
(2011) 08 DEL CK 0144

In the Delhi High Court

Case No : Writ Petition (C) No. 4331 of 2011 and CM No. 8869 of 2011

Patel Engineering Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2011) 7 AD 137 : (2012) 1 BC 115 : (2011) 182 DLT 64

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shaktiher, J

Bench : Division Bench

Advocate : Rajiv Nayar, Jai Munim, Shally Bhasin and Shikha Sarin, for the Appellant; Neeraj Chaudhri, CGSC, Akshay Chandra and Mohit Auluck for R1/UOI and Amrinder Sharma Padma Priya and Somesh Chandra Jha for R2/NHAI, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The National Highways Authority of India (for short "NHAI")/Respondent No. 1, issued a request for qualification in November, 2010 for a six-laning project of Dhankuni-Kharagpur Section of NH-6 from 17,600 to 1,29,000 in the States of West Bengal and Orissa under the National Highway Development Projects Phase-V on design, build, finance, operate, transfer and toll basis. The Petitioner, a public limited company, submitted its bid on 10.01.2011. The bid submitted by the Petitioner and other bidders were processed and by a letter of award dated 17.01.2011, Respondent No. 2 informed the Petitioner that its bid had been accepted and that the Petitioner should execute the relevant documents in that regard.

2. It is the say of the Petitioner that on account of various factors including amendments, perceived insufficient time etc., the bid submitted by the Petitioner was significantly higher than it should have been and thus the Petitioner came to the conclusion on 24.01.2011 that the bid made by it was commercially unviable. This fact was intimated to Respondent No. 2 on 24.01.2011 within the period of 7

days prescribed for the Petitioner to execute the necessary documents.

3. As a sequitur to this, Respondent No. 2 informed other bidders, and ultimately the contract was awarded to M/S. Ashoka Buildcon Limited at a much lower premium of Rs 126.06 crores. We may notice at this stage that the Petitioner had specified a premium of Rs 190.53 crores.

4. All the bidders were to submit a bid security amount of Rs. 13.97 crores. Part "D" deals with the bid security amount. Clause 2.20.6 envisages forfeiture of bid security amount in the following terms:

2.20.6 The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No. relaxation of any kind on Bid Security shall be given to any Bidder.

5. The aforesaid amount was agreed as a genuine pre-estimate of compensation in respect of the eventuality set out in the Clause 2.20.7. The facts of the case fall within such an eventuality where a contractor fails to sign and return a duplicate copy of the LOA. Clause 2.20.7 reads as under:

2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority within prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise, under the following conditions:

a) If a Bidder submits a non-responsive Bid, "subject however that in the event of encashment of bid security occurring due to operation of para 2.20.7 (a), the damage so claimed by the authority shall be restricted to 5% of the value of the bid security.;

b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirably practice or restrictive practice as specified in Clause 4 of this RFP;

c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;

d) In the case of Selected Bidder, if it fails within specified time limit -

i) To sign and return the duplicate copy of LOA;

ii) To sign the Concession Agreement; or

iii) To furnish the Performance Security within the period prescribed therefore in the Concession Agreement; or

e) In case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.

6. It is in view of the aforesaid facts and circumstances that Respondent No. 2 took a decision to encash the bank guarantee furnished towards the bid security amount; however in the meanwhile Petitioner addressed a letter dated 01.02.2011 volunteering to make the payment of Rs. 13.97 crores in return of the bank guarantee; which amount was duly paid vide a demand draft on 03.02.2011. Thus, the issue of encashment of the bid security amount stood concluded with the said step and both the parties accepted the same.

7. The grievance of the Petitioner arises out of the subsequent action taken by Respondent No. 2 to issue a show cause notice dated 24.02.2011 to the Petitioner to debar the Petitioner for a period of five years from "pre-qualification, participating or bidding" for future projects to be undertaken by Respondent No. 2.

7.1 This show cause notice was replied to by the Petitioner on 01.03.2011, and the impugned letter was issued on 20.05.2011, on the basis of which Respondent has debarred the Petitioner for a period of one year commencing from the date of issue of the letter, i.e., 20.05.2012 from "pre-qualification, participating or bidding" for future projects of or to be undertaken by Respondent No. 2.

