
(2012) 12 GAU CK 0016
In the Gauhati High Court
Case No : Writ Petition (C) No. 536 of 2012

Rabi Mohan Tripura

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Citation : (2013) 2 GLD 306 : (2013) 2 GLT 267

Hon'ble Judges : Utpalendu Bikas Saha, J

Bench : Single Bench

Advocate : S.M. Chakraborty and Ms. P. Chakraborty, for the Appellant; A.S. Lodh, Addl. GA, for the Respondent

Final Decision : Dismissed

Judgement

Utpalendu Bikas Saha, J.—The instant writ petition is filed by the petitioner who is a member of the tribal community and a contractor by profession, for quashing the letter of the Executive Engineer PWD (R & B), Ambassa Division, the respondent No. 3 herein, dated 20.11.2012 (Annexure-5 to the writ petition) written to the Counsel of the petitioner communicating the decision that the petitioner failed to qualify in his technical bid submitted for the work namely, construction of link road towards Indo-Bangladesh Border from Ratannagar Market to IBB road via Sikandar para BOP (L = 6,000 Km.)/SH:- Site clearance, Formation, Soling, Metaling, Carpeting, CDs, in/c. bailey bridge 3 (three) Nos. Toe wall, Retaining wall, CC drain etc. in response to the Press Notice Inviting Tender (for short, hereinafter referred to as NIT) dated 28.8.2012 (Annexure-3 to the writ petition) and also for a direction to the respondents to take into consideration the price bid of the petitioner with reference to the said NIT. Heard Mr. S. M. Chakraborty, learned senior Counsel assisted by Ms. P. Chakraborty, learned Counsel appearing for the petitioner as well as Mrs. A. S. Lodh, learned Additional Govt. Advocate appearing for the State respondents at this motion stage.

2. The pleaded case of the petitioner in short is as follows:

That the petitioner is a member of the Tribal community of Tripura and a permanent resident of Gandacherra Sub-division and by profession a contractor who has executed numbers of civil works.

3. On 25.2.2002, the Secretary, P.W.D. issued a letter to the Superintending Engineer, Public Works Department, First Circle, Kumarghat, North Tripura wherein it is mentioned that in continuation to office letter No. F (38)-PWD-(c)/88 dated 29.10.98, the award of works to the Tribal individuals in Gandacherra and Longtharai valley subdivision has been reviewed and decided that Tribal contractors of Gandacherra and Longtharai Valley Sub-Division may tender for works in their respective Sub-Divisions without registration as a special case until further order and as such, the petitioner being a member of tribal community and residing in Gandacherra area purchased tender form relating to the above NIT dated 28.8.2012 and ultimately dropped the technical bid and price bid relating to the said work of construction of link road towards Indo-Bangladesh Border from Ratannagar Market to IBB road via Sikandar para BOP (L = 6,000 Km.)/SH:- Site clearance, Formation, Soling, Metaling, Carpeting, CDs, in/c. bailey bridge 3 (three) Nos. Toe wall, Retaining wall, CC drain etc., but the respondent No. 3 upon receipt of the tender documents of four agencies including the tender of the petitioner, ultimately rejected the technical bid of the petitioner and consequent thereto did not open the price bid of him. As a result, he is ousted from the tender in question, though as a tribal inhabitant, he was exempted from registration i.e. enlistment as a contractor.

4. Being informed regarding the decision of the respondent No. 3, the petitioner has served a demand notice through his lawyer on 9.11.2012 and in response to the said demand notice, the respondent No. 3 informed the learned Counsel of the petitioner vide his reply dated 20.11.2012 (Annexure-5) that question of opening of the price bid of the petitioner did not arise as he could not fulfill the conditions of the technical bid as per the terms of the NIT. Hence, the writ petition.

