

(2002) 02 AP CK 0148

In the Andhra Pradesh High Court

Case No : Writ Petition No. 26047 of 2001

Neelambar Ropeways

APPELLANT

Vs

Andhra Pradesh Tourism Development Corporation Ltd.

RESPONDENT

Date of Decision : 18-02-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2002) 3 ALT 412 : (2002) 3 ARBLR 150

Hon'ble Judges : I. Venkatanarayana, J

Bench : Single Bench

Advocate : Deepak Bhattacharjee, for the Appellant; A.A.G. and Nandigam Krishna Rao, for the Respondent

Final Decision : Dismissed

Judgement

1. Venkatanarayana, J.—The petitioner is a partnership firm and has invoked Article 226 of the Constitution of India seeking for a direction to the respondent-Corporation to consider the bid of the petitioner submitted pursuant to the bid No.APTDCL/TVZ. Projects/ RW/2001 dated 9-4-2001 along with other competitors.

2. The factual matrix leading to the filing of the present Writ Petition is set out as hereunder:- The respondent-Corporation floated an open tender for selection of an investor for design, finance, construction operation, maintenance and marketing of Aerial ropeway at Tirupati Visitors Zone, Tirupathi, India vide bid No.APTDCL/TVZ. Projects/ RW/2001. The estimated value of the work is Rs.78 Crores. The petitioner attended the Pre-Bid Conference held on 29-5-2001 and submitted its bid on 20-8-2001 for consideration of the respondent-Corporation. The respondent-Corporation sought certain clarification by its letter dated 10-10-2001 and the petitioner by its letter dated 22-10-2001 submitted all the clarifications to the respondents. On 9-11-2001 the respondent-Corporation wrote a letter asking the petitioner to extend the Bank Guarantee and accordingly it was extended on 16-11-2001. It is the case of the petitioner that it complied

with all the requirements and submitted the bid as desired by the respondent-Corporation in three different covers. The petitioner-firm is a member of the consortium which is as follows: The petitioner-firm, i.e., M/s. Neelambar Ropeways, Hyderabad holds 80%; M/s. Damodar Ropeways and Construction (P) Ltd., Kolkata holds 20% equity which will be responsible for O&M of the Ropeways taking assistance from M/s. Graventa of Switzerland for the first seven years. The petitioner further submits that M/s. Graventa of Switzerland is one of the internationally reputed company which manufactures, erects and creates the facility of Ropeways which fact has been acknowledged by the respondent-Corporation in their eligibility criteria. The petitioner-firm is the Lead Consortium Member registered in India especially for Ropeways Projects. The petitioner-firm consists of Mr. M.Prasad and Mr. M.J.Patel as the partners with 50% of holding and they are promoters of Lead Consortium Member and both of them individually hold more than 26% in the Lead Consortium Member in accordance with the definition of "Promoter" under clause 3.16 of Request For Proposal ("R.F.P" for short). It is further submitted that M/s. West African Cements SA (WACEM SA) is the Affiliate of LCM. For the purpose of evaluation of financial capability to aggregate the strength of "Affiliate" with LCM, Promoter of the LCM should hold not less than 26% of the voting securities in the "Affiliate Company" either directly or indirectly as the relevant entity is a company within the meaning of clause 3.1 of the bid document. In short, it is the case of the petitioner that they complied with all the prescribed conditions and the petitioner is entitled to be considered for the bid. The respondent-Corporation opened Cover No.1 for considering the eligibility criteria of the bidders in the fray. Cover No.1 deals with (a) minimum eligibility criteria which consists of the financial strength, (b) technical skill and (c) commercial skill. The respondent has not taken any decision to open Cover No.2 or Cover No.3, which deals with "evaluation of business proposal and financial bid". Though the petitioner submitted all the clarifications with documentary proof and with all legitimate expectation was expecting that the respondent would write to the petitioner asking it to participate in the opening of technical bid i.e., Cover No.2 the petitioner has not heard anything from the respondent till to-date. Hence, the present Writ Petition seeking for a direction to the respondent-Corporation to consider the bid of the petitioner along with other competitors.