7.2 The Petitioner made a representation against such debarment to the Ministry of Road Transport and Highways on 28.05.2011, and subsequently filed the present writ petition on 13.06.2011 under Article 226 of the Constitution of India making a prayer for quashing of the letter dated 20.05.2011.

8. The aforesaid grievance has naturally been contested by Respondent No. 2. Respondent No. 1/UOI has not filed any separate counter affidavit in this matter.

9. We have heard learned Counsel for the parties.

10. It is the say of learned senior counsel for the Petitioner that the forfeiture of the bid security amount concluded the consequence which the Petitioner could be visited with on its failure to convey the acceptance in respect of the LOA. In other words the Petitioner could not be penalized any further by being debarred from participation in future projects undertaken by Respondent No. 2. According to the learned Counsel the order of debarment was in the nature of the Petitioner being blacklisted.

11. The learned Counsel in this behalf has drawn our attention to Clause 4.2 which forms part of part 4 with the heading "Fraud and Corrupt Practices". Clause 4.2 reads as under:

Without prejudice to the rights of the Authority under Clause 4.1 hereinabove and the rights and remedies which the Authority may have under the LOA or the Concession Agreement, or otherwise if a Bidder or Concessionaire, as the case may be, is found by the Authority to have directly or indirectly or through an

agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the Concession Agreement, such Bidder or Concessionaire shall not be eligible to participate in any tender or RFP issued by the Authority during a period of 2(two) years from the date such Bidder or Concessionaire, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice, or restrictive practices, as the case may be.

12. Learned senior counsel for the Petitioner submitted that the aforesaid clause applied only if the Petitioner indulged in any "corrupt practice", "fraudulent practice", "coercive practice", "undesirable practice" or "restrictive practice" during the bid process or after the issuance of LOA or on the execution of the Concession Agreement, and that the definition of each of these expressions provided in Clause 4.3 made this aspect quite clear. Learned Counsel thus submitted that the case of the Petitioner does not fall in any of the aforementioned practices as defined in Clause 4.3 read with Clause 4.2.

12.1 A reference was made to following paragraphs of the show cause notice dated 24.02.2011 to buttress this point:

"AND WHEREAS subsequent to technical evaluation, Financial Bids were opened on 13.01.2011 in the presence of the Bidders representative and it was noted that M/s Patel Engineering Ltd. had offered the highest premium of Rs. 190.53 Crore for the said project. Therefore, as per RFP Volume-I, Clause 3.3.1, M/s Patel Engineering was declared by the NHAI as the Selected Bidder and subsequently was issued the letter of Award (LOA), as per Clause 3.3.5 of RFP Volume-I. Copy of letter dated 17.01.2011 is enclosed.

AND WHEREAS, M/s Patel Engineering Ltd., vide letter No. Hyd/181/NHAI-DK BOT/3326 dated 24.01.2001, had expressed their inability to accept the LOA, stating that errors have crept in impacting the bid value significantly. Copy of letter dated 24.01.2011 is enclosed.

AND WHEREAS, as per Clause 2.20.07(d) of the RFP, in case the Selected Bidder fails to accept the LOA, the bid security shall be forfeited and appropriated by NHAI as mutually agreed genuine pre-estimated compensation as payable to NHAI for, inter-alia, time, cost and effort of NHAI without prejudice to any other right or remedy that may be available to the NHAI there under or otherwise.

AND WHEREAS, in view of your conduct which has, inter-alia, resulted in delay of execution of a project of National importance, a view is made out not to deal with you in future for participation and/or award of further projects of NHAI. It needs to be appreciated that the projects being undertaken by NHAI are of huge magnitude and both in terms of manpower and finance besides being of utmost National importance, striking at the root of economic development and prosperity and general public and a nation as a whole, the NHAI cannot afford to deal with

entities who fail to perform their obligations as in your case.

AND WHEREAS, in the premises it is proposed to debar above named noticee for a period of five years from pre-qualification, participating or bidding for future projects of/or to be undertaken by NHA, either directly in your name or indirectly in any other name or in association with any other person entity in which you may choose to carry on your business.

