

(2006) 02 OHC CK 0051

In the Orissa High Court

Case No : Writ Petition (Civil) No. 15040 of 2005

Neutron Systems Pvt. Ltd. and Another

APPELLANT

Vs

Government of Orissa and Another

RESPONDENT

Date of Decision : 23-02-2006

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2006) 02 OHC CK 0051

Hon'ble Judges : Sujit Barman Roy, C.J;M.M. Das, J

Bench : Division Bench

Advocate : S.N. Mohapatra, B. Rout and P.K. Panda, for the Appellant; A.G.A. for O.Ps. 1 and 2, I. Mohanty, D. Sribastava, B.K. Sharma, S.R. Kanungo, S. Mohanty, Vivek K. Tankha and Debal K. Banerji for Intervenor, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—The Petitioners, NEUTRON SYSTEMS PVT. LTD. and its Director, in the present writ petition have called in question the inaction of the Government of Orissa in its Transport Department, in not answering the queries made by the Petitioners under Annexure-4 to the writ petition and in proceeding with the tender process for awarding the contract work for establishing necessary infrastructure and undertaking the management of the Process of Modernization of Transport Administration and Operationalisation of e-Governance by issuance of Smart Card Basis driving licences and registration certificates in the State.

2. The Petitioners' case in a nutshell is that a tender notice was published by the Transport Commissioner, Government of Orissa in Commerce and Transport Department on 15.9.2005, inviting bids for private participation in Smart Card System for driving licences and registration certificates in the State of Orissa. It was intimated therein that the interested parties can download the draft Invitation For Bidding (in short "IFB") document from the website mentioned in the said notice between 15.9.2005 to 15.10.2005 and the cost of the draft bid document was fixed at Rs. 20,000/- (non-refundable and non-adjustable) which

was to be deposited at the time of submission of the bid document in shape of a demand draft drawn on any scheduled bank payable at Cuttack in favour of the Transport Commissioner, Orissa, Cuttack. The Petitioners down loaded the said document from the website and sent necessary intimation to opp.party No. 1 in the format provided at Appendix-I to Part-1 of the bid document, which was received by opp.party No. 2 on 27.9.2005. On 5.10.2005, a pre-bid meeting at the secretariat of the Government of Orissa, Bhubaneswar, was held, which was attended by the representatives of the Petitioners. During the course of the said meeting, the representatives of the Petitioners raised various queries and sought for clarification thereon in order to enable the Petitioners to submit their bids. Such queries as raised by the Petitioners have been annexed as Annexure-4 to the writ petition. It is alleged by the Petitioners that the clarification sought for by them was never answered in spite of reminders issued by the Petitioners. The last date for submission of bids/proposals was extended from 31.10.2005 to 5.11.2005 by way of notice given in the website mentioned in the tender document. It is stated in the writ petition that the technical bids of the tenderers who offered their bids were opened on 5.11.2005. Before a final decision was taken by the Government of Orissa, the Petitioners filed the present writ petition on 5.12.2005 for appropriate relief.

3. An intervention application was filed by M/s. Smart Chip Limited, which was registered as Misc. Case No. 239 of 2006. In the said Misc. Case, the applicant asserting that the said applicant has been declared by the Government of Orissa as the successful bidder in the tender process, sought for intervention in this writ petition. The said misc. case was allowed by order dated 24.1.2006.

4. Separate counter affidavits have been filed by the State of Orissa and the intervenor-Smart Chip Limited. The Petitioners have also filed rejoinder affidavits.

5. Learned Counsel for the Petitioners vehemently argued that immediately after down-loading the IFB document, the Petitioner No. 1-company sent the intimation expressing its intention to take part in the bid in the prescribed format which was duly received by the opp.party No. 2. The representatives of the Petitioners also attended the pre-bid meeting held on 5.10.2005 in the State Secretariat and raised certain queries during the course of the said meeting which has been annexed as Annexure-4 to the writ petition. He submitted that even though in the tender document, it is specifically mentioned in Para-1.8 that a prospective bidder requiring any clarification on the IFB may notify the Government Orissa in writing through post or facsimile and the bidders should send their queries latest by the last date for receiving queries as given in the schedule of bidding process, but, as a matter of fact, no such date was mentioned in the said schedule of bidding process. He further submitted that in the said paragraph of the bid document though it is mentioned that copies of the response of the Government of Orissa will be forwarded in accordance with Clause-1.7 of Part-1 of the IFB to bidders including a description of the enquiry, but without identifying its source, no answer whatsoever was intimated to the

