(2016) 01 JH CK 0079

In the Jharkhand High Court

Case No : W.P. (C) No. 3046 of 2015

Patel Engineering Limited and Others APPELLANT

Vs

The State of Jharkhand and Others RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 226

Citation : (2016) 2 AIRJharR 98 : (2016) 1 JBCJ 474 : (2016) 2 JCR 141 : (2016) 1 JLJR 736

Hon'ble Judges : Prashant Kumar, J.

Bench : Single Bench

Advocate : Sunil Kumar, Sr. Advocate, Sumeet Gadodia and Ranjeet Kushwaha, Advocates, for the Appellant; Rajesh Shankar, G.A. and Anil Kumar, J.C. to A.G., for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—1. This application has been filed for quashing the decision of the Departmental Tender Committee dated 12.06.2015, whereby and whereunder the tender issued vide "Re-e-Procurement Notice" dated 26.12.2014 has been cancelled. Petitioners further prayed for issuance of a writ in the nature of mandamus commanding the respondents to proceed in the matter of allotment of work pursuant to "Re-e-Procurement Notice" dated 26.12.2012 as per the terms and conditions mentioned under the e-Procurement Portal of the State of Jharkhand framed for submission of on-line tender. It is further prayed that a direction be issued commanding the respondents to open the price bid of successful bidder and to allot the work in question to the petitioners Joint Venture, if the bid of the petitioners is found most competitive.

2. It appears that the Water Resources Department of the State of Jharkhand had invited tender through "Re-e-Procurement Notice" dated 26.12.2014 for the following work:--

"(1) The work involves preparation of detail project report (DPR) consisting of survey design drawing specification etc. for laying of MS Pipe lined with 25 mm thick cement mortar conduit pipe line parallel to 34.50 Km. long Tenu-Bokaro Canal having capacity to deliver 300 (Three hundred) cusecs discharge from Tenughat reservoir/Dam to cooling pond of Bokaro Steel Plant, SAIL, Bokaro, Jharkhand including intake structures and other required structures as per site condition for road crossing river/nala crossing, outlets etc.

(2) Complete construction of all the required works to ensure 300 cusecs discharge to cooling pond of Bokaro Steel Plant and its commissioning as per approved DPR of this work. Making proper arrangement for supply of drinking water and supply of irrigation water at different points as provide in the existing Tenu-Bokaro Canal."

3. In response to the aforesaid notice, altogether six Companies, including the petitioners, participated in the tender process. It is further stated that the technical bid of all the participants opened and the Departmental Tender Committee evaluated the technical bid of all the six bidders on 01.06.2015. In the said evaluation the technical bids of three bidders namely (i) M/s. Saisudhir Infrastructure Limited; (ii) Max Infra BRCCPC JV; and (iii) Shri Awantika Contractors (I) Limited, were not found to be responsive, therefore, their technical bids rejected. In the aforesaid decision, three tenderers namely (i) Megha Engineering and Infrastructure Limited; (ii) NCC Limited and (iii) GKC - PEL - UNITY JV (Petitioners) have been found responsive. It is stated that the technical bid of Megha Engineering and Infrastructure Limited was wrongly declared responsive by respondents - State of Jharkhand, as the aforesaid Company has not furnished the bank guarantee for the period mentioned in e-Procurement Portal. It is stated that the validity period of the bank guarantee furnished by aforesaid Company was only up to 03.12.2015, whereas e-Procurement Portal required that the bank guarantee should remain valid till 29.04.2016. It is stated that thereafter petitioner filed a representation before the Engineer-in-Chief-(I) (respondent No. 2) stating therein that Megha Engineering and Infrastructure Limited has been wrongly declared responsive by the Department. It appears that petitioner''s representation as well as representations of the other bidders were considered by the Departmental Tender Committee on 12.06.2015 and it was found that there is contradiction in the terms and conditions mentioned in e-Procurement Portal and in the NIT with regard to the bid validity period. The Committee found that in the e-Procurement Portal the bid validity period was mentioned as 365 days, whereas in Clause-21 of the NIT, it was mentioned as 180 days. Accordingly, the Committee decided to cancel the tender vide its Resolution dated 12.06.2015 (Annexure-12). The aforesaid decision of the Departmental Tender Committee has been challenged in this writ application.

4. It is submitted by Sri Sunil Kumar, learned Senior Advocate appearing for the petitioners, that the aforesaid decision of the Departmental Tender Committee is most arbitrary, mala fide, unreasonable and against the public interest. It is

further submitted that the aforesaid decision has been taken with a view to favour disqualified tenderers, therefore, the aforesaid decision cannot be sustained.