5. The state respondents have filed a short affidavit denying the allegations of the petitioner contending inter alia that the petitioner was given special preference in terms of the order of the Secretary of the Public Works Department dated 25.2.2002 for participating in the tender process as a special case though he was not up to the standard of a contractor qualified for the said work. It is also stated that at the time of the order of the Secretary dated 25.2.2002, two bids system, i.e., technical bid and financial bid - was not there. But subsequently, two bids system in a tender has been introduced relating to a work costing Rs. 3.00 crore by the Public Works Department and but no modification was done in the said letter/order dated 25.2.2002.

6. It is the further case of the respondents that by way of letter dated 25.2.2002, the tribal contractors of Gandacherra and Longtharai Valley Sub-division was only allowed to participate in a tender without registration, i.e., without enlistment, but at no point of time such tribal contractors were relaxed from fulfillment of the

conditions mentioned in the NIT relating to a particular work on two bids system, like technical bid and price bid and as the petitioner failed to fulfill the criteria relating to technical bid, the respondents authorities after evaluating the criteria as mentioned in the NTT found his bid non-responsive and in the result, his price bid was not opened in terms of the clause-9 of the NIT and 22.2 and 22.3 of the instructions to the bidders. It is also stated that as per bid capacity, the agency of the petitioner is non-responsive and the requisite machineries for road work to be required in this instant work are not having with the Agency of the petitioner.

7. Considering the nature of the prayer and the points involved in the writ petition, the same is taken up for final decision at this motion stage, particularly, considering the averment of the petitioner in the writ petition and the pleadings of the respondents in their short affidavit.

8. Mr. Chakraborty, learned senior Counsel while urging for the relief sought for would contend that being the petitioner was allowed to participate in a tender without registration, i.e., enlistment, his tender cannot be rejected on the ground for non-fulfillment of the technical bid. He also submits that such work in question is mainly specified for the class-1 contractors and the petitioner was allowed to participate by Respondent-the authority and subsequent to his participation, the Respondent-authority cannot raise question of non-fulfillment of the conditions of the NIT including the technical bid. He finally submits that the petitioner is also executing a work relating to construction of a degree college under the jurisdiction of the respondent No. 3.

9. Mrs. Lodh, learned Addl. Govt. Advocate while countering the submissions of Mr. Chakraborty with the aid of short affidavit would contend that mere permission to participate in a tender without registration does not mean that the petitioner has also been permitted for non-fulfillment of the conditions of NIT relating to a particular work. She further submits that the petitioner purchased the tender form as an unregistered/unlisted contractor, but that does not mean that he is not bound by the terms and conditions of the NIT. She also submits that contention of the petitioner that he was exempted from the financial limit as per the decision of the State Government is also not correct as in the letter dated 25.2.2002, there is nothing mentioned regarding the exemption of financial limit or exemption from technical bid. The said letter only authorized the Superintending Engineer, First Circle, Kumarghat, the Respondent No. 3, to allow the tribal contractors to tender for works in their respective sub-division without registration as a special case.

10. In support of her contention, Mrs. Lodh has also referred to a decision of the Apex Court in *Larsen and Toubro Ltd. and Another Vs. Union of India (UOI) and Others*, wherein the Apex Court while upholding the decision of the High Court rejecting the writ petition noted, inter alia, that:

we are satisfied that the High Court did not commit any error in dismissing the writ petition filed by the petitioners since in the absence of compliance with the

terms and conditions relating to firm and fixed price offer, the petitioners stood excluded from consideration. The offer in this regard made by the respondent No. 4 satisfies the requirements of a firm and fixed offer, since once the commercial bids were opened, there was no further scope of the rates being altered, which was not so in the case of the petitioners, which tried to make its bid responsive by withdrawing the initial offer and substituting the same with another.

11. From the above submission of the learned Counsel of the parties, the questions arise for decision by this Court is as under:-

(1) Whether a tribal contractor without registration is exempted from fulfillment of the conditions of the technical bid as well as price bid in terms of the NIT?

(2) Whether a contractor/agency whose technical bid in a tender is found not satisfactory as per the terms and conditions of the NIT can claim that his price bid should be opened?

