

(2016) 09 GAU CK 0056

In the Gauhati High Court

Case No : Writ Petition (C) No. 343 (AP) of 2016.

RCM Infrastructure Ltd. Another - Petitioners @HASH State of Arunachal Pradesh and Others

Date of Decision : 16-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 BC 79 : (2017) 1 GauLR 303 : (2016) 4 GauLT 1129

Hon'ble Judges : Mrs. Rumi Kumari Phukan, J.

Bench : Single Bench

Advocate : Mr. S.S. Dey, Sr. Advocate, Mr. H.K. Das and Mr. R.J. Das, Advocates, for the Petitioners; Mr. Kardak Ete, Sr. Addl. AG, for the Respondents

Final Decision : Disposed Off

Judgement

Mrs. Rumi Kumari Phukan, J. - Heard Mr. S.S.Dey, learned counsel for the petitioner and Mr. K. Ete, learned Sr. Addl. Advocate General, Arunachal Pradesh.

2. The petitioner no. 1 is a Limited Company involved in construction of roads, bridges etc. on pan India basis and the petitioner no. 2 is an authorised representative of the company. The Government of Arunachal Pradesh, PWD issued notice to inviting re-tender no. PKB/NEC/PSI/2015-16/1 dated 17.1.2016 for "improvement up gradation of pakke-seijosa-itakhola road (62 kms) under NEC" at an estimated cost of Rs. 12175.00 lakhs. The petitioner participated in the E-tender process by submitting its bids. Although there were only two bidders including the petitioner fulfilling the eligibility criteria but by subsequent newspaper notification the respondent authorities dated 25.2.2016, date and time for opening the bid was deferred till 3.6.2016 due to some unavoidable circumstances. I hereafter on 3.3.2016 the Respondent No.2/Chief Engineer issued corrigendum dated 3.3.2016 and clause No. 1, 1a, 1(a)(i), 1(a)(ii), 1(a)iv), 1.21,7.1,7.3.,7.5, 7.6, and 12 were modified in suppression of original uploaded bill documents, whereby respondent authorities have substantially lowered the eligibility criteria that has been mentioned in the original bid documents. Thereafter on 8.3.2016 by order of respondent no.2 date of opening

tender was extended to 18.4.2016. On 10.3.2016, the Respondent No.2 issued an office order to the effect that online bids invited for the aforesaid works, as such portal is non-active on account of non-opening of bids as scheduled on 3.3.2016 and as such authorities decided to upload the same again on the website with the same bid with an extension of date of opening as per the order of the Gauhati High Court, Itanagar Bench, with a request to the earlier bidders to upload their bidding once again. In terms of the aforesaid office order the petitioner re-submitted their E-bid on 17.4.2016 along with all necessary documents for the eligibility criteria of the aforesaid tender. The respondents uploaded the bid submission on 17.4.2016. In the interregnum respondents issued the OM dated 6.5.2016 and they received hard copies of some documents from the bidders due to non availability of space provided in the web portal. On 2.7.2016 the petitioner came to know that the respondent authority on 30.6.2016 has uploaded the tender summary report whereby technical bid of the petitioner was rejected for not satisfying the minimum qualifying criteria.

3. Petitioner states that they submitted all the necessary documents to meet the minimum criteria to the satisfaction of the respondent authorities in evaluating the technical bid but the respondent authorities have rejected the technical bid in a vague manner without specifying the qualifying criteria on which he had failed to fulfil. By referring to the bid documents (Annexure-1) and the office corrigendum dated 3.3.2016, the minimum eligibility criteria for bidders for qualifying the financial bids it has been submitted that as per the new eligibility criteria also the petitioner fulfils all the eligible criteria.

4. By filing this petition under Article 226 of the Constitution of India the petitioner has challenged the legality of the decision of Board Meeting under No. CAP(WZ)/MEC-5 (NIT)/2016-17/101925 dated 29.6.2016 by which the technical bid of the petitioner was rejected. Further legality of the tender summary report dated 2.7.2016 uploaded by respondents and the legality and validity of entire tender process has been challenged on the contention that the respondent authorities rejected the technical bid of the petitioner in gross arbitrary exercise of administrative discretion conferred upon them. The petitioner has assailed that the satisfaction of the tender evaluation committee resulting in rejection of technical bid of the petitioner was not at all objective, but based on subjective satisfaction in unfair manner, which can be a subject matter of judicial review by this Court as there is prima facie illegality and arbitrariness in the decision making process by the respondents, resulting rejection of the technical bid of the petitioner. It has also been submitted that till date no letter of intent has been issued by the respondents and the petitioner has prayed for adequate relief as has been mentioned in the prayer portion.(i to x).

