
(2014) 12 OHC CK 0059

In the Orissa High Court

Case No : Writ Petition (Civil) No. 22824 of 2014

Sadhav Off-Shore

APPELLANT

Vs

Board of Trustees of Paradip Port Trust

RESPONDENT

Date of Decision : 17-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 12 OHC CK 0059

Hon'ble Judges : Amitava Roy, C.J.; Akshaya Kumar Rath, J

Bench : Division Bench

Judgement

Amitava Roy, C.J.—The petitioner which is a participating tenderer in a process initiated by the Tender Call Notice MD/ACCTS/WK-R-5/2014/1397 dated 06.08.2014 for settlement of "05th Dry Docking/Repairs of TUV PARVATI of Paradip Port Trust" seeks judicial redress as the opp. party-Paradip Port Trust (for short, hereinafter referred to as "the PPT") contemplates to forsake the exercise and initiate a fresh one.

2. We have heard Mr. S.K. Sangneria learned counsel for the petitioner and Mr. Partha Mukherji, learned counsel for the PPT.

3. The petitioner, which claims to be a company carrying on business of repair, etc. and dry docking on the shore and a part of the PPT along with others, did respond to the above tender call notice by complying with the necessary formalities and making essential deposits in time. In terms of the tender call notice, the last date of downloading the tender quotation was 4.9.2014. The petitioner availed the tender documents from the website of the opp. party and downloaded the tender quotation along with the required documents and submitted the same in time. Thereafter, the tender quotation of the petitioner along with 4-6 others were opened on 9.9.2014 and on a scrutiny of their technical bids that of the petitioner along with two other firms, i.e., Bharat Docking and Engineering of Haldia and Bhawan Engineering works of Paradip were adjudged to be responsive. Subsequent thereto, the price bids of the

petitioner and other two technically qualified tenderers were opened on 16.10.2014, whereupon, it transpired that the petitioner was the lowest valid tenderer with its quoted price bid of Rs. 67,69,570.00p. The Tender Committee comprising of responsible officials of the PPT, after considering all relevant aspects recommended the petitioner for execution of the work. However, as inexplicably the PPT delayed the issuance of the work order, the petitioner made necessary enquiries and could eventually learn from reliable sources that the PPT being interested in some other tenderer was in contemplation of cancelling the process. By notice No. MD/ACCTS/WK-R-5/2014/2001 dated 21.11.2014 issued by one Bablu representing himself to be the Sr. Marine Engineer, PPT, the tender notice dated 06.08.2014, was discharged. The petitioner has sought refuge of this Court seeking a direction to the PPT to execute the agreement with it for the works involved.

4. The opp. party in their counter while admitting the issuance of the tender call notice dated 06.08.2014 has admitted that the same was discharged by the impugned order dated 21.11.2014 without incurring any financial liability. According to the opp. party, the Tender Committee had recommended for issuing the work order in favour of the petitioner and that the said recommendation was also approved by the Chairman, PPT. The opp. party has asserted that meanwhile M/s. Shri Mankeswar Mechanical Works, Mumbai, a disqualified bidder did submit a complaint on 12.10.2014 with the Chief Vigilance Officer (CVO), Paradip Port Trust, stating that though it had the required qualification for the tender, due to space constraints on the internet, it was unable to submit the necessary documentary proof thereof. It sought for a chance to re-submit the necessary documents. According to the opp. party, the said request was forwarded by the Chief Vigilance Officer, PPT to the Chairman of the organization and the same was ordered eventually to be laid before the Tender Committee for consideration. The opp. party has stated that the Tender Committee, accordingly in its meeting held on 03.11.2014, on a threadbare consideration of the issue, came to the conclusion that the disqualified bidder i.e. M/s. Shri Mankeswar Mechanical Works, Mumbai, had unnecessarily uploaded the scanned copies of more than 20 pages of irrelevant documents on the internet for the purpose of the tender notice and recorded as well that it had failed to upload the documents which were required as per the pre-qualification norms. While observing that there was adequate space on the internet for uploading the required documents, the Tender Committee concluded that the complaint of M/s. Shri Mankeswar Mechanical Works, Mumbai, was bereft of any merit and thus recommended that the work be awarded to the petitioner who was the lowest bidder.

