(2006) 10 P&H CK 0083

In the Punjab And Haryana At Chandigarh

Rajindra and Company APPELLANT

Vs

State of Punjab and Others RESPONDENT

Date of Decision : 17-10-2006

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (2007) 146 PLR 723 : (2007) 3 RCR(Civil) 39 : (2007) 2 RCR(Civil) 39 : (2007) 2 RCR(Civil) 54

Hon'ble Judges : S.S. Nijjar, Acting C.J.;S.S. Saron, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.S. Saron, J.—The rejoinder filed by the petitioner to the written statement of respondents 1, 2 and 4 and the written statement filed on behalf of respondent -5 are taken on record.

The CMs stand disposed of.

C.W.P. 11706 of 2006

2. The petitioner firm-M/s Rajindra & Company, it is submitted, is engaged in executing huge works including roads, buildings, etc. It has earlier done work for the re-spondent-PWD B&R Department and executed their works for over Rs. 5.00 crores during the period 2002-03. In the following year of 2003-04, the works are stated to be of much higher amount. The works were completed to the complete satisfaction of the respondent department who even issued certificates (Annexures P1 and P2) in this regard. Notice inviting tenders (Annexure P3) was issued by the respondent department for strengthening of the Mamoon-Madhopur road KM No. 0.00 to 16.30 in district Gurdas-pur under the RIDFNABARD-XI scheme. The petitioner being eligible, completed the necessary formalities and applied for the same. During the tender process he came to know that with a view to oust his claim as a successful tenderer, some terms and conditions of the tender notice were being changed by respondents-1 and 2.

Besides, inspite of the fact that the project was a NABARD sponsored/financed project and the terms and conditions had been settled by it, the respondents-1 and 2 for reasons and considerations best known were changing the terms and conditions to suit a particular category. Accordingly, the petitioner-firm served a legal notice dated 14.7.2006 (Annexure P4) on respondents -2 and 3. It expressed its apprehension that the terms and conditions were being changed not only after the tenders had been invited but had been duly accepted by the department. The petitioner received a letter dated 19.7.2006 (Annexure P5) from the Executive Engineer, Construction Division, PWD B&R Branch, Pathankot (respondent -4). He was informed about opening of the financial bid on 21.7.2006. The petitioner was present at the time of opening the finanoial bid on 21.7.2006 and his apprehension was confirmed. A contractor namely R.K. Mahajan and Company (respondent-5) who was not eligible was made eligible by diluting the terms and conditions that were earlier specified. The said contractor R.K.Mahajan and Company (respondent -5) was in fact required to have and was asked whether it had executed any work of Rs. 10.00 crores or two works of Rs. 5.00 crores each during the last three years. However, no certificate could be produced by the said contractor. Till date, no allotment of the work has been done but the petitioner-firm believes that the allotment was now being made in favour of the said contractor (respondent-5) who was ineligible even to apply for the tender. It is stated that the petitioner believes that the terms of the tender have been diluted on account of political, extraneous and arbitrary considerations without publication of any change in the terms and conditions. The petitioner, by way of the present petition under Articles 226/227 of the Constitution of India, seeks a mandamus directing respondents-1 and 2 to strictly adhere to the terms and conditions of the notice inviting tender and to allot the work to lowest tenderer without diluting or tailor-making the same to favour a party; besides, not to allot the work to respondent-5.

