in Union of India v. E.G. Nambudiri, AIR 1991 0 AIR(SC) 1216; Shree Sindhbali Steels Ltd. V. State of U.P.,

AIR 2011 0 AIR(SC) 1175; State of Punjab V. Dhanjit Singh Sandhu, AIR 2014 0 AIR(SC) 3004; State of Jharkhand v. Cwe-Soma

Consortium, AIR 2016 0 AIR(SC) 3366; Siemens Aktiengesellschaft and S. Ltd. v. DMRC Ltd., AIR 2014 0 AIR(SC) 1483; and Kerala State

Electricity Board V. Kurien E. Kalathil, AIR 2000 0 AIR(SC) 2573.

7. Mr. A.K. Budhia, learned counsel appearing for Laxmi Enterprises, one of the unsuccessful bidders which has filed an application for

intervention, supported the contention of Mr. S. Nanda, learned counsel and justified the action taken by the authority in cancelling the tender.

8. We have heard Mr. B.K. Sharma, learned counsel for the petitioner; Mr. A.K. Pandey, learned Standing Counsel for School and Mass

Education Department appearing for opposite party no.1; Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P.K. Pasayat,

learned counsel for opposite party no.2; Mr. P.K. Rath, learned counsel appearing for intervenor- Odisha Consumers Cooperative Federation

Limited, Baripada Branch, Mayurbhanj, who has supported the case of the petitioner; Mr. S. Nanda, learned counsel appearing for United Sales

Corporation, and Mr. A.K. Budhia, learned counsel appearing for intervenor-Laxmi Enterprises, who is supporting the case of the opposite

parties. Pleadings having been exchanged between the parties and considering the urgency, the matter is being disposed of finally at the stage of

admission with the consent of learned counsel for the parties.

9. The relevant provisions of the Tender Call Notice and Letter of Invitation of bid dated 31.07.2017 are quoted below for just and proper

adjudication of the case in hand:

TENDER CALL NOTICE

XX XX XX

The Authority (OPEPA) reserves the right to accept / reject any/all BIDs/cancel the entire selection process at any stage without assigning any reason thereof.

LETTER OF INVITATION

XX XX XX

6. While all information/data given in the BID document are, to the best of the OPEPA knowledge, accurate within the consideration

of0 AIR(SC)ope of the proposed assignment, OPEPA holds no responsibility for accuracy of information and it is the responsibility

of the bidder to check the validity of information/data included in this document. OPEPA reserves the right to accept/reject any/all

BIDs/cancel the entire selection process at any stage without assigning any reason thereof.

SECTION: 1

INFORMATION TO THE BIDDER

XX XX XX

7. Specification, samples.

(a) Specification: The Specification of the0 AIR(SC)hool bag is provided in the Section-2 of the BID document.

(b) Sample: The sample of Bag is available in Text Book Section of OPEPA for viewing by the potential bidders to know the design,

colour, dimension, cloth, strap, water bottle pocket part, bag closure part as a customized item. For details the bidders are require to

refer the detailed specification given in the BID document.

XX XX XX

9. Evaluation of BID & award of Contract.

(a) The Purchase Committee will evaluate the Technical BID along with the sample & Financial BID.

(1) Evaluation of Technical Bid: The technical bid of the bidders will be evaluated in two stages. Firstly, the document/papers asked

in the technical bid will be evaluated. Secondly, the sample of the bidder submitted all the document/papers as asked in the technical

bid will be evaluated against the sample, quality & specification of bag duly approved. There after the technically qualified bidders will

be short listed. Financial Bid of the bidder/s submitted all the required document/papers & sample as per the desired quality &

specifications will only be considered for opening.

XX XX XX

10. Acceptance or Rejection of the Bids:

(a) OPEPA reserves the right to accept/reject any/all BIDS/cancel the entire selection process at any stage without assigning any

reason thereof.

(b) Any bid with incomplete information is liable for rejection.

11. Signing of Contract:

(a) The successful bidder/s whose bid has been accepted will sign an agreement within 07 (seven) days of issue of the work order.

(b) Failure by the tenderer to comply with the requirement of above mentioned clause, the offer shall be rejected and the tenderer

shall have no claim further.

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20. The Authority reserves the right to modify any terms in the bid document at the time of execution of contract, if felt necessary.