In view of the aforesaid, you are hereby called upon to show cause within 14 days of the receipt of this notice as to why action as aforesaid should not be taken against you. If No. reply is received within the said period, it shall be presumed that you have nothing to say against the proposed action of NHA and NHA shall be free to take appropriate action as may be deemed fit in the facts and circumstances of the case and as per applicable law.

13. It was contended that aforesaid extract from the show cause notice would reveal that as per Respondent No. 2, it was the failure on the part of the Petitioner to enter into the contract after being declared a successful bidder which occasioned delay in execution of the project propelling Respondent No. 2 in coming to a prima facie view that it would not deal with the Petitioner in respect of its future projects for a period of time, which was tentatively proposed as five years.

13.1 Learned senior counsel for the Petitioner submits that such a show cause notice could not have been issued for the reason that it was not envisaged under the terms and conditions of the invitation to offer and No. such decision ought to have been taken de hors the contract. This was more so according to the learned Counsel as No. guidelines had been provided.

13.2 Learned senior counsel for the Petitioner has also drew our attention to the contents of the final order of debarment dated 20.05.2011, to demonstrate that the debarment order was passed on grounds which did not find a mention in the show cause notice. The reason being, according to the learned Counsel, to somehow bring the order of debarment within the four corners of Clause 4.2 read with Clause 4.3 of the ITB.

13.3 It is his say that Clause 4.3(e) which defines restrictive practices cannot bring within its ambit allegations of "pooling" or "malafides":

restrictive practice" means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

14. In other words it was contended that the allegations pertaining to "pooling" and "mala fides" were incorporated in the debarment letter dated 20.05.2011 only as an afterthought with a view to bring the Petitioner within the purview of "restrictive practices".

15. In order to appreciate the aforesaid submission, we consider it appropriate to

reproduce the relevant portion of the letter of debarment dated 20.05.2011 which reads as under:

In view of your conduct, Show Cause Notice dated 24.02.2011 was issued to you seeking your explanation as to why action should not be taken to debar above named addresses for a period of five years from prequalification, participating or bidding for future projects of / or to be undertaken by NHAI, either directly in your name or indirectly in any other name or in association with any other person entity in which you may choose to carry out your business. In response to the said Show Cause Notice dated 24.02.2011, you vide letter dtd.01/03/2011, inter-alia, stated that minutes of the pre-bid meeting, which included several amendment/queries, were communicated on website of NHAI on 7.1.2011 while bid submission was kept the next date on 10.01.2011. You also stated that in the light of the above notice in the bid clarification, certain anomalies crept up in bid submission, which were only discovered subsequent to the letter of intent being issued.

It is noted that above submission was also made in your letter dated 24/01/2011, wherein you have accepted the fact that other bidders also participated under the similar circumstances. Further the fact remains that clarification/amendments communicated by NHAI were "minor" and cannot be attributed as a cause for occurrence of an "error" of "major" nature and magnitude. With project facilities clearly spelt out in the RFP document, the project cost gets frozen well in advance and similarly traffic assessment & projections, which largely impact the financial assessment, are also not expected to be left out for last few days of bid submission. Therefore, stating that an "error" of this nature and magnitude occurred is neither correct nor justified. It is to be noted that your act of non-acceptance of LOA has resulted in huge financial loss, to the tune of Rs. 3077 crores, as assessed over the life of concession period, in terms of lower premium, apart from cost of the time and effort, to NHAI. It is further noted that this is the first case where a bidder has not accepted the LOA, and warrants exemplary action to curb any practice of "pooling", and "malafide" in future.

After considering all material facts, and your reply in response to the Show Cause Notice, NHAI is of the considered view that No. justifiable grounds have been made out in support of your action of non-acceptance of LOA. Keeping in view the conduct of the addresses, NHAI find that they are not reliable and trustworthy and have caused huge financial loss to NHAI. Therefore, it is hereby informed that without prejudice to any other rights available to NHAI in terms of the provision of RFP document and/or the applicable law, you the above named addresses are hereby barred from prequalification, participating or bidding for future projects of / or to be undertaken by NHAI, either directly in your name or indirectly in any other name or in association with any other person entity in which you may choose to carry out your business for a period of one year from the date of issue of this letter.

