

(2017) 01 AHC CK 0141
In the Allahabad High Court
Case No : Misc. Bench No. 29835 of 2016

M/s Uttam Sucrotech International Pvt. Ltd.	APPELLANT
Vs	
State of Uttar Pradesh	RESPONDENT

Date of Decision : 24-01-2017

Acts Referred:

Citation : (2017) 2 AILLJ 291

Hon'ble Judges : Amreshwar Pratap Sahi and Sanjay Harkauli, JJ.

Bench : Division Bench

Advocate : Abhinav Nath Tripathi and Amrendra Nath Tripathi, Advocates, for the Petitioner; C.S.C., P.K. Sinha, Sameer Kalia and Sanjeev Singh, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

Sanjay Harkauli, J.—Heard Sri J.N. Mathur, learned Senior Counsel for the petitioner assisted by Sri Amrendra Nath Tripathi, Sri P.K. Sinha, learned counsel for the respondents 2 & 3 and Sri S.K. Kalia, learned Senior Counsel assisted by Sri Sameer Kalia for the respondent no. 4.

2. This writ petition has been filed by the petitioner-M/s Uttam Sucrotech International Pvt. Ltd. praying for a writ of certiorari quashing the award of tender by the respondent no. 2 in favour of the respondent no. 4 in pursuance of the tender dated 15.09.2016 (Annexure no. 2) and commanding by means of writ of mandamus the respondent no. 2 to award the said tender in favour of the petitioner claiming himself to be technically qualified as having given an undertaking to match the technical and financial bid of the tender. It is also prayed that respondent no. 1 be directed by means of mandamus to conduct an enquiry as to how the tender was awarded to respondent no. 4 who was not qualified as having not complied with the mandatory tender conditions.

3. Brief facts of the case are that petitioner is a registered company which specializes in Design, Manufactures, Supply, Complete Green field energy

efficient Sugar Plants, including Civil, Milling Tandems, Boilers and Power Co-generation, Energy Efficient Process House, Sugar Refineries, distilleries and Ethanol Plants and Expansion and Modernisation and its area of operation is pan India and overseas.

4. The respondent no. 2 is a government company and is, therefore, a State of U.P. undertaking with the State of U.P. having financial control over the affairs of the respondent no. 2.

5. The respondent no. 3 had issued advertisement inviting tenders from the intending bidders for engineering, procurement and construction for supply, Erection and Commissioning of expansion of Mohiuddinpur Sugar Mill from 2500 TCD to 3500 TCD along with Co-generation Plant of 15 MW power, construction of foundation and Factory building on turn key basis including operation and maintenance of Sugar Mill and Co-generation Plant for 2 crushing seasons from the date of start of commercial production of Sugar Mill and Co-generation plant.

6. The conditions of the tender necessary to the controversy of the present writ petition are extracted hereunder:

"??????????????????

(2.1) Financial Criteria:?????.

(2.2) Technical Criteria?????..

Other conditions which are necessary to be fulfilled by the Bidder:

1?????????????????.

2. The seller should submit their Technical and Financial bids in the manner prescribed hereunder in the box provided for this purpose on their "Official Letter Head" on "prescribed format" and submit the same.

?????????????????..

Opening of Technical and Financial Bids:

(a)???

(b)???...

1?????..

2?????..

3?????..

4?????..

5?????..

6?????..

4. The purchasers shall award the contract to the bidder whose offer has been determined to be the lowest or most advantageous bid in accordance with the evaluation criteria set out in the bidding documents, provided that the bidder has been determined to be qualified to perform the contract satisfactorily on the basis of qualification criteria fixed for the bidders in the subject matter of procurement.

6. The information furnished shall be clear and un-ambiguous in terms. It should be strictly, as asked for in the bid proforma."

(As quoted in Annexure-2 to the writ petition).

7. The relevant part of the technical bid proforma is extracted hereunder:

"?????????..

4.1. Please enclose the proof of production minimum 50% equipments in house."

(As quoted in Annexure-A-2(b) to the writ petition)

8. The petitioner along with the respondent no. 4 and one M/s Indiana Sucrotech Ltd. had submitted their technical and financial bids on 20.10.2016. After the bid meeting of the officials of the respondent no. 2-M/s Indiana Sucrotech Ltd. was held to be disqualified on account of want of experience required under the Technical Bid Proforma. The respondent no. 4 was listed as L1 while the petitioner was listed as L2 i.e. the tender of respondent no. 1 was given priority upon selection as compared to that of the petitioner.