SECTION:2

SPECIFICATION

(1) Materials: (For Body, Strap, Pocket & Partitions)

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(2) Manufacture, Workmanship & Finish:

XX XX XX

(3) Shape and Dimensions:

XX XX XX

(4) Specification of Flap Buckle Portion (bag closure)

XX XX XX

(4) Test:

i) Drop Tests- The bag shall withstand 8 Kg load when tested as per clause 7.1 of IS: 10228.

ii) Handle Snatch Test-The bag shall comply the test when tested as per clause

CORRIGENDUM/ADDENDUM

1. Eligibility Criteria-

XX XX XX

All other terms and conditions of the tender call notice as well as Bid document and corrigendum/addendum issued earlier shall remain unchanged.

10. The aforementioned provisions stipulated in the Tender Call Notice, Letter of Invitation, Information to the Bidder, Specification and also

Corrigendum/Addendum, clearly specify that opposite party no.2-OPEPA reserves the right to accept/reject any/all bids or cancel the entire

selection process at any stage without assigning any reason thereof. Needless to mention that the evaluation of bids and award of contract were to

be done in two stages; firstly, the documents/papers asked in technical bid were to be evaluated; and secondly, the samples of the bidders

supported by documents/papers as asked in the technical bid were to be evaluated against the sample, quality and specification of bags duly

approved. Thereafter, the technically qualified bidders were to be short listed, and the financial bids of the bidders submitted all the required

documents/papers and samples as per the desired quality and specification were only to be considered for opening. Clause-10 clearly empowers

OPEPA to reserve the right to accept or reject any/all bids or cancel the entire selection process at any stage without assigning reasons thereof.

Apart from the same, under Clause 20 the authority even reserves the right to modify any term in the bid documents at the time of execution of the

contract, if felt necessary.

11. In the proceeding of evaluation committee meeting held on 29.08.2017 for opening of the bids, preparation of evaluation sheets towards

procurement of 0 AIR(SC)hool bags under Clause-2, 3 and 4, it has been stated as follows:

(2) The technical members from Directorate of EPM, Odisha were requested to verify the samples submitted by other 19 firms.

After detailed checking physically/visually, it is opined by the technical members of the Directorate of EPM, Odisha that only 04 firms

i.e. (1) M/s Mayank Associates, Bhubaneswar, (2) M/s Madhunagar Textile Industries (P) Ltd., Cuttack, (3) M/s International

Trade Link, Kolkata, (4) M/s Odisha Consumers Cooperative Ltd., Baripada, Mayurbhanj have submitted samples as per the

specification mentioned in the Bid document. Other 15 firms have some drawback in samples. The verification sheet is attached as

Annexure-D.

(3) All other Committee members verified the samples visually and observed that visual checking of samples cannot be treated as

cent percent correct unless it is tested in the Laboratory. The quality of 04 samples qualified by the technical officers from EPM seem

to have some deviations.

(4) After threadbare discussions, in the greater interest of the Government the committee unanimously decided without opening the

financial BID which is as follows:

(a) to cancel the tender as per Provisions of the tender call notice no. 5914 dated 31/07/2017 for Supply of 0 AIR(SC)hool Bags.

(b) to float fresh tender in e-tender mode.

(c) To return the EMD of the bidders participated.

(d) To avoid confusion, a structural design of the 0 AIR(SC)hool bag may be made and placed in the specification part of the Bid

document.

(e) Laboratory testing of the samples may be made to avoid any confusion. The same may be incorporated in the bid document.

12. It is apparent from the above that the tender evaluation committee requested the technical members of Directorate of EPM, Odisha to verify

the samples submitted by 19 firms. After detailed checking physically/visually, it was opined by the technical members of the Directorate of EPM,

Odisha that only four firms, namely, (1) M/s Mayank Associates, Bhubaneswar; (2) M/s Madhunagar Textile Industries (P) Ltd., Cuttack; (3) M/s

International Trade Link, Kolkata (petitioner); and (4) M/s Odisha Consumers Co-operative Ltd., Baripada, Mayurbhanj have submitted samples

as per the specification mentioned in the bid document, and all other firms have some drawbacks in samples. However, the tender evaluation

committee members verified the samples visually and observed that visual checking of samples cannot be treated as cent percent correct unless it is tested in the laboratory. The quality of four samples qualified by the technical members of Directorate of EPM, Odisha seemed to have some deviations, even if it has not been explained in so many words what are the deviations found in the samples given by the qualified bidders. Though there is some technical lapses in the decision making process of the evaluation committee, but at the same time taking into consideration the tender conditions, as stipulated in the Tender Call Notice, Letter of Invitation, Clause-6 read with Clause-10 of the Information to the Bidder, the opposite party no.2-OPEPA has a right to accept/reject any/all bids or cancel the entire selection process at any stage without assigning reasons thereof.

