
(2022) 07 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 1927 Of 2020 (O&M)

M/S Om Sai Ram Construction And Another

APPELLANT

Vs

Union Territory Of J&K And Others

RESPONDENT

Date of Decision : 06-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g)

Citation : (2022) 07 J&K CK 0002

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : Ankur Sharma, Ravinder Gupta

Final Decision : Dismissed

Judgement

Rajnesh Oswal, J

1. The petitioners through the medium of this petition, have sought for following reliefs:

i) Certiorari: Quashing the Corrigendum bearing No. CEJ/DB/Master/725 dated 24.09.2020 issued by the respondent No. 2 as the same is arbitrary and unreasonable and issued without application of mind;

ii) Certiorari: quashing e-NIT No. 25 of 2020-21 dated 24.11.2020 issued by respondent No. 4 as the eligibility condition 18 is arbitrary, unreasonable and introduced without application of mind.

iii) Certiorari: quashing e-NIT No. 43 of 2020-21 dated 26.11.2020 issued by respondent No. 5 as the eligibility condition 18 is arbitrary unreasonable and introduced without application of mind.

iv) Mandamus: directing the respondents to allot the subject e-NIT Tenders referred to above in favour of the petitioners if they are found meritorious for the same.

2. The petitioners are mainly aggrieved of the Corrigendum dated 24.09.2020 issued by the respondent No. 2 whereby respondent No. 2 has kept the earlier circular dated 18.09.2020 in abeyance. It is stated that respondent No. 2 issued a circular dated 18.09.2020, which reads as under:

"In case of macadamization works, the qualification criteria for General Class Contractors, who are not registered Hot Mix Plant holders shall have to up load an undertaking on Affidavit duly attested by 1st Class Magistrate stating that the work of Macadamization shall be executed by the successful General Class Contractor/bidder, exclusively by using paver finisher and the mixed aggregate shall be brought from the Hot Mix Plant existing in nearby vicinity, thus over ruling the previous Circular issued by this office vide No. CEJ/PS/Master/6482-95 dated 01.06.2019."

3. The petitioner No. 1 had earlier challenged the various conditions imposed in NITs by way of writ petition titled, "Sujan Singh vs State and others" bearing WP(C) No. 2388/2019 and the Court stayed the allotment of work till further orders. Therefore, the respondents approached the petitioner No. 1 and he was assured that conditions challenged by him would be removed and the petitioner No. 1 would be allowed to participate in the tendering process. Consequently, circular dated 18.09.2020 was issued.

4. In e-NIT No. 25, the eligibility condition No. 18 is reproduced as under:

"18 The A-Class contractor who are not registered as Hot Mix Plant holders shall have to up load the Affidavit from Registered Hot Mix Plant holder that they will provide machinery/material to carry out the Macadamization work, otherwise the tender quoted by them are straight way rejected. This as per instructions issued by Superintending Engineer PWD (R&B) Jammu Kathua Circle Jammu vide his No. SEJ/Adm/2019-20/1008-16 dated 29.04.2019."

5. In e-NIT No. 43 dated 26.11.2020, the eligibility condition No. 18 is reproduced as under:

"18 The A-class contractor can also participate in the e-tendering provided that they upload an undertaking on the affidavit from a registered Hot Mix Plant Holder that if in case the work is allotted in favour of "A"-Class Bidder who is a non Hot Mix Plant Holder, then they will undertake the macadamization work. In this connection the Hot Mix Plant Holder should be registered with PWD (R&B) Department Jammu having the plant located in Jammu Province. This as per instructions issued vide Chief Engineer PW (R&B) Department Jammu's No. CEJ/PS/Master/6482-95 dated 01.06.2019."

6. The petitioners have impugned the circular dated 24.09.2020 and also the above mentioned conditions on the grounds inter alia that they are arbitrary in violation of Article 14 and 19(1) (g) of the Constitution of India. Besides, it is also one of the grounds that the corrigendum has been issued with mala fide intention and to oust the petitioners from the bidding process. It is also stated

that the corrigendum has been issued after the initiation of tendering process.