Petitioner on their queries. He further contended that even though under the letter, Annexure-5 to the writ petition, a reminder seeking answer to the queries raised by the Petitioners was sent, the opp.parties in contravention of Clause-1.8 of the IFB, failed to answer the said queries of the Petitioners for which the Petitioner No. 1 was illegally prevented from taking part in the bid. The Petitioners have also filed rejoinder affidavits to the counter affidavit filed by the intervenor to which a letter issued by the Sales Manger of M/s. Giessecke and Devrient Pvt. Ltd. to the Petitioners has been annexed as Annexure-7 and basing on the said letter, it has been stated in the rejoinder affidavit that the said company, namely, M/s. Giessecke and Devrient Pvt. Ltd. is a consortium member of the Petitioner No. 1-company having wide experience and fulfilling eligibility criteria and has expressed its intention in the said letter to be a consortium partner for the project of the Government of Orissa with regard to preparation of Smart Card for driving licences and vehicle registration certificates.

6. Thus, the thrust of the argument advanced on behalf of the Petitioners is that the Government of Orissa having not acted in accordance with Clause-1.7 of the IFB and failing to clarify the queries raised by the Petitioners has illegally prevented the Petitioners from taking part in the tender process and that with an ulterior motive has selected the intervenor for the project in question.

7. Mr. Banerjee, learned senior Counsel appearing for the intervenor-M/s. Smart Chip Limited raised preliminary question with regard to maintainability of the writ petition at the instance of the Petitioners on the ground that the Petitioner-company being not a bidder in response to the tender call notice have no locus standi to challenge the process of selection made by the Government of Orissa. However, we are unable to accept the contention in view of the admitted position that the Petitioner-company in response to the tender call notice have not only intimated its intention to take part in the process of bid but also attended the pre-bid meeting held on 5.10.2005. We, therefore, hold that the Petitioners have a locus standi and there exists a cause of action for filing the present writ petition which cannot be held to be not maintainable.

8. With regard to the merits of the case, Mr. Banarjee submitted that during the course of the pre-bid meeting, it is no doubt true that the representatives of the Petitioners raised certain queries as stated in Annexure-4 but the said queries being innocuous in nature, were answered/clarified then and there by the authorities of the Government of Orissa present in the said meeting and, as such, there was absolutely no necessity for clarifying the said queries raised by the Petitioners in writing and intimating the same to the Petitioners. He further submitted that, as a matter of fact, in course of the pre-bid meeting, several queries/proposals were made/advanced by various intending bidders present and it was given out by the Government of Orissa that pursuant to such queries/proposals, a fresh IFB document would be published in the website for the knowledge of all concerned. Accordingly, a fresh IFB document with changes and modifications was made available in the website by the Government of Orissa

which was down loaded by various tenders who participated in the tender process pursuant to the said modified IFB. He, therefore, contended that even assuming that the queries raised by the Petitioners were required to be clarified and intimated to them by the Government of Orissa, the same being duly clarified by making necessary changes/modifications in the IFB and publishing the same in the website it should be presumed that the Petitioners were well aware of the same.

9. In reply to the contentions raised by the Petitioners that the Petitioner-company formed a consortium with another company having wide experience and thus, they fulfilled the eligibility criteria, Mr. Banerjee submitted that pursuant to the tender call notice, the intimation given by the Petitioners to take part in the pre-bid meeting expressing their intention to participate as a bidder did not disclose that they were doing so as a consortium. Further, he submitted that the requirements for proposal to be submitted by a consortium as envisaged in Para-1.11 of the IFB were never fulfilled by the Petitioners.

10. It is profitable to quote the said paragraph-11 of the IFB for appreciation of the said contention.

I. 11 Requirements for Proposals submitted by Consortium

I. 11.1 Proposals submitted by a Consortium must fulfill the following conditions:

(a) The Consortium just be a Qualified Bidder in terms of provisions contained in Clause II.1.3 of IFB.