5. In their counter affidavit respondent nos. 1 to 5 have submitted that the technical bid of the bidders was opened on 18.4.2016 in presence of the intending bidders including the petitioners and thereafter the process of evaluation was undertaken on 28.6.2016. The technical bid of the petitioners was

rejected due to non fulfilment of minimum eligibility criteria. On 8.7.2016, the financial bid was opened for the technically qualified bidder. It is also contended that the main grounds of rejection of the technical bid was that the petitioners could not submit the experience certificate from the employer and blasting licence of the firm which were mandatory criteria of the NIT. Without blasting licence the Govt. Department could not select a tenderer in the State of Arunachal Pradesh as the State cannot take the responsibility of the loss of human being without insurance. The respondents further contended that despite the opportunity given to the petitioners to upload once again their bidding vide office order dated 10.3.2016, petitioners failed to submit experience certificate.

6. Reference has been made to clause 1.1.2 which stipulates that "intending bidder is eligible to submit the bid provided he has definite code from the appropriate authority, which shall be the satisfaction from the competent authority, of having satisfactorily completed similar works of magnitude. Thus it has been submitted that petitioners failed to submit documents like award letter and experience certificate issued by the employer of executing similar nature which forms the essential and mandatory" conditions of the tender.

7. Denying the allegations that there was any short of mala fide or arbitrariness while rejecting such technical bid of the petitioners it has been submitted that the documents submitted by the petitioner cannot be accepted as genuine which is not authenticated by the employer. In the instant case the contractors (Pan India Infrastructure Pvt. Ltd. and Maharashtra Hydrocarbon Products Pvt. Ltd., who issued certificates to the petitioners are private entity and also failed to submit supporting documents like award letter.

8. Refuting the allegation of petitioner it has been submitted that the tender evaluation committee has carried out the evaluation fairly, without any biasness or partiality. Out of 8 nos. of bidders, only 3 bidders have been qualified in the technical bid and 5 bidders were disqualified. Lastly it is submitted that such development project are meant for best interest of general public and expeditious execution is required to avoid cost escalation and already delay has occurred from the day of sanction so prayer has been to dismiss the petition.

9. Both the parties have submitted same set of documents from the sanction order towards the Board meeting dated 29.6.2016 and I have gone through those documents carefully.

10. The petitioners have filed affidavit-in-reply to the affidavit-in-opposition filed by the respondent nos. 1-5 controverting the contention so made by the respondents. It has been categorically stated that the petitioners cannot be attributed for the delay that has crept into for the conduct of the respondents themselves who in spite of approval of the project as on 2.6.2015 have issued the NIT on 4.12.2015 and thereafter issuing several corrigendum extended the date of submission of the Bid on 18.4.2016. Thereafter also they took 27 months for evaluation process. Further, referring to the Board meeting dated 29.6.2016

point no.3 it has been contended that the First reason for rejection of the technical bid of the petitioner has been shown as below:

"(3.1) The bidder M/s RCM In Ltd has submitted the work experience from the Maharashtra Hydrocarbon Pvt. Limited Mumbai 4000025 which is a Pvt. Company Ltd. The firm has not submitted any supported documents of subletting of contract agreement duly authenticated by the employer. But the check list for evaluation which was signed by the committee members does not support such findings who gave remark as "OK" against experience. Thus it is contended that in spite of this remarks the decision of the Committee to arrive at a different conclusion apparently arbitrary."

11. In paragraph 2 of the corrigendum dated 3.3.2016 issued by the respondents towards amending the minimum eligibility criteria mandated as follows:

"For this a certificate from employer shall be submitted along with the application incorporating clearly the name of the work, contract value, billing amount, date of commencement of the work, satisfactory" performance of the contractor and any other relevant information."

12. There was no any averment/disclosure that such a certificate cannot be given by a private company. In this context the petitioners have submitted certificate on 17.4.2014 wherein his employers M/s Essel Infraprojects Ltd. certified the name of the work, contract value, billing amount, date of commencement of the work, satisfactory" performance of the contractor/i.e. the petitioner) and all other relevant information. The NIT nowhere mandated for submitting any supported documents of subletting of contract agreement duly authenticated by the employer. The members of the Board intentionally choose to ignore the aforesaid letter (page 108 of the writ petition) and in fact the said certificate clearly explains the manner in which the petitioner was associated with M/s Maharashtra Hydrocarbons Products Private Ltd. and the said company cannot issue work experience certificate without completing the works on the part of the petitioners. That apart, in checklist for evaluation of substantive responsiveness technical bid has taken note of the aforesaid letter dated 17.4.2013 and gave remark "OK" against the column experience. Further the Board meeting dated 29.6.2016 reveals that the technical bid of the petitioner was rejected on two other grounds:

3 (i)The documents submitted for key personnel are also inadequate.

(ii) The documents submitted for blasters are without having valid licence. No supporting documents have been submitted for lab Engineer and lab technicians.