13. In course of hearing much emphasis was laid on the opinion of the technical members of Directorate of EPM, Odisha, who were, on being requested, verified the samples submitted by 19 firms and opined that only 4 firms, out of 19 were qualified as per the specification. This Court, vide order dated 05.12.2017, directed learned Senior Counsel appearing for opposite party no.2 to produce such opinion of the technical members from Directorate, EPM, Odisha. In response thereto, an affidavit was filed on 08.01.2018 stating inter alia that pursuant to the request of OPEPA in its letter dated 23.08.2017 to the Director, EPM, Odisha, two numbers of technical experts, namely, Sri A.K. Behera, Senior0 AIR(SC)ientific Officer from the office of the Director, EPM, Odisha; and Sri N.K. Sundarray,0 AIR(SC)ientific Assistant from the office of Senior0 AIR(SC)ientific Officer Testing Laboratory, Cuttack were deputed to be the members of the committee for opening of the bids, preparation of evaluation sheet, etc. and to be present on 29.08.2017, for verification of the samples of the0 AIR(SC)hool bags submitted by the bidders in the tender process initiated pursuant to tender call notice dated 31.07.2017. The manner of evaluation, which has been done by them, has been indicated and those documents have been placed on record as Annexure-B to the said affidavit. On perusal of the said documents, the reasons for decision of choosing four bidders out of 19 could not be made out and as has been stated by the evaluation committee the checking

having been done physically/visually it cannot be construed that they are satisfying the requirement as specified in the tender call notice. While recommending the four qualified bidders in the technical bid, having verified the samples visually, the committee further opined that the quality of four samples qualified by the technical members of Directorate of EPM, Odisha seems to have some deviations. In that view of the matter, taking into consideration the conditions stipulated in the tender call notice, as well as letter of intent mentioned supra, no reasonable conclusion can be drawn that the evaluation committee has evaluated the tender documents in conformity with the specification mentioned therein.

14. Mr. B.K. Sharma, learned counsel appearing for the petitioner, relying on M/s Shree Ganesh Construction (supra) contended that since no reason has been assigned and by a cryptic order the tender process has been cancelled, the same requires to be interfered with in the present proceeding. As the factual matrix of the case of M/s Shree Ganesh Construction (supra) is totally different from that of the present one, in view of the fact that by a cryptic order the cancellation was made but subsequently the opposite parties have justified the same by way of filing counter affidavit, which the Court did not accept.

15. So far as the case of Gangadhar Jena (supra) is concerned, in that case the tender evaluation committee having reviewed its own decision behind the back of the petitioner therein, this Court did not feel inclined to accept the same stating the tender evaluation committee did not have the power to review its own order behind the back of the petitioner, as his interest would adversely affect. Further, the explanation, which was given subsequently in the counter affidavit, after passing the order of cancellation, is not to be taken into account in absence of any reason assigned in the cancellation order itself. But the ratio decided in the said case is also not applicable to the facts and circumstances of the present case.

16. In E.G. Nambudiri (supra) the apex Court held that the administrative authority is bound to give reasons which may have led him to rejection of representation.

17. In Shree Sidhballi Steels Ltd. and Dhanjit Singh Sandhu (supra), while considering the provisions of promissory estoppels, the apex Court held that by virtue of Sections 14 and 21 of the General Clauses Act, when a power is

conferred on an authority to do a particular act, such power can be exercised from time to time and carry with it power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. Therefore, if opposite party no.2 has got power to issue tender and as such the tender conditions stipulate that it has got power to cancel the tender in view of the terms and conditions prescribed in the tender call notice as well as the letter of invitation and instruction to bidder read with the law laid down by the apex Court mentioned supra, the OPEPA has got power to cancel the tender.

18. So far as judgment of the apex Court in Cwe-Soma Consortium (supra) is concerned, the same being a case of single tender, is not applicable to the present case.

19. In Siemens Aktiengesellschaft (supra) the apex Court held that parameters of evaluation conditions were to have been applied uniformly to all bidders under a procedure that was open, transparent and fair as required by law, the same cannot be interfered with.

20. In Kerala State Electricity Board v. Kurien E. Kalathil (supra) the apex Court held that dispute relating to interpretation of clause in contract and implementation of such clause cannot be made subject matter of writ petition.

21. Considering the law laid down by the apex Court and examining the conditions of the tender document and also the reasons assigned by the evaluation committee, as discussed above, this Court is of the considered view that the direction given for cancellation of tender as per tender call notice dated 31.07.2017 for supply of 0 AIR(SC) hool bags cannot be found to be faulted with. As such, this Court is not inclined to interfere with such decision of the evaluation committee to float a fresh tender in e-tender mode. Therefore, we find no merit in the writ application, which is accordingly dismissed. No order as to costs.