(b) The Proposal shall contain the required information for each of the members of the Consortium;

(c) One of the members of the Consortium shall be nominated and authorized, by the other member of the Consortium, as being in charge (Lead Member) and this authorization shall be supported by a Power of Attorney, in the format specified in Appendix VI, in favour of the Lead Member duly signed by the authorized signatory of the other Consortium Member.

(d) Members of the Consortium shall enter into a Memorandum of Understanding (MOU) for the purpose of submitting the Proposal. The MOU shall, inter alia, convey the intent to form an SPV. As s a joint venture company which would enter into the Concession Agreement and subsequently carry out all the responsibilities of the Successful Bidder and undertake the Project as stipulated in the Concession Agreement, in case the Concession is awarded to the Consortium. The MOU shall also clearly give in detail, the proposed roles and responsibilities of each member at each stage and the proposed share holding of the respective members of the Consortium in the SPV, which must be in compliance with clause I.11.2 of this IFB. A copy of the MoU shall be submitted with the Proposal;

(e) Members of the Consortium shall be liable jointly and severally for the

execution of the Project in accordance with the terms of the Concession Agreement and a statement to this effect shall be included in the MoU mentioned under (c) above, as well as in the Proposal and in the Concession Agreement; and

(f) All witnesses and sureties shall be persons of status and probity and their full names and addresses shall be stated below their signatures. All signatures in the Proposal and other accompanying documents shall be dated.

I.11.2 Minimum Shareholding in SPV

(a) the members of the Consortium would be required to hold 100% (hundred percent) of the paid up share capital of the SPV until expiry of 5 (five) years from the date of execution of Concession Agreement;

(b) individual shareholding of any member of Consortium shall not be less than 40% of the paid up share capital of the SPV until expiry of 5(five) years from the date of execution of Concession Agreement.

11. Learned Counsel for the Petitioners relying upon the decision in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, submitted that since the IFB stipulates that the queries made by the intending bidders were to be answered and communicated to such bidders, by not following the said procedure, the Government of Orissa has deprived the Petitioners from taking part in the bid. In the case of Monarch Infrastructure(P) Ltd. (supra), the Supreme Court in the facts of the said case observed as follows:

...The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had began and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractive bids could be offered.

12. The broad principles enunciated by the said decisions have been summarised in Paragraph-10 thereof which is as under:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the Courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest;

(ii) The Government cannot arbitrarily choose any person it likes for entering into

such a relationship or to discriminate between persons similarly situate;

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the Courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

13. It is fairly settled by now that the principle of judicial review can be applied to the exercise of contractual powers by Government Bodies in order to prevent arbitrariness or favoritism. However, it has been repeatedly held that there are inherent limitations in exercise of the power of judicial review and the Government being the guardian of the finances of the State, it is expected to protect the financial interest of the State and right to refuse the lowest or any other tender is always available to the Government. It is no doubt true while doing so the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The question of infringement of Article 14, of course, will not arise if the Government tries to get the best person or the best quotation and the right to choose cannot be considered to be an arbitrary power unless such power is exercised for any collateral purpose. The Supreme Court in the case of Tata Cellular Vs. Union of India, while dealing with the question of exercise of the power of judicial review has categorically concluded that judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself and in that regard, it is different from an appellate power. Where the selection or rejection is arbitrary, the Court certainly has the power to interfere. In the language of the Supreme Court "it is not the function of a Judge to act as Super Board or with the Zeal of a pedantic school master substituting its judgment for that of the administrator".

14. Though several other decisions were cited by the contesting parties, for the shake of brevity, we do not find any necessity of discussing each of the said cases. On consideration of the submission of the learned Counsel for the parties and the facts of the present case, we find that a fresh IFB having been published in the internet after the pre-bid meeting, taking into consideration the queries/suggestion of the participants, no illegality has been committed by the Government of Orissa in not specifically answering the queries and communicating the same to the Petitioners in writing keeping in view the admitted position that the Petitioner-company has not taken part in the bid. We do not find any illegality or arbitrariness in the decision making process of the Government of Orissa in selecting Smart Chip Ltd. (intervenor) for awarding the contract. We, accordingly, dismiss the writ petition but in the circumstances without costs.

Sujit Barman Roy, C.J.

15. I agree.