7. The respondents besides raising preliminary objections with regard to maintainability of writ petition, have stated that condition that Hot Mix Plant Holder should be registered with PW(R&B) Department Jammu having plant located in Jammu Province has logic because laying of premixing is a specialized job and has to be laid at a temperature varying between 110 c-125 c and number of plants are located in Samba, Billaوار and Kathua. The roads mentioned in e-NIT No. 25 are to be constructed in District Samba and work in e-NIT No. 43 dated 26.11.2020 pertains to Executive Engineer, PWD (R&B), Division Basholi who has jurisdiction over Tehsils of Billaوار, Basoli, Mahanpur, Bari, Lohai Malhar and Rampat. It is also stated that impugned e-NITs were issued as per instructions of Respondent No. 2 vide circular dated 01.06.2019 and also keeping in view the corrigendum dated 24.09.2020. As per circular dated 01.06.2019, the "A" Class contractors who are not registered as Hot Mix Plant Holders can also participate in e-tendering provided they upload an undertaking on affidavit from these plant holders that if in case work is allocated in favour of "A" class contractor who is non-Hot Mix Plant Holder, then they will undertake macadamization work. Further the Hot Mix Plant Holders should be registered with PW(R&B) department, Jammu having the plant located in Jammu Province. It is also stated that no corrigendum No. 2469-2543/G dated 01.06.2019 was issued by the answering respondents but was issued by the Executive Engineer (PWD)(R&B) Division Kathua who is not a party to the present writ petition. It is further stated that the nature of work is specialized job and is usually done by Hot Mix Plant Holders but as per Development Commissioner order dated 03.02.2018, the qualification criteria was relaxed and "A" class contractors were also allowed to participate for road works valuing up to 2.00 Crores. As "A" class contractors can also participate provided they furnish requisite undertaking from Hot Mix Plant Holder as such, there is no arbitrariness on the part of the respondents.

8. Mr. Ankur Sharma, learned counsel for the petitioners vehemently argued that by adding Clause No. 18 to the e-NITs, the petitioners have been discriminated, as there is no justification for imposing condition that the "A" Class contractors who are not registered as hot mix plant holders shall have to upload affidavit from hot mix plant holders duly registered with PW (R&B) Department, Jammu, having the plant located in Jammu province. In support of his submissions, Mr. Sharma has relied upon the judgment of this Court in case Shiva Build Tech Private Ltd. Vs. State of J&K and ors, passed in OWP No. 1084/2017 decided on 23.08.2019.

9. Per Contra, Mr. Ravinder Gupta argued that there is logic behind the said condition as the laying of pre mixing plant is a specialised job and has to be laid at a temperature varying 110c to 125c and number of plants are located in Samba, Billaوار and also in Kathua. In nut-shell the stance of the respondents is that a particular temperature is required to be maintained for laying pre-mixing.

10. Heard and perused the record.

11. On a specific query by the Court, Mr. Ankur Sharma, learned counsel for the petitioners submitted that the petitioners had participated in both these tenders but their offers were rejected by the respondents. The contention of the petitioners that the conditions were changed after the initiation of tendering process is mis-conceived as the tenders were issued after the issuance of circular dated 24.09.2020. Though the petitioners have prayed for quashing of the corrigendum dated 24.09.2020 but the petitioners have not chosen to challenge the circular dated 01.06.2019 issued by the Chief Engineer PW (R&B) Department, Jammu. Be that as it may, the petitioners have not been barred by imposition of the abovementioned condition and they can participate by complying the said condition. Mr Ankur Sharma has submitted that the petitioners have participated in the tendering process un-successfully. More so, there is reason behind the said condition that the particular temperature is required to be maintained for laying pre-mixing. It needs to be noted that the petitioners have not challenged the circular dated 01.06.2019 and that the petitioners have participated in the above mentioned tendering process. The Hon"ble Apex Court in Assn. of Registration Plates v. Union of India, (2005) 1 SCC 679 examined the scope of judicial review while examining the validity of tender condition and held as under:

42. There is no material on record to infer any mala fide design on the part of the tendering authority to favour parties having foreign collaborations and to keep out of the fray indigenous manufacturers. The high security plate is a sophisticated article — new for a manufacturer in India. It is being introduced for the first time under the scheme contained in Rule 50 of the Rules and the Act. At the time of issuance of notices of tender, technical know-how for manufacture of plates and its further development was undoubtedly outside the country. Only a few concerns in India having collaboration with foreign parties possessed the expertise and were available in the market. The terms of the notice inviting tenders were formulated after joint deliberations of Central and State authorities and the available manufacturers in the field. The terms of the tender prescribing quantum of turnover of its business and business in plates with fixation of long-term period of the contract are said to have been incorporated to ensure uninterrupted supply of plates to a large number of existing vehicles within a period of two years and new vehicles for a long period in the coming years. It is easy to allege but difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.

43. Certain preconditions or qualifications for tenders have to be laid down to

ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (*supra*) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for.

12. The judgment relied upon by Mr. Ankur Sharma, learned counsel for the petitioners is not applicable in the present facts and circumstances of the case.

13. Viewed thus, there is no merit in the present petition. As such, the same is dismissed.