5. On the other hand, Sri Rajesh Shankar, Government Advocate, submits that while considering the representation of the petitioner, the Departmental Tender Committee has found that there are contradictory provisions relating to bid validity period as well as validity period of earnest money. He submits that in the NIT (Re-e-Procurement Notice) in Clause-21 the bid validity period was mentioned as 180 days, whereas in e-Procurement Portal the bid validity period was mentioned as 365 days. It is further submits that as per the on-line e-Procurement Portal the validity period of bank guarantee was up to 29.04.2016, whereas as per Clause-15 of the NIT, the bank guarantee is required to be valid for atleast six months from the date of opening of tender. It is submitted that thus there is major contradictions in the terms and conditions mentioned in the NIT and on-line e-Procurement Portal. It is submitted that keeping in view the aforesaid contradictions in both the terms and conditions, the Departmental Tender Committee had decided to cancel the tender, because it felt that the contradictory provisions would vitiate the purity and transparency of the tender process. It is submitted that as per Clause-32 of the SBD format, the employer has right to accept any bid and to reject any or all bids. It is submitted that as per Clause-32.2 of the SBD clauses, an employer has right to cancel the bidding process and reject all bids at any time prior to award of contract, without incurring any liability towards the affected bidder or bidders. It is submitted that a tenderer have no fundamental right to carry on business with the Government. It is submitted that if the action of the Government is reasonable, fair and not against the public interest, then in that case its action is not subject to judicial review of this Court. It is submitted that since a dispute cropped up between petitioners and another bidder namely Megha Engineering and Infrastructure Limited due to contradictory terms and conditions mentioned in the NIT and e-Procurement Portal, therefore the Departmental Tender Committee think it proper to cancel the entire bidding process with a view to take fresh steps in due course after rectifying the defects. Thus, the action of the Departmental Tender Committee is fair and reasonable, hence, no interference required by this Court.

6. Having heard the submissions, I have gone through the record of the case. The material facts are not in dispute. Clause-21 of the NIT stipulates that the price quoted by the Companies/Firm/Consultancy will be valid for 180 days from the date of opening of EOI (Financial Bid), whereas in the e-Procurement Portal, it is mentioned that the bid remain valid for 365 days. Thus, there is material contradiction in the terms and conditions of NIT and e-Procurement Portal. If the respondents -State follow the bid validity period mentioned in NIT then the technical bid of Megha Engineering and Infrastructure Limited is valid, whereas if the terms and conditions mentioned in the e-Procurement Portal will be taken into account then the technical bid of Megha Engineering and Infrastructure Limited is not responsive. Under the aforesaid facts and circumstances, the

Departmental Tender Committee with a view to maintain purity and transparency in the tender process had taken decision to cancel the entire tender process. In the aforesaid facts and circumstances, I find that the decision taken by the Departmental Tender Committee is reasonable and fair.

7. In the entire writ application, the petitioners have not alleged any malice against the respondents-authority. I further find that no prejudice had caused to the petitioners, because as soon as the representation of petitioner and other bidders received by the respondent No. 2, he directed the respondent No. 3 for not opening the financial bid of any tenderers. Accordingly the financial bid has not been opened. In that view of the matter, the rates quoted by the petitioners have not become public. Thus, by cancellation of the tender no prejudice caused to the petitioners.

8. In the case of Michigan Rubber (India) Ltd. v. State of Karnataka reported in , (2012) 8 SCC 216, the Hon''ble Supreme Court, after considering its various decisions rendered in Tata Cellular v. Union of India reported in , (1994) 6 SCC 651, Raunaq International Ltd. v. I.V.R. Construction Ltd., reported in , (1999) 1 SCC 492, Jagdish Mandal v. State of Orissa reported in , (2007) 14 SCC 517, laid down the following principles for judicial review in contractual matter:--

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) 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; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

9. The scope of judicial review in the matter relating to award of contract by State or its instrumentalities have been again considered by the Hon''ble Supreme Court in the case of Maa Binda Express Carrier and Another v. North-East Frontier Railway and Others reported in , (2014) 3 SCC 760 and it was held at paragraph No. 8 that:--

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

10. Thus, in view of the aforesaid law laid down by their Lordships of the Hon''ble Supreme Court, if the Government acted reasonably and fairly then in that case the decision of the State Government is not subject to judicial review.

11. As noticed above in the instant case, there are contradiction in the terms and conditions mentioned in the NIT and e-Procurement Portal. Thus, with a view to maintain purity and transparency in the tender process, the Government had

cancelled the entire tender. In that view of the matter, I find that the decision of the State Government is fair and reasonable and by stretch of no imagination it can be treated as arbitrary and violative of Article 14 of the Constitution of India. Thus, in my view, the aforesaid decision is not subject to judicial review of this Court.

12. In view of the discussions made above, I find no merit in this writ application. Accordingly, the same is dismissed.