3. A detailed counter-affidavit was filed, sworn to by the Managing Director of the respondent-Corporation. It is stated in the counter-affidavit that the petitioner did not qualify as per the minimum eligibility criteria stipulated in the Request For Proposal document and hence the petitioner's bid was not considered in the further stages. The respondent-Corporation has ensured that the entire process is objective, transparent and fair. The bidding and evaluation process was stipulated clearly in the RFP document and was adhered to diligently. Narrating the chronology of events the respondent states that the bids by the interested parties in response to RFP will be in three covers. The first cover deals with compliance of Minimum Eligibility Criteria and the second cover

deals with Business Proposal and the last cover deals with Financial Bid. The respondent evaluates the information submitted by the bidders in Cover-I of the bid. It is only when the bidders satisfy the Minimum Eligibility Criteria, then they will be considered for the subsequent steps. The RFP would clearly establish that the entire bidding process has been clearly defined in an objective form. The provision of returning the unopened covers at the end of the bidding process on demand is to ensure and prove transparency that the subsequent covers of the bidders disqualified at any stage are not opened. It is also stated that the petitioner has never questioned or complained about the bidding procedure. Ample time was given to all the bidders including the petitioner to seek any clarifications with respect to bid documents. Even without raising a query about the structure of financial eligibility with respect to the involvement of Family Trust "JT 484" and without any kind of communication from the respondent or their consultant, the petitioner has assumed it to be accepted which is incorrect. The sole responsibility to ensure that their bid is eligible as per the terms and conditions of the RFP is entirely on the petitioner. The respondent gave fair chance to all the bidders including the petitioner and collected all the additional information from the bidders through its letter dated 10-10-2001 and based on the information submitted by the petitioner it is found that the petitioner failed to establish that it is fulfilling the Minimum Eligibility Criteria regarding the financial and technical capability requirements of Cover No.1 Evaluation. Even the financial eligibility of the petitioner was not established. For the purpose of meeting the eligibility criteria, reliance was placed on West African Cement S.A (WACEM for short) as an affiliate (as defined in RFP), which is said to be a company constituted under the laws of Republic of Togo West Africa. The petitioner claims that Mr. M.J.Patel has more than 26% interest in the petitioner-firm as partner and hence is a "promoter" (as defined in RFP) and that Mr. Patel was settler of an irrevocable family trust referred to as "JT-484". In short, it is the contention of the respondent-Corporation that the petitioner has failed to fulfill the Minimum Eligibility Criteria regarding the financial and technical capability requirements of Cover No.1 evaluation and hence his bid was not considered in the further stages.

4. Taking into consideration the rival submissions of the petitioner and the respondent, the only question that falls for consideration is whether the petitioner is entitled for a direction to the respondent to consider its bid.

5. Sri V.R.Reddy, the learned Senior Counsel appearing for the petitioner assailed the conduct of the respondent in not considering the bid of the petitioner after opening Cover No.1. It is his contention that the petitioner fulfilled the conditions prescribed and the respondent has not communicated any decision taken by it. Such non-communication, according to the learned Senior Counsel, would amount to non-application of mind on the part of the respondent-Corporation and their consultant M/s. Crisil. In short, it is the contention of the petitioner that the action of the respondent in not considering the bid of the petitioner for further stages is arbitrary and the elimination is unjust and unsustainable. The learned

Senior Counsel placed reliance on the judgment of the Supreme Court reported in NEW HORIZONS Ltd & ANOTHER Vs. UNION OF INDIA¹ and contended that in the matter of distribution of State largesse State should act in a fair manner and the terms and conditions of the tender should be construed from the stand point of prudent businessman.

6. Sri Ramesh Ranganathan, the learned Additional Advocate General appearing for the respondent-Corporation submits that the petitioner did not qualify as per the Minimum Eligibility Criteria stipulated clearly in the Request For Proposal (RFP) document and hence the petitioner's bid was rightly not considered in the further stages. It is his contention that the bid process is objective, transparent, fair and far from being arbitrary. The bidding and evaluation process was followed as laid down in RFP document. He explained the process of evaluation in the sealed covers and asserted that the respondent-Corporation gave ample opportunity to all the bidders and sought clarifications wherever required. It is stated that the petitioner has failed to demonstrate the eligibility and financial capability. The petitioner claimed that WACEM (West African Cement) is an "affiliate" under the laws of Republic of Togo, West Africa and that Mr. M.J.Patel is a "promoter" who was settler of an irrevocable Family Trust, referred to as "JT-484". It is contended on behalf of the respondent-Corporation that the definition of "affiliate" in the RFP document does not include relatives of the promoter and from the information provided it is not possible to conclude that Mr. M.J.Patel holds the entire voting securities in KENELM Ltd., which is stated to be the investment holding company wholly owned by the Family Trust JT 484. Consequently it is not possible to determine the extent of Mr. M.J.Patel's individual interest in WACEM. In any event the Trustees would hold the voting right and not the beneficiaries. In short, it is the contention of the learned Additional Advocate General that it is not possible to conclude that WACEM is an affiliate of the petitioner. Section 6.6-Point No.15 of the RFP document clearly states, "APTDCL reserves the right to vet and verify any or all information submitted by the bidder". The mere fact that the petitioner was asked to extend the bank guarantee does not imply any satisfaction with the information supplied nor does it confer any right on the petitioner. The respondent acted fairly through out the evaluation process and in line with the internal procedures of APTDCL and Government of Andhra Pradesh.