3. On notice of motion, written statement has been filed by Mr. Madan Bansal, Executive Engineer, Construction Division, Pathankot on behalf of respondents-1, 2 and 4. It is stated that the financial bid was opened by the Tender Processing Committee on 21.7.2000 in the presence of the petitioner as well as other contracting agencies. Since the rates of the financial bid of the petitioner were not the lowest, he has no right to file the present petition. It is, however, admitted that the petitioner-firm applied for issuance of tender documents which were issued to it. The tenders were called for Rs. 495.00 lakhs per DNIT submitted to the Chief Engineer but due to change of use of bitumen CRMB-55 instead of 60/70 grade, the amount of DNIT marginally increased to Rs. 516.00 lakhs. It is denied that the terms and conditions of the bidding documents had been framed in consultation with the NABARD authorities. It is submitted that the NABARD authorities had in fact vide letter (Annexure R1) emphasized in condition No. 11 of the terms and conditions for constituting a High Power Committee by the State Government to finalize the tender documents relating to the projects sanctioned by NABARD. A three member committee has been

constituted for receipt and processing the matters for road works approved under RIDF-VIII CRF. The committee was named as Tender Processing Committee (T.P.C.). The members of the committee have been indicated as (1) Superintending Engineer, Construction Circle, Pathankot, (2) Superintending Engineer, Construction Circle, Hoshiarpur and (3) the concerned Executive Engineer in whose jurisdiction the work falls. The guidelines and criteria to be followed for receipt and process of the tenders by the committee was also issued vide letter dated 24.12.2002 (Annexure R3). The Tender Processing Committee while scrutinizing the technical bid in the present case found that M/s. R.K. Mahajan & Company (respondent-5) fulfilled all the conditions except one condition i.e. the agency must have executed two works of Rs. 5.00 crores each or one work of Rs. 10.00 crores whereas the said agency has executed one work of Rs. 5.00 crores and two works of Rs. 2.50 crores each. As per the standard bidding criteria prescribed for works which cost Rs. 2.00 crores to Rs. 5.00 crores, the contracting agency must have executed two works of Rs. 2.00 crores or one work of Rs. 5.00 crores. Since only two agencies submitted their technical and financial bids and moreover the DNIT amount was marginally higher than Rs. 5.00 crores, the Tender Processing Commitee decided to refer the case to higher authorities so as to have competitive rates. It is stated that had the technical bid of M/s R.K. Mahajan & Company (respondent-5) been rejected on account of this marginal variation from the stipulated condition there would have been no competition. Besides, there is an extra saving to the government exchequer to the tune of Rs. 4,19,696/- which is evident from the financial statement (Annexure R4). It is stated that due to minor variation in the stipulated conditions and to have competitive rates, the case was referred to the Chief Engineer, Punjab as per guidelines contained in the letter dated 24.12.2002(Annexure R3) prior to the opening of the financial bid of the petitioner. Therefore, the question of favouring anybody does not at all arise.

4. In the written statement filed by respondent-5, a preliminary objection has been raised to the effect that the petitioner raised no-objection when the technical bid was opened on 10.7.2006 in his presence and thereafter when the financial bids were opened on 21.7.2006. Therefore, the petitioner-firm is estopped by its act and conduct to challenge the award of the tender in its favour. The filing of writ petition, it is stated, is nothing but an attempt to stop the carrying out the contract relating to the strengthening of Mamoon Madhopur road awarded to respondent-5. The petitioner is laying challenge to the commercial contract and the manner of its implementation which cannot be agitated under Articles 226/227 of the Constitution of India. It is further stated that the contract was awarded to respondent-5 only after opening of the financial bids. The Tender Processing Committee held that the tender offered by respondent-5 was the lowest and there was an extra saving of an amount of Rs. 4,19,696/-. The location of the plant of respondent-5 near the site of the contract and the past performance of respondent-5 while executing the earlier contract sanctioned in its favour in the previous year by the same department

also showed that the award of work in favour of respondent-5 was in the interest of the department and the public at large.