9. The petitioner raised an objection on the qualification of respondent no. 4 as it did not enclose any proof of in-house production of equipments which was mandatory as per Clause 4.1 of the bid document and also filed a written objection to the same effect. The said objection is Annexure-3 to the writ petition and was dated as 20.10.2016. The petitioner itself enclosed proof of its inhouse manufacturing of its machinery and submitted proof regarding the same in the form of bills of landing, tax invoices, excise forms and packing lists etc. when it was required by the officials of the respondent no. 2 along with its letter dated 21.10.2016, copy whereof is Annexure no. 4 to the writ petition. The respondent no. 2 had assured that proper investigation would be carried out to verify the in-house manufacturing of the respondent no. 4 as no proof as required under Clause 4.1 of the bid document was forthcoming from them.

10. On 26.10.2016 and 04.11.2016, the petitioner submitted its reminders regarding the objections and reiterated that in order to have a fair and transparent tendering process, the proof as required under the technical bid proforma must be applied uniformly with respect to both the bidders i.e. petitioner and respondent no. 4 but no heed was paid by the respondent no. 2 in this regard. The said representations are Annexure nos. 5 and 6 to the writ petition. When the petitioner did not receive any response on his objections as stated above, he wrote a letter dated 19.11.2016 requesting the status of the

award of the tender (Annexure no. 7). The petitioner received a letter from respondent no. 2 on 22.11.2016 mentioning therein that the petitioner had failed to qualify for the tender and the security deposit for the tender was being returned to him (Annexure no. 8).

11. Thus, according to the petitioner the award of tender to respondent no. 4 is arbitrary exercise of powers by respondents 2 and 3 and lacks transparency and propriety as the condition in Clause 4.1 of the technical bid proforma of the tender was mandatory in nature and could not have been deviated from. Hence, denial of award to the petitioner is violation of his rights under Article 19(1)(g) of the Constitution of India. The petitioner has accordingly prayed for the aforesaid reliefs.

12. Admittedly, the tender of the respondent no. 4 was accepted by respondents 2 & 3 and, hence, the respondents 2 to 4 have also contested this petition.

13. The first objection to the petition by both the sets of the respondents i.e. respondents 2 & 3 on one hand and respondent no. 4 on the other hand is that after acceptance of the tender, a time of almost two months have elapsed during which respondents have proceeded to comply with the conditions of the tender and huge sums of money has been exchanged and invested in the project. According to them, if the petitioner had any real grievance, he should have approached this Court much earlier in stead of waiting for such a long duration during the course of which opposite party no. 4 has undertaken substantial work in compliance of the tender.

14. The second argument raised is that Para 4.1 of the tender bid should not be treated as a mandatory condition because it was not a part of the original terms of the tender notice.

15. The third argument relied upon by the opposite parties is that opposite parties 1 to 3 were authors of the tender and even if the specified condition at Para 4.1 of the tender bid was not complied with, they were the best judges in this regard who were actually aware as to what conditions should have been necessarily complied with so as to secure the business interests of opposite parties 2 and 3. In this context, it is stated that vide Annexure no. CA-5 of the counter affidavit on behalf of opposite parties 2 and 3, it would be abundantly clear that they had engaged the services of National Federation of Cooperative Sugar Factories Ltd. and for that purpose had paid them Rs. 40 lakhs as fees so as to ensure that specialised services of the said Federation was available to O.Ps. 2 & 3 for their assistance and as would further be evident from Annexure-5-A to the said counter affidavit, a team of 11 persons was appointed, including the technical experts of the Federation, for evaluation of the tenders. It is this team which while evaluating the tender went into great detail while examining the technical bids and relevant parts of the report of the evaluation Committee are extracted as hereunder:

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16. It is in the aforesaid circumstances that the opposite parties have argued that since the technical bids were examined by technical experts who were so appointed for the purpose and it was for them to ensure that the requirements for safeguarding the business interests of the respondent nos. 2 and 3 would be sufficiently safeguarded and then to accept the bids of respondent no. 4 in the first place and the petitioner in the second.

17. Since they themselves were authors of the terms of the tender, therefore, if they decided not to treat Para 4.1 of the tender bid as absolutely essential and further that no malafides are alleged against them in accepting the tender bids, the Court should not treat the condition in Para 4.1 of the tender bid as mandatory to interfere in the matter.

18. In reply, a passing argument has also been made by the petitioner that as per terms of the tender notice, the technical bids should have been opened first and examined and only after that should the financially bids have been evaluated. Annexure 5-A to the counter affidavit itself goes to show that the technical bids were first evaluated and the financial bids were taken up subsequently and, therefore, this argument of the petitioner lacks force.