16. The aforesaid apart, the Petitioner is also aggrieved by the website display of Respondent No. 2 where the name of the Petitioner is shown with the remark "the applicant has been debarred by NHAI?". He thus submits that this may have an effect on the other tenders issued by third parties, in which, the Petitioner may want to participate.

17. The last aspect urged by learned Counsel for the Petitioner is that without prejudice to the aforesaid, the punishment imposed on the Petitioner is disproportionate, and such a decision of debarment can form subject matter of adjudication under Article 226 of the Constitution of India in view of the judgment of the learned Single Judge of this Court in M/s. V.K. Dewan and Co. Vs. Municipal Corporation of Delhi and others,

18. On the other hand, learned senior counsel for Respondent No. 2 has pointed out to us that all that the Respondent No. 2 has done is to take a decision not to deal with the Petitioner for a period of one year on account of the Petitioner having backed out at the last minute from entering into the contract. The parties participating in such bids are well experienced and the Petitioner is one such party, which is in fact a public limited company, and which has been participating in various tenders including that of Respondent No. 2. The difference between the Petitioner as H-1 and H-2 to whom ultimately the contract was awarded is quite large (i.e., a differential itself amounting to Rs. 64 crores). Since the bid security forfeiture term in the contract provided for a pre-estimate of damages, only that amount was forfeited, i.e., a sum of Rs. 13.97 crores. Learned Counsel has referred to the final order passed by Respondent No. 2 to contend that it is a first case where a bidder has not executed LOA, and Respondent No. 2 as a prudent commercial party is entitled to take a decision to discourage such practice in future by contractors like the Petitioner. The decision taken by Respondent No. 2 is a prudent commercial decision not to deal with a contractor like the Petitioner for a limited period of one year and that the position could be No. different only because Respondent No. 2 is a public sector enterprise. A decision, such as the one taken by Respondent No. 2, would not have been called into question if a private party had decided not to deal with such recalcitrant entity.

19. It is the say of learned Counsel for Respondent No. 2 that the debarment is for a short period of time keeping in mind the nature of contracts which are entered into by Respondent No. 2. Learned senior counsel for Respondent No. 2 states that Clause 4.2 has No. role to play in the present case, and that the decision taken by it is de hors the same in view of Clause 2.20.7 which states that the encashment of the bid security amount is "without prejudice to any other right or remedy that may be available to the authority".

20. We find the action of Respondent No. 2 is completely justified and in accordance with law. The Petitioner, a corporate entity, knew the nature of bid it was making. It made a bid for RS 190.57 crores. On having found out that the next highest bid of H-2 was for Rs. 126.06 crores (as revised), though the

original bid was even lower, it had a second thought and under the garb of ostensibly re-visiting a business decision withdrew from the tender. It naturally bore the financial consequences of the bid security amount being forfeited without any demur or protest. What the Petitioner seeks by way of the present writ petition is a right to continue to participate in the tenders to be issued of Respondent No. 2 in the near future despite the aforesaid conduct. We cannot lose sight of the fact that Respondent No. 2 is dealing with highway projects all over the country which are of critical national importance both in terms of their economics and logistical relevance. Expeditious construction of road links is an important part of infrastructure development of the country. Any delay in such infrastructure projects is a national waste. In such a situation for the Petitioner to have withdrawn at the last minute, ostensibly on the ground of prudent commercial decision can certainly invite the consequences of the tendered declining to deal with such an entity for a specified period of time. Learned senior counsel for Respondent No. 2 has rightly contended that but for the fact that the said Respondent is a public sector undertaking such a decision would have passed muster of the court on the ground of business expediency. The fact that Respondent No. 2 is a public sector undertaking ought not to disable it from taking a commercially prudent and if you take an expedient decision in its own interest. It is not the function of this Court to interfere with such a decision which impinges on its business efficacy merely because it happens to be taken by a public sector undertaking which, in the instant case, happens to be Respondent No. 2. The order of the Respondent No. 2 also notes that this is a first instance of its kind. The reference of "pooling" and "mala fide" is made in that context, and as clarified by learned Counsel for Respondent No. 2, not to bring it within the parameters of Clause 4.2.