5. In the rejoinder filed by the petitioner to the written statement filed by respondents 1, 2 and 4, it is submitted that the respondents have tried to over-reach this Court. The letter dated 24.12.2002 (Annexure R3), it is stated, had been highlighted to show that the Chief Engineer could change the terms and conditions which were not. part of the notice inviting tenders and not part of the tender documents. It is further submitted that the original documents of tender may be called for and the responsibility for the manner in which an attempt had been made to mislead and over-reach this Court may be looked into. Even prior to the opening of the financial bid on 21.7.2006, the petitioner had sent a legal notice dated 14.7.2006 and objected to any change in the terms and conditions of the tender. In spite of the same, respondent-5 has. outrightly been favoured besides arbitrariness and mala fides are writ large on the face of it. In fact, after opening the technical bid and finding that respondent-5 is not eligible and qualified even to be considered, the terms and conditions have been changed so as to make ineligible contracting agency as eligible. Therefore, it is incorrect to say that the financial bid of the petitioner is not the lowest one. The petitioner in fact was the only eligible tenderer and even with respect to the financial bid, the petitioner submits that it is not known to negotiate and even at present he was prepared to match the same as the variation is very little. It is stated that the petitioner has been treated by the respondents with unfairness and arbitrariness. The other averments made in the written statement of respondents-1, 2 and 4 have been denied and those made in the writ petition have been reiterated.

6. Mr. Kanwaljit Singh, Advocate, learned Counsel for the petitioner has contended that it is the admitted case of the respondents that the terms and conditions of the notice inviting tenders have been varied and changed to suit the grant of tender to respondent-5. Therefore, the entire process of awarding the contract in question to respondent-5 is liable to be invalidated and the contract awarded to the petitioner as it is not incorrect to say that the financial bid of the petitioner is not the lowest and even otherwise, the petitioner-firm is open to negotiations with the respondent-department.

7. In response, Mr. A.S. Grewal, Additional A.G. Punjab appearing for respondents-1, 2 and 4 and Mr. A.K. Chopra, Sr. Advocate with Mr. Rajbir Singh, Advocate appearing for respondent-5 have submitted that the petitioner was not the lowest tenderer and, therefore, it has no Cause of action to invoke the extra-ordinary writ jurisdiction of this Court. In any case, it is contended that the contract awarded to respondent-5 had been awarded after following the due procedure. The petitioner-firm and respondent-5 submitted their technical bids as well as financial bids on 10.7.2006 and except for one condition, respondent-5 fulfilled all the conditions. Besides, the petitioner-firm was based near Chandigarh and did not have any plant in Gurdaspur district where the work is to be carried out. It is also submitted that the petitioner-firm has been allotted two

works which cost Rs. 6.65 crores and Rs. 6.68 crores respectively in Pathankot Circle during the year 2003-04 and they did not install any hot mix plant at the site. Taking all the facts and circumstances, the contract was awarded to respondent-5. It is submitted that it has almost completed the work.

8. We have given our thoughtful consideration to the matter. The dispute in the case relates to award of contract by respondents-1, 2 and 4 in favour of M/s. R.K. Mahajan & Company (respondent-5) for strengthening Mamoon-Madhopur road. The petitioner and respondent-5 had made their bid for the award of contract. Respondent-5 admittedly did not fulfil one of the conditions i.e. it had not executed two works of Rs. 5 crores each or one work of Rs. 10.00 crores. However, it had executed one work of Rs. 5.00 crores and two works of Rs.2.50 crores each. As per the standard bidding criteria prescribed for work which costs Rs. 2.00 to Rs. 5.00 crores, the contracting agency must have executed works of Rs. 2.00 crores each or one work of Rs. 5.00 crores. In the present case, only two agencies had submitted their technical and financial bids. Besides, the DNIT amount was marginally higher than Rs. 5.00 crores. The Tender Processing Committee, therefore, referred the case to higher authorities so as to have competitive rates. Had the technical bid of respondent-5 been rejected on account of the marginal variations from the stipulated condition, there would have been no competition. The case was referred to the Chief Engineer, Punjab in accordance with the guidelines dated 24.1.22002 (Annexure R3) prior to the opening of the financial bid of the petitioner. Therefore, it cannot be said that there was any question of favouring anybody. The tenders were admittedly called for Rs. 495.00 lakhs as per DNIT submitted to the Chief Engineer but due to change of use of bitumen CRMB 55 instead of 60/70 grade, the amount of DNIT marginally increased to Rs. 516.00 lakhs. Respondents-1,2 and 4 after considering all the pros and cons decided to award the contract to respondent-5 on account of which there has been a saving to the government exchequer to the tune of Rs. 4.19.696/- The change of the terms and conditions are, therefore, not glaring or irrational which would warrant interference of this Court in exercise of its extra-ordinary jurisdiction under Articles 226/227 of the Constitution and that too in the realm of contract. A Division Bench of this Court in Dongfang Electric Corporation v. Reliance Energy Ltd. and Ors. 2006 (1) R.C.R. 744 while considering the scope of judicial review in contractual matters relating to contracts with government in collaboration with private agencies and considering the rights of the owner of contract to change membership, held that unless the Court finds any material to hold that the decision is arbitrary or irrational or actuated by mala fides or is so outrageous in its defiance of logic or of accepted moral standards that no sensible person would have arrived at the same, the writ Court will not interfere. In Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , it was held that the Court can scrutinize the award of contracts by government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism within its inherent limitations. However, the terms of inviting tenders cannot be open to judicial scrutiny. It was