12. To consider the aforesaid points, it would be proper for this Court to reproduce the letter dated 25.2.2002 which is as under:

No. F. 1(1)/PWD(c)/2000

GOVERNMENT OF TRIPURA PUBLIC WORKS DEPARTMENT

Dated, February 25, 2002

To

The Superintending Engineer

Public Works Department

First Circle, Kumarghat

North Tripura

Sub:- Award of works to Tribal individuals in Gandacherra and Langtharai Valley Sub-Division.

Sir,

In continuation to this office letter No. FA (38)-PWD-(c)/88 dated 29.10.98 the above mentioned subject have been reviewed and decided that Tribal contractors of Gandacherra and Longtharai Valley Sub-Division may tender for works in their respective Sub-Divisions without registration.

This is allowed as a special case until further order.

Yours faithfully, (S. Nag) Secretary, PWD Government of Tripura

Copy to:-

1. The Executive Engineer, Ambassa Division, Ambassa for information.

2. The Executive Engineer, Kumarghat Division, Kumarghat for information.

3. The Assistant Engineer, Manu Sub-Division, Manu, for information.

4. The Assistant Engineer, Gandacherra Sub-Division, Gandacherra for information.

13. As Mrs. Lodh has referred to Clause-9 of the NIT as well as Clause 22.2 and 22.3 of the instructions to the bidders, it would be proper to reproduce the said clause-9 of the NIT and the Clause 22.2 to Clause-22.4 of the said instructions which are as under:

9. Technical bids shall be opened first and after technical evaluation is completed; financial bid in respect of technically acceptable offers only shall be opened.

22.2. Only the Price Bids of qualified Tenderers whose technical Bids are found satisfying the eligibility criteria shall be opened in the presence of the qualified Tenderers or their authorized representatives present on the date and time fixed. The bid offers are read out and minutes recorded and the signatures of the Tenderers present are taken in the minutes.

22.3 The Price Bid of the unqualified Tenderers will not be opened.

22.4 Tenders shall be scrutinized in accordance with the conditions stipulated in the Tender document. In case of any discrepancy of non-adherence conditions the Tender accepting authority shall communicate the same which will be binding both on the tender opening authority and the Tenderer. In case of any ambiguity, the decision taken by the Tender Accepting Authority on tenders shall be final.

14. She finally contended that unless the decision of the authority relating to the finalization of the tender is either wholly arbitrary or unfair and mala fide or suffered from procedural irregularities, the writ Court should not interfere with the said decision, as the writ Court is not acting as an appellate authority over the decision of the administrative/executive authority who invited the tender of the work.

15. Normally, in a writ proceeding, the Court would not certainly act as an appellate authority over the decision of the administrative/executive authority, who invited tender for a contract taking note of public interest unless in the decision making process, there is some wrong or decision is wholly unfair, unreasonable and contrary to the provisions of law. More so, it would also not be proper for the Court to interfere with the administrative/executive action only on the allegation made against the decision of the said authority. In a writ proceeding, function of the writ Court is like umpire in a game of cricket who has to see both the players play their respective game as noted in Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, .

16. In Tata Cellular Vs. Union of India, , the Apex Court when considered what is the requirement of tender and principles of judicial review in a contractual matter

also took note of the fact that on examination of the entire case law cited before their Lordships of the Apex Court, their Lordships laid down the following principles which are as follows:-

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely review the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to the tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

(emphasis supplied)

17. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , the Apex Court noted that awarding of contract is essentially a commercial transaction whether the said contract is by a private party or by a public body or by the State. The Apex Court also considered in arriving at a commercial decision what should be the considerations of paramount importance. In para-9 of the said Report, the Apex Court also noted that while the authority awarding a contract has also the power to see as to whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important. Not only that, the Apex Court also said that tendering authority can also consider past experience of the tenderer while awarding the contract. For better appreciation, it would be proper to reproduce paragraph-9 of the said Report:

9. 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 of paramount importance are commercial considerations, there would be:

- (1) The price at which the other side is willing to do the work;
- (2) Whether the goods or services offered are of the requisite specifications;
- (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important.
- (4) The ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) Past experience of the tenderer and whether he has successfully completed similar work earlier;
- (6) Time which will be taken to deliver the goods or services; and often
- (7) The ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the state or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, as there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

(Emphasis supplied)

18. In the said report, the Apex Court also noted that:

the past record of the tenderers, the quality of the goods, services which are offered, assessing such quality on the basis of past performance of the tenderers, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a low price. The Court should not substitute its own decision for the decision of an expert evaluation committee.

19. In Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , the Apex Court noted that the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory or mala fide or actuated by bias.

20. It is well settled by this time that the State can choose its own method to arrive at a decision and it can fix its own term inviting a tender that is not open to the judicial scrutiny. It can also enter into negotiation before finally deciding to accept one of the offers made to it. In the instant case, it appears from Clause-9 of the NIT that the technical bid is to be open first and only after fulfillment of the technical bid, the price bid can be-open.

21. In Clause 22 to 24 of the instructions to the bidders which is a part of the NIT, it is specifically stated that the price bid of the tenderer whose technical bid are found satisfying the eligibility criteria shall be opened, meaning thereby whose technical bid does not satisfy the eligibility criteria, his price bid shall not be opened.

22. The aforesaid view of this Court also gets support from Clause 22.3 of the Instructions to the bidders wherein it is specifically mentioned that the price bid of the unqualified tenderer will not be opened.

23. In Clause 22.4, it is specifically stated that at the time of scrutiny if there is any ambiguity, the decision taken by the tender accepting authority on tenders shall be final.

24. On going through the Clause-9 of the NTT and Clause 22 to 24 of the instructions to the bidders, this Court is of the considered opinion that the petitioner, who was permitted to participate in a tender within a particular area as a special case, is not exempted by the conditions of the NIT. More so, it was known to the petitioner that a participant in a tender has to fulfill the eligibility criteria of both the technical bid and price bid.

25. This Court is of further opinion that the Secretary, PWD in his letter dated 25.2.2002 nowhere mentioned that a tribal contractor permitted for participating in a tender as a special case is relaxed or exempted from fulfillment of the conditions of the NIT. Thus, the plea of the petitioner that even if he does not fulfill the eligibility criteria in the technical bid, his price bid can be opened, cannot be accepted.

26. This Court has also gone through the letter dated 17.4.2008 issued by the Chief Engineer (Annexure-R/1 to the counter-affidavit) to the Superintending Engineer, first Circle, Kumarghat etc. wherein it is stated that in partial modification of Clause No.-18.2.3(1) of the PWD Works Manual notified vide No. F. 15 (2)/MC-PWD dated 30th May 2007 in the interest of the works, it has been decided that two bid system, i.e., getting technical bid and financial bid in separate covers, may be followed for the works of estimated cost more than Rs. 3 (three) crore. It further appears from the evaluation of the Technical bid (Annexure-R/2 to the counter-affidavit) that the technical bid of the petitioner was considered along with technical bid of other tenderers and the technical authorities who were experts on the subject specifically stated that as per bid capacity, the agency of the petitioner is non-responsive and he has submitted all valid documents. But the requisite machineries for road work to be required in

this instant work are not having with the Agency of the petitioner and he is a Class-IV(A) enlisted contractor and has purchased the tender form as per the order dated 25.2.2002.

27. When the expert body which has the technical expertise regarding the work in question has decided that the petitioner's technical bid is not fulfilled the eligibility criteria, it would not be proper on the part of this Court to re-assess the decision of the technical expert body who has considered the technical bid of the tenderers in terms of the NIT. For the foregoing discussion and reasons stated above, the writ petition is dismissed being devoid of merit. No order as to costs.