5. The counter of the opp. party further discloses that the Tender Committee deliberated as well on the aspect of discharge of tender and opined that in case such a course was adopted, the work would be held up by 4-5 months, which might lead to termination of the Classification Certificate of the TUG by Indian Register of Shipping. That on the discharge of the tender, the PPT would incur loss of Rs. 4-5 lakhs in re-tendering the process was also mentioned. The Tender

Committee thus recommended to further the process underway. The opp. party also mentioned that the matter was referred for legal advice, which too endorsed the conclusion of the Tender Committee.

6. The answering opp. party has averred that the matter was thereafter laid before the Chairman, PPT with a request to ignore the complaint of M/s. Shri Mankeswar Mechanical Works, Mumbai, and to award the work in favour of the petitioner. The Chief Vigilance Officer, PPT, however, with reference to the circular No. FA/PA/Misc/02/2013/1479 dated 20.09.2014 observed that in terms thereof in order to encourage competition, in situations, of deficiency in submission of any document by any bidder, the issue was to be placed before the Tender Committee. The Chairman, PPT, on the recommendation of the Chief Vigilance Officer, PPT, however, ordered for discharge of the tender and accordingly the impugned order was passed.

7. Mr. Sangneria, learned counsel for the petitioner, has emphatically argued that as the complaint of M/s. Shri Mankeswar Mechanical Works, Mumbai, on a scrutiny of all relevant aspects had been rejected, the opp. party in law ought to have settled the work with the petitioner, it having been adjudged to be the valid lowest tenderer and technically qualified for the purpose. According to the learned Senior Counsel, reference to the Circular dated 20.09.2014 was wholly misconceived and that the impugned order of discharging the tender notice is patently illegal, arbitrary and prompted by extraneous considerations. The learned Senior Counsel submitted that as there is no justification in law to discharge the tender notice dated 06.08.2014, it is a fit case where the Court would issue a writ of mandamus to the opp. party to award the work involved to the petitioner.

8. Per contra, Mr. Mukherji, learned counsel for the opp. party-PPT, has insisted with reference to the minutes of the proceedings of the Chairman, PPT, preceding the issuance of the impugned order, that it would be apparent therefrom that the decision assailed had been taken to ensure fairness and transparency in action more particularly in view of the mandate of the circular dated 20.09.2014. While admitting that the complaint of M/s. Shri Mankeswar Mechanical Works, Mumbai, had been found on scrutiny to be de hors any merit, the learned counsel has maintained that the impugned action having been taken to enlarge the zone of competition and to secure a level playing field for the eligible bidders, this Court in exercise of its power of judicial review would not intervene.

9. We have traversed the pleaded facts and the documents on record. The arguments advanced have been analyzed as well. It is admitted by the opp. party that in the process initiated by the tender notice dated 06.08.2014 and conducted in accordance with the tender stipulations, the petitioner had been at the penultimate stage thereof adjudged to be the valid lowest tenderer. It is a matter of record that on the date on which the process was initiated i.e. 06.08.2014 the circular dated 20.09.2014 was not in existence. The process got stalled on the complaint lodged by M/s. Shri Mankeswar Mechanical Works,

Mumbai, which put forward the grievance of want of adequate internet space for downloading requisite documents in support of its eligibility. As admitted by the opp. party, this plea on verification was found to be without any merit and the complaint was thus rejected. The circular dated 20.09.2014 was noticed at this juncture. For ready reference the relevant portion of the circular dated 20.09.2014 is quoted herein below:

"It has been observed that most of the tenders are not being decided as the firms are not qualified due to non-submission of required documents as per the Notice Inviting Tender (NIT) during uploading even though these documents are available with the bidders at the time of submission of the bid for which competitive bids are not obtained.

In view of this, the Circular of Vigilance vide No. VIG(F)10/82-III/50 dtd. 28.01.2014, the clause 5(e) is hereby modified to encourage more competition which is as below:

In case of deficiency in submission of any document by the bidder at the time of submitting the bid, the same may be placed before the tender committee for a view. The tender committee will consider the gravity of individual issue and if required the bidder will be asked to submit the documents which will be considered for the purpose of evaluation. The documents which are in possession with the bidder at the time of bid submission only shall be considered for re-submission. The Department shall take action on the view of the Tender Committee and there after the matter shall be placed to Tender Committee in relation to compliance of the deficiencies, which shall be considered by the Tender Committee during evaluation."