For better understandings the petitioner has submitted the relevant portion of the chart that was prepared from the checklist for evaluation of substantive responsive technical bids which reads as follows:

Sl no as Per the Check list (page 53 of the counter)

Qualifying Criteria as per the approved NIT and corrigendum issued

M/S RCM Infrastructure Ltd (petitioner)

M/S Anupam Nirman Pvt Ltd and M/S Sailaja Commercial Construction Ltd. (J V)
(selected bidder)

M/S PRL projects & Infrastructure Ltd. and M/s Gepong(JV) (selected bidder)

Madhucon Projects Ltd. and K.D. Construction (JV) (selected bidder)

4 (xiii)

Tandem 8-10 tone capacity roller

Ok

Ok

Not ok

Ok

4(xvii)

Tandem Roller

Ok

Ok

Not ok

Ok

4(xxiii)

Mechanical Grader

Ok

Not ok

OK

Ok

6(ii)

Deputy Project Manager BE(Civil + 10 yrs Exp.(5yrs in Road Construction)

Ok

Not ok

Ok

Ok

6(iii)

Site Engineer Diploma in Civil Engg+10 years Exp (5 years in road construction)

Ok

Not ok

Not ok

Ok

6(iv)

Plant Engineer BE Mechanical + 10 years Exp or Diploma Mech.+ 15 years experience.

Not ok

Ok

Ok

Ok

6(viii)

Blaster licence holder + 5 years experience.

Not ok

Not ok

Ok

Ok

6(ix)

Lab Engineer Degree in Civil Engineering +1 yr. experience.

Not Ok

Not Ok

Not ok

Ok

6(x)

Lab Engineer, Diploma in Civil Engineering + 2 yr experience.

Not ok

Not ok

Not ok

ok

6(xi)

Lab technician with 3 years experience.

Not ok

Not ok

Not ok

Ok

Total Not Ok

5

6

6

13. It has been submitted that the above chart clearly demonstrates that selected two bidders 3(i) and 3(ii) also did not have blasters licences nor did they have key personnel which signifies that the above mentioned 3(i) and (ii) do not fall under the minimum eligibility criteria. It has been contended that there cannot be different yardsticks for other vis-a-vis the petitioner and this reflects the arbitrariness in the entire tender process. Thus according to the petitioner he has made out a prima facie case of arbitrariness against the said respondents which has vitiate the entire tender process.

14. By filing an additional affidavit the petitioner has brought on record that the Chief Engineer issued letter dated 8.7.2016 wherein it has been stated that financial bids of the qualified technical bidders for the NIT No. PKD/NEC/ES1/2015-16 was open on 8.7.2016 on 11.00 Hrs in the office of Chief Engineer with a declaration that the financially qualified bidder shall be decided in due course of time after duly evaluating the financial bids vide Annexure-16.

15. Thus matters from records reveals that after dealing the financial bid financial bid was also opened. It is to be noted that as per the Board meeting dated 29.6.2016 the Board recommended for opening financial bid on 8.7.2016 at 11.00 Hrs. So such opening of financial bid is within the tenor of the official declaration and coincidentally the case was also filed on 8.7.2016.

16. I have considered the submissions so made by the learned counsel for both the parties and considered all relevant documents filed by the parties. So far as the rejection of the technical bid of the petitioner as it reflects from the Board meeting dated 29.6.2016 that basically it was rejected only on two accounts that the petitioner failed to submit proper experience certificate as well as documents pertaining to sub-letting of contract agreement duly authenticated by the employer and also for inadequate submission of documents for key personnel.

Another ground for rejection was for having no valid blasting licence as well as no supporting documents regarding Lab Engineer and Lab Technician.

17. Learned Sr. Addl. Advocate General Mr. Ete in course of his argument has emphasised the same aspect that the experience certificate produced by the petitioner is not proper and highly insufficient to fulfil the criteria of eligibility as per the terms of the NIT. It has also been argued that the petitioner fails to produce certificate from his employer and the respondent authorities are within their discretion to reject such documents which is not upto the mark.

18. On the other hand, the learned counsel for the petitioner has vehemently opposed such contention of the learned counsel for the respondents and by referring to the documents at page 108 i.e. the experience certificate, it has been pointed out that the said certificate (and all other documents annexed with the record) is clear enough to show all details that its employer is M/s Essel Inffaproject Ltd who has certified about the subletting of works to the petitioner and date of commencement of works, contract value and the satisfactory completion of the works by the petitioner company. As such the respondent authority is not at all justified to ignore such document by creating another definition of employer.

19. After going through the deliberation of the learned counsel for both the parties and the documents submitted, particularly the checklist for evaluation, wherein all members of the committee has found the "experience" of the petitioner as "OK" as has been mentioned in the list, I found no any substance to the submission of the respondents while holding the petitioner not "OK" in their Board meeting dated 29.6.2016.