19. It may not out of place to mention that compliance of Para 4.1 of the tender bid was to be complied with by the bidders at the time of submission of the Form and admittedly, at that stage the required compliance was done neither by the O.P. no. 4 nor by the petitioner. According to the petitioner himself subsequently on the next day when he was so required that it submitted certain documents which were receipts of the Excise Department showing payment of excise duty and, hence, the petitioner had made substantial compliance of para 4.1. of the bid condition. As against this, the petitioners contend that the O.P. no. 4 though filed registration certificates which relate to trade tax and excise department but

no such proof of actual production of 50% equipments in house was submitted by him. If this argument of the petitioners is treated as correct, then the petitioners will have to explain that the receipts of payment of excise duty as produced by them are proof of production of iminimum 50% equipments in house, which they have failed to do.

20. It may be noteworthy that the condition contained in para 4.1. of the tender bid was waived at the time of evaluation of tenders both in the case of respondent no. 4 as also of the petitioner, as both were held qualified at places L1 and L2 respectively. Accordingly, such waiver of condition in para 4.1. of the tender bid was applied equally to O.P. no. 4 as also the petitioners and, hence, no disparity was maintained in this regard while accepting the tender bids.

21. Sri Mathur urged that in view of condition No. 4.1, a proof of production of minimum 50% equipments in house being compulsory, the same was not fulfilled by the respondent No. 4. Respondent No. 4 in fact does not produce or manufacture equipments in house and rather it has all the capabilities to obtain such equipments and assemble them together to set-up a plant. He therefore submits that if the respondent No. 4 does not produce inhouse equipments then there is no proof of the same and as such, any certification by the respondent No. 4 to that effect cannot amount to a proof of production. The committee has nowhere assessed the actual production by the respondent No. 4 and it has only made a recommendation that the respondent No. 4 has the capacity to do so. Sri Mathur therefore submits the possession of capacity to produce does not amount to actual production and in the absence of such proof, the respondent No. 4 did not fulfil the terms of condition No. 4.1 of the tender bids which is mandatory.

22. The words "manufacture" and "production" are often used synonymously but there appears to be a difference between the two terminologies. Manufacture is generally understood as a process by which raw material is converted for sale as a finished product. It involves a process that adds value to the material and consumes some material for adding value. On the other hand, production is a process to convert any type of input to an output, tangible or intangible. Thus, production is a process which makes something useful for consumption by combining various resources whereas in manufacture a raw material is utilized to generate an output. Manufacture therefore can be understood as being included in production but all production is not manufacturing.

23. If the aforesaid principles are applied then the activity of production as per condition No. 4.1 of the tender conditions envisages the combination of various resources which may also include manufacturing. Thus, even if the respondent No. 4 is providing material through assemblage, the same will fall within the meaning of production.

24. It is not the case of the petitioner that the respondent No. 4 is incapable of and does not produce such material. To the contrary, the Expert Committee has found the petitioner as well as respondent No. 4 both are capable of producing

such material. The Expert Committee therefore technically approved the status of the petitioner and the respondent No. 4 and which to our mind clearly conforms to the logic that we have deduced here-in-above.

25. Apart from this, it is on record and is not disputed that such type of work has been executed both by the petitioner, and in more numbers by the respondent No. 4. Thus, the respondent No. 4 has been found to have such experience of production by the Corporation.

26. In the case of Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. reported in 2016 SCC Online SC page 940 passed in Civil Appeal No. 9078 of 2016 and decided on September 15, 2016, guidelines have been laid down in this regard. In paragraph no. 12, Hon"ble the Apex Court has observed as under:

"??...the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous."

27. Further paragraph 16 of the said judgment of the Apex Court which throws a lot of light on the matter in hand is further extracted as under:

"We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

28. In the case of Jagdish Mandal v. State of Orissa [(2007) 14 SCC page 517] it was observed by the apex Court as under:

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona

fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

29. Deriving guidance from the principles laid by the Hon"ble Supreme Court as above, it may be mentioned that in the present case, no malafides have been attributed while accepting the tender bid of opposite party no. 4 by opposite parties nos. 2 and 3 in the first place. Since the condition in para 4.1. of the tender bid read with the tender notice was authored by O.Ps. 2 and 3 considering the requirements of the project to be undertaken, they were the best persons to understand the import of the condition aforesaid and it"s actual necessity in their business interests. A team of qualified persons on their behalf had thoroughly evaluated the tender bid with certain officials of the agency engaged by them i.e. National Federation of Cooperative Sugar Factory Ltd. and considering the data available before them had accepted the tender bid. As a constitutional court, it would be wise to give respect to their evaluation and treat the acceptance of the tender bid as valid and allow the work to proceed further, substantial part of which may also have been undertaken.

30. In view of the foregoing discussion, we find little scope for interference in the jurisdiction conferred upon us by Article 226 of the Constitution of India.

31. Accordingly, this writ petition is hereby dismissed.