21. In our considered view, such an action by Respondent No. 2, in the given facts and circumstances of the case, is a decision which any prudent businessman placed in a similar situation would naturally have taken to deter such like entities from conducting themselves in a manner, to say the least, which is unbusinessman like. In such circumstances, it would be both unfair and unreasonable for the court to issue a direction requiring Respondent No. 2 to deal with a person (i.e., the Petitioner) who had No. qualms in ditching the project at the nth hour.

22. We are also unable to accept the submission of learned senior counsel for the Petitioner that adequate opportunity was not granted to the Petitioner to defend its case since an oral hearing was not accorded to the Petitioner. A right of personal hearing is not an inbuilt right in such like proceedings especially given the peculiar facts of the case, which stand unrequited. In this regard, we draw strength from the observations of the Supreme Court in *Union of India and another Vs. M/s. Jesus Sales Corporation*, where para 5 reads as under:

5. The High Court has primarily considered the question as to whether denying an opportunity to the Appellant to be heard before his prayer to dispense with

the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred. It need not be pointed out that under different situations and conditions the requirement of compliance of the principles of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the Appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the Appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. of course, if in his own discretion if he requires the Appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that No. personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters. When an authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty should be deposited cannot be held to be unreasonable as already pointed out above. In the case of *Shyam Kishore v. Municipal Corporation of Delhi* (supra) it has been held by this Court that such requirement cannot be held to be harsh or violative of Article 14 of the Constitution so as to declare the requirement of pre-deposit itself as unconstitutional. In this background, it can be said that normal rule is that before filing the appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as a tax or penalty. The non-deposit of such amount itself is an exception which has been incorporated in different Statutes including the one with which are concerned. Second proviso to Sub-section (1) of Section 4-M says in clear and unambiguous words that an appeal against an order imposing a penalty shall not be entertained unless the amount of the penalty has been deposited by the Appellant. Thereafter the third proviso vests a discretion in such Appellate authority to dispense with such deposit unconditionally or subject to such conditions as it may impose in its discretion taking into consideration the undue hardship which it is likely to cause to the Appellant. As such it can be said

that the statutory requirement is that before an appeal is entertained, the amount of penalty has to be deposited by the Appellant; an order dispensing with such deposit shall amount to an exception to the said requirement of deposit. In this back-is ground, it is difficult to hold that if the Appellate authority has rejected the prayer of the Appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without hearing the Appellant, on perusal of the petition filed on behalf of the Appellant for the said purpose, the order itself is vitiated and liable to be quashed being violative of principles of natural justice.

(emphasis is ours)

23. We also do not find that the consequences stipulated in the impugned letter are disproportionate when examined in the context of the conduct of the Petitioner. The case referred to by learned senior counsel for the Petitioner in V.K.Dewan and Company v. Municipal Corporation of Delhi and Ors. case (supra) was a case where period of debarment imposed was three years. The aspect of proportionality has to be examined in the context of the facts and circumstances arising in a given case. In the present case, after proposing a debarment for a period of five years, the decision taken by Respondent No. 2 is of debarment of Petitioner for a year from participating in the tenders to be issued by Respondent No. 2 within the said time frame. The effect of the Petitioner withdrawing from the contract is that the Respondent No. 2 has suffered a loss of Rs 64 crores per year to begin with, and thereafter, on an extrapolated scale, spread over a period of 25 years, the loss is pegged at Rs. 3077 crores; as set out in the final order. The Respondent No. 2 was thus well within its rights to take appropriate action against the Petitioner, and taking into consideration the enormity of the loss, we are of the considered view that Respondent No. 2 has dealt with the Petitioner rather lightly.

24. Insofar as the display on website is concerned, the same is only stating a fact that Respondent No. 2 has taken a decision to debar the Petitioner from further dealing for a period of one year. It is not a debarment qua any third party. It is for the third parties to take an informed decision whether they would like to deal with the Petitioner keeping in mind the conduct of the Petitioner qua Respondent No. 2. We can only sum up by noting that the consequences which flowed in this case pursuant to the conduct of the Petitioner are those, which are of, the Petitioner's own making; it has No. one else to blame but itself.

25. We find the writ petition devoid of both merit and substance and hence dismiss the same with costs quantified at Rs. 1,00,000/-.

26. Interim order stands vacated.