observed that if the project to be undertaken involved total cost of more than Rs. 100.00 Crores prescribing a condition of turnover of at least Rs. 20.00 crores, would not amount to any discrimination. Such conditions are relevant having a nexus with the object. learned Counsel for the petitioner, however, contended that it was observed in the said case that a company having turn over of say Rs. 2.00 crores may not have the financial viability for the project. However, in the present case, the variation is of a marginal nature and is not shown to be discriminatory or based on extraneous considerations.

9. The learned Counsel for the petitioner has also referred to the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, wherein it was held that whatever procedure the government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons would expose the authorities concerned. There is no dispute to the said proposition of law. However, in the said case, the entise procedare followed by the Commissioner Excise and the Government of Assam in accepting the tender of the appellant therein was found to be unfair and opposed to the norms which the government was liable to follow in such matters viz openness, transparency and fair dealing. The reasons given were duly indicated. In West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, referred to by the learned Counsel for the petitioner, the tender instructions to the bidders required them to fill in rates and prices for all items of works described in the Bill of Quantities both in figures and words. The requirement was to fill item rates and prohibited change in item rates after the tenders were opened. The tender contained repetitive errors because of computer malfunctioning. The rate of one work was repeated in column for the other work in the bid. The correction of rates and evaluation of bids by the authority by taking note of rates which were repetitive rates for different work items was held to be improper. The said case is, therefore, confined to its own facts. The learned Counsel for the petitioner has further referred to the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . The tender notices in the said case were called for running restaurant and snacks bar at the Airport. The notice inviting tenders required that only a person running a registered IInd class hotel or restaurant and having five years experience as such would be eligible to place a tender. This was a condition of eligibility and it was observed that it is difficult to see how the said condition could be said to be satisfied by any person who did not have five years experience of running a IInd class hotel or restaurant. It was observed that the test of eligibility laid down was an objective test and not a subjective one. However, while so observing, it was held that the decision of the first respondent therein accepting the tender of the 4th respondent would ordinarily have been set aside, but in view of the peculiar facts and circumstances, their Lordships observed that it would not be a sound exercise of discretion to upset that

decision and void the contract. In the present case, as has already been noticed, the work is almost complete and the remaining part is being carried out. learned Counsel for the petitioner has also referred to State of Karnataka and Another Vs. All India Manufacturers Organization and Others, ; wherein it has been held that the State or its instrumentalities cannot be allowed to act arbitrarily so as to cause harm and injury in discharge of its statutory duty flowing from a contractual obligation. A petition under Article 226 of the Constitution of India would be maintainable to direct performance of a statutory duty by the State or its instrumentalities. There is no dispute to the said proposition. However, the petitioner has failed to show any statutory right that it may have which has been violated or a corresponding obligation on the part of the State to accept only its tender and none other.