20. Regarding other contentions of the petitioner on the basis of the aforesaid checklist it is found that the selected bidder nos. 2 and 3 also have no blaster licence nor they have key personnel for which they are also shown as "not OK" which is at par with the present petitioner (the chart mentioned above which is prepared on the basis of checklist page 53 to 58). In such eventuality, how the Board meeting can find those two bidder nos. 2 and 3 fulfilling the eligibility criteria is itself discriminatory and per-se illegal. The aforesaid checklist shows that the petitioner was shown "not OK" against the column of blaster licence and other bidders 3(i) and 3(ii) namely M/s Anupam Nirman Pvt. Ltd. and M/s Sailaja Commercial Construction are also found "not OK" on the same aspects. Again the other bidder no.3 is also not found "OK" in three column against Lab Technician and Lab Engineer. But in spite of such disparity the other two persons were selected by showing reasons that they have fulfilled most of the minimum qualifying criteria, which perhaps cannot be maintained as not based on sound reasoning. While deciding the technical bid the Board has relied upon the aforesaid check-list. Such a decision which is contrary to the documentary evidence indicates that there was no proper application of mind rather arbitrary use of official procedure.

21. At the time when the learned counsel for the petitioner argued showing the disparity in the checklist as discussed above, the learned Sr. Addl. A.G has made a submission that such entry in the checklist showing not "OK" in respect of those selected bidders and showing "OK" in respect of petitioner as has been pointed above is a typing mistake and they may be allowed to correct the same. Such a contention was seriously resisted by the learned counsel for the petitioner, Mr. Dey that the checklist which was signed by the 5 (five) members of the Committee cannot be allowed to be correct at this stage whereas everything has been finalised on the basis of the said checklist by the said members. I found sufficient force in the submission of the learned counsel for the petitioner and accordingly I prefer to reject the contention of the learned counsel for the State Respondents.

22. Referring to a decision of *Michigan Rubber (India) Ltd v. State of Karnataka & Ors.*, 2012 (8) SCC 216, the learned counsel for the respondent has contended that scope of court's interference by way of judicial review" is very restricted when the state acts reasonably, fairly and in public interest. That apart the respondent authority has discretionary power to set and decide the eligibility criteria in the tender and greater latitude is to be conceded to the state authorities in matters of formulating condition as of tender and awarding contracts. On the other hand the learned counsel for petitioner has relied upon a decision of the Hon'ble Apex Court reported in 2004 (4) SCC 19, *Directorate of Education & Ors. v. Educomp Datamatics Limited & Ors* and a recent order of the Hon'ble Apex Court in Civil Appeal no. 8004/2016, *Central Coalfield Limited & Anr. v. SLL-SML(JV) Consortium & Ors.* and has relied upon the observation of the Hon'ble Apex Court that scope of judicial review can be invoked under Articles 226 and 299 of the Constitution when arbitrary, discriminatory and biasness of the respondent authority is made out. Further, in *Tata Cellular v. Union of India*, (1994) 6 SCC 5651 also gave importance to the lawfulness of a decision not its soundness. If an administrative decision such as a deviation in terms of the NIT is not arbitrary, irrational, unreasonable or bias, the court will not judicially review the decision taken. Similarly the court will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. Following the aforesaid decision in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 the matter has been dealt with in the following words: Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The court laid down the following questions that ought to be asked in such a situation. It was said.

Therefore a court before interfering in tender of 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

(ii) Whether the process adopted or decision made is so arbitrary or 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.

(iii) Whether public interest is affected. If the answers are in negative, there should be no interference under Article 226 of the Constitution. On asking these questions in the present scenario conducted by the respondent authorities it is apparent that the decision taken by the respondent authorities is certainly not rational and arbitrary and hence the decision is not at all lawful and sound reasoning.

23. In view of the discussion and findings above about the disparity of the Board's meeting as regards the selection of bidders against the finding contrary to the Checklist has vitiated the entire findings of the Board. Obviously they have not applied the same yardstick to all the bidders while assessing their eligibility criteria. All the pleas taken by the respondent authorities are flouted, in view of such disparity between the checklist and findings by the Board Meeting and I am of the opinion that any further discussion on any of the deliberation became unwarranted. Accordingly I am of the view that it is fit case to invoke the judicial review which I accordingly do. The decision of the board meeting held on 29.6.2016 under no. CAP(WZ)/MEC-5 (NIT)/2016-17/101925 and all other consequential orders and findings made by the respondent authority as regards the aforesaid NIT (including the financial bid) are hereby quashed and set aside. Respondent authority will issue fresh NIT accordingly and in that event all the earlier participants including the petitioner can take part. The petition is disposed.