7. Taking into consideration the facts of the case, it should be noted that a tender is only an offer inviting the prospective bidders to submit their tenders. Such tenderers should possess Minimum Eligibility Criteria stipulated in the tender documents. In the present case submission of tenders was categorized under three covers. The first cover evaluates the Minimum Eligibility Criteria and the other two covers evaluate Business Proposal and Financial Capability. On scrutiny of the first cover it is seen that the petitioner did not qualify as per the Minimum Eligibility Criteria stipulated in the RFP document. According to the respondent-Corporation the petitioner failed to demonstrate their fulfilling the Minimum Eligibility Criteria regarding the financial and technical capability as stipulated in

Cover No.I evaluation. The petitioner claimed that West African Cement SA (WACEM) is an "affiliate" said to be a company constituted under the laws of Republic of Togo, West Africa. Ultimately the financial eligibility of the petitioner's bidding consortium was dependent on WACEM being admitted as an "affiliate" of the petitioner. On examining the entire issue the respondent came to the conclusion that the definition of "affiliate" in the RFP document does not include relatives of the promoter and that Mr. M.J.Patel does not hold any controlling rights in KENLEM which is stated to be an investment company. Strong reliance is placed on Section 6.6 Point No.15, which gives the right to vet and verify any or all information submitted by the bidder. In the circumspection of the entire facts placed before this court it will be the duty of the court to confine itself as to whether the decision making authority exceeded its power and whether there was a transparency in the decision making process. The respondent gave ample opportunity to the petitioner and considered all the clarifications submitted by the petitioner and came to the conclusion that the petitioner failed to comply with the minimum requirements for further consideration. In other words, the petitioner did not reach the zone of consideration. Therefore, it is not for the court to determine whether a particular policy decision taken in pursuance of that policy is right or wrong. This court is only concerned with the manner in which those decisions have been taken. Shortly put, this court will not interfere with the administrative action or decision so long as it is transparent, fair and free from bias. The scope of judicial review of administrative decisions in contractual matters is very limited. This court does not sit as a court of appeal but merely reviews the manner in which the decision was made. This court does not have the expertise to decide whether WACEM is an "affiliate" and whether a particular individual can be considered as promoter or not. The terms of an invitation to tender cannot be open to judicial scrutiny because it falls within the realm of "contract". The decision to award a particular contract is reached by process of negotiations at several stages and such decisions are made by experts. The right to choose the best person or best quotation cannot be considered to be an arbitrary power. This court will not venture to exercise the power of judicial review as long as the decision making process is transparent and fair. Judicial review is concerned with reviewing not the merits of the decision but the decision making process. The Apex Court in a leading case reported in TATA CELLULAR Vs. UNION OF INDIA² has succinctly put the entire scope of judicial review as hereunder:

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There

can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

8. The Supreme Court further observed:

"Observance of judicial restraint is currently the mood in England. The judicial power of review is exercise to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merit. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

9. Following the afore mentioned legal principles, the Apex Court in a recent judgment reported in AIR INDIA LTD Vs. COCHIN INTERNATIONAL AIR PORT LTD³ has held that the State and its other authorities can fix its own terms of tender and that it is not open to judicial scrutiny. The Apex Court summarized the principles governing the award of contracts by the State and its instrumentalities in the following words:

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the court must exercise its discretionary power under Article 226 with

great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

10. The court while exercising the power of judicial review under Article 226 of the Constitution of India has to see whether the State has treated all the tenders fairly and whether the conduct of the State was free from bias. Ultimately it has to be held that a citizen has no fundamental right to insist on "State" or its authorities to do business with it. The State is entitled to enter into business with any person or class of persons to the exclusion of others as long as State does not prohibit others to carry on their business.

11. In the circumspection of the case law laid down by the Apex Court, the legal principle that would emerge is that this court while reviewing the validity of a state contract will not act like an appellate authority sitting in judgment over the decision taken by the experts in the field and interfere with the decision on merits lightly. The State has spectrum of discretion in the matter of distribution of largesse and the power of judicial review is limited. The State is also free to choose its own method to arrive at a decision. As stated earlier, the decision making process is transparent and fair and all the bidders have been given ample opportunity to submit their clarifications and merits of their case.

12. Taking into consideration the entire facts and circumstances of the case, I find that there is nothing irrational, capricious or arbitrariness in not considering the bid of the petitioner in the further stages. I do not find any ground for invoking Article 226 of the Constitution of India for exercising the power of judicial review in this case. The Writ Petition is devoid of merits and is accordingly dismissed. No order as to costs.