10. In Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, in respect of distribution of State largesse/government contracts, the Supreme Court considered the norms for valid State action and stressed the paramount importance of commercial considerations. The tender document in the said case required the bidders to have licence to act as surveyor or loss assessor under the Insurance Act to prequalify. The appellant company therein did not have such licence in its name but its chairman being so licensed, the Contracting Authority exercising its powers under the tender conditions to do so, waived the said technical requirement tor various reasons given by it. The appellant therein was awarded the contract on financial grounds since its bid for the work involved was the lowest. The work to the extent of 98% was of a clerical nature which required no licence under the Insurance Act. It was held that the Contracting Authority was justified in awarding the contract to the appellant-company therein primarily on financial/commercial considerations. In any case, it was not as if there was any breach of tender conditions. In such circumstances, no such public interest was involved which warranted interference under Article 226 of the Constitution of India. Besides, it was stressed that the modern trend pointed to judicial restraint in reviewing administrative action. It was observed that the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. 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. It was further observed that quashing of decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers 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. Besides, only when the Court comes to a conclusion that overwhelming public interest requires interference, should the Court interfere.

11. In the present case, the ratio of the above judgment in Master Marine Services Case (supra) aptly applies. As has already been noticed, the Tender

Processing Committee had referred the variations in the conditions regarding execution of two works of Rs. 5.00 crores each or one work of Rs. 10.00 crores to the Chief Engineer to have competitive rates. This was done before the opening of the financial bid and keeping in view the taci thai had the technical bid of M/s R.K. Mahajan & Company (respondent-5) been rejected on account of marginal variations from the stipulated condition, there would have been no completion. Besides, the administrative action was in public interest and there was a saving to the tune of Rs. 4,19,696/- which is evident from the financial statement (Annexure R-IV). There are other reasons also which were found favorable to award contract to respondent-5. These inter alia include that the petitioner was based near Chandigarh and it did not have any hot mix plant in the district. It would result in delay in shifting the plant that the petitioner had elsewhere and ultimately adversely affect the completion schedule of work as this work was wholly plant-oriented. Therefore, it was held by the Tender Processing Committee to seek approval of the Chief Engineer, Punjab, Patiala in accordance with the guidelines (Annexure R-III) to relax the above conditions in view of the marginal difference in stipulated condition and to have competitive rates. Accordingly the sanction was sought from the competent authority. The Chief Engineer vide this letter dated 19.7.2006 (Annexure R-VI) granted the necessary approval. The necessary relaxation of the condition for the two works of Rs. 5.00 crores each or one work of Rs. 10.00 crores to one work of Rs. 5.00 crores and two works of Rs. 2.50 crores each was accorded. The Chief Engineer is the competent authority to relax the conditions as stipulated in the tender documents as per guidelines dated 24.12.2002 (Annexure R-III). The financial statement revealed that the rates quoted by M/s. R.K. Mahajan & Company (respondent-5) generated a saving of Rs. 8,15,,647/- over the estimates whereas the petitioner''s rates generated a saving of Rs. 3,95,951/- over the estimates. In this manner, there was an extra saving of Rs. 4,19,696/- in case the bid of respondent-5 was accepted and has been ultimately accepted. This decision taken by the respondents is not shown to be in any manner irrational or perverse which would warrant interference of this Court in exercise of its power of judicial review under Article 226 of the Constitution of India. This Court in exercise of its extra-ordinary jurisdiction does not sit in appeal over the decision taken by the administrative authorities and it is not for this Court to evaluate or assess the award of contracts when it is not shown to be in any manner perverse or irrational. Therefore, no ground for interference with the award of contract by respondents-1, 2 and 4 in favour of respondent-5 is made out.

For the foregoing reasons, there is no merit in this petition and the same is accordingly dismissed.