10. It would be apparent from the above text that by this circular an opportunity to a defaulting tenderer for its lapse in not submitting required documents during uploading was sought to be provided by referring its case to the Tender Committee which, if satisfied, about the genuineness of its ground for its failure could grant the bidder a chance to submit the documents for the purpose of evaluation in case those were in possession of the said bidder at the time of submission of the bid. The circular amongst others mentions that the same effected modification of clause 5(e) of the earlier of the Circular No. VIG(F)10/82-III/50 dated 28.01.2014 to encourage competition. The relevant extract of the minutes of the proceeding before the Chairman, PPT, which eventually culminated in the impugned order also deserves to be quoted;

"As per CVC circular No. 21/05/06 (placed at 133/C) this complaint has been accepted by the undersigned for consideration.

The present case was intimated to DC PPT (Chairman of Tender committee for this bid), by Chairman PPT on dated 22 October 2014 for examination by Tender Committee and the same was deliberated in the tender committee meeting held on dated 03.11.2014, where the complaint was recommended to be dropped whereas in tendering process for another tender No. MD/SME/Works/07/12/273

dated 18.08.2012 (details of which are placed at 134/c to 136/c), when circular dated 20th September, 2014 was not issued, and terms and conditions (Sl. No. 2 of tender conditions) of the said tender says "Offer shall be rejected if offer is submitted without EMD and cost of Tender documents" the Dy. Conservator, PPT had taken a decision contrary to the condition of tender that "we may request both the firms to submit the shortfall documents i.e. EMD, Paper cost, Dealership Certificate, etc, within Five days" after the opening of the bid. There cannot be different standards for same tendering process."

11. As the text of this extract would reveal, the Chairman, PPT while noting that the Tender Committee had rejected the complaint of M/s. Shri Mankeswar Mechanical Works, Mumbai, referred to another process relatable to tender notice No. MD/SME/Works/07/12/273 dated 18.08.2012, when the Circular dated 20.09.2014 was not in operation and in which a decision was taken by the Deputy Conservator, PPT, contrary to the tender condition mandating rejection of an offer submitted without E.M.D. and the cost of tender documents. The Chairman, PPT, was thus of the view that there could not be "different standard for the same tender process". It was on this ground that he recommended that the tender notice dated 6.10.2014 be discharged and a fresh tender be invited.

12. Even assuming that the circular dated 20.9.2014 was applicable to the exercise initiated by the tender dated 6.8.2014, having regard to the decision of the tender committee rejecting the demur of M/s. Shri Mankeswar Mechanical Works, Mumbai, on merits, it passes our comprehension as to how the Chairman, PPT could, in the facts of the present case, draw an analogy from a distinctly different tender process and a decision taken therein in the context thereof to conclude that a fresh tender needs be invited. As the two processes referred to in the above minutes of the proceedings of the Chairman, PPT are vividly distinguishable, the ground recorded by the Chairman, PPT that two different standards for the same tendering process involved cannot be sustained as a justification to discharge the tender process does not commend for acceptance. There appears to be, in our estimate, no perceptible nexus between the two processes to warrant such a conclusion. The decision making process leading to the discharge of the tender dated 6.8.2014 thus is informed, as the records reveal, with irrelevant and non-germane considerations rendering it illegal, irrational and improper, thus exposing it to be interfered with by this Court in the exercise of its writ jurisdiction under Article 226 of the Constitution of India. We are thus of the unhesitant opinion that in the facts of the present case even conceding a free play in the joints to the opp. party in the exercise of the administrative discretion involved, it is a case of patent illegality and arbitrariness accompanied by lack of objectivity, relevance and reason. The impugned decision of discharging the tender notice dated 6.8.2014 and the related process is thus interfered with. There being nothing overwhelming on record to render the petitioner unsuitable for the work, it would be up to the opp. party following this adjudication to take consequential steps in the interest of expeditious execution of the work and loss of public revenue, however, strictly in

accordance with law.

The petition is thus allowed.

Akshaya Kumar Rath, J.

I agree.