
(2017) 07 RAJ CK 0092
In the Rajasthan High Court
Case No : 1995 of 2017

Shree Ercon Prefabs

APPELLANT

Vs

The State of Rajasthan & Ors.

RESPONDENT

Date of Decision : 28-07-2017

Acts Referred:

Citation : (2017) 07 RAJ CK 0092

Hon'ble Judges : Vijay Bishnoi

Bench : SINGLE BENCH

Advocate : Jitendra Maheshwari, Lalit Parihar, Prithvi Raj Singh, Dinesh Ojha, Ajeet Singh Shekhawat

Judgement

1. The petitioner, which is a Small Scale Industry registered with the Directorate of Industries Rajasthan holding Udyog Aadhar Number (UAN) issued by the Ministry of Micro, Small and Medium Enterprises, Government of India, manufacturing Prefabricated Structures, Accomodations, Porta Huts etc., has filed this writ petition being aggrieved with the communication/decision dated 10.02.2017 (Annexure-P/5) issued by the respondent Nos.2 and 3, whereby the technical bid of the petitioner, pursuant to the E-tender dated 29.12.2016 (Annexure- P/1) issued by respondent No.2, was not accepted and the technical bid of respondent No.4 was accepted.

2. Brief facts of the case are that the respondent No.2 invited tenders for various products including Porta Huts vide Etender (Annexure-P/1) dated 29.12.2016. The petitioner participated in this E-tender and filed its technical bid for supplying Porta Huts. The last date for submission of the E-Bid was 02.02.2017 and the bids were to be opened on 02.02.2017 at 4:00 P.M. As per the petitioner, it received an E-mail from the respondent No.2 dated 06.02.2017 in the evening, which was opened by it in the next morning i.e. on 07.02.2017. In the said E-mail (Annexure-P/2), the petitioner was asked to submit scanned certificate of the Central Building Research Institute, Rurki (for short "the CBRI" hereinafter) by 11:00 A.M. on 07.02.2017 in respect of insulated panels proposed to be

supplied by the petitioner. The petitioner replied to the said E-mail on 07.02.2017 vide Annexure-P/3 and claimed that certificate from the CBRI can be filed only when the ordered material is manufactured as per the specification, meaning thereby that such certificate is not required to be submitted along with the Bid. In the said letter, the petitioner has also questioned the credibility of CBRI certification submitted by respondent No.4 along with its bid. On 07.02.2017, vide another mail sent to respondent No.2, the petitioner sent its certification of various parameters for tests performed on the panels manufactured by it from Bharat Sanchar Nigam Limited.

3. As per the petitioner, on 10.02.2017, it found a document duly digitally signed uploaded on the internet giving the decision of the Purchase Committee accepting the bid of respondent No.4 and as per the same, except the bid of respondent No.4, other bids were rejected. Being aggrieved with the action of the respondents of rejecting its bid, the petitioner has filed this writ petition seeking following reliefs: "It is, therefore, respectfully prayed that this writ petition may kindly be allowed and by writ, Order, Direction, the Hon"ble Court:

(i) May please allow the Writ Petition. (ii) May please quash & set aside the impugned Communication/Decision dated 10/02/2017 (Annexure - P/5) issued/ passed by the respondent Authorities no.2 and 3, vide which the Bid of respondent no.4 has been accepted in the subject-Tender dated 29/12/2016.

(iii) May please declare that the petitioner is fully entitled to get the subject-Bid accepted in the matter of subject-Tender dated 29/12/2016 (Annex.-P/1) and further may please order for opening the Financial Bid submitted by the petitioner.

(iv) May please declare that the Tender Conditions once made public, cannot be allowed to relax/alter/change by way of any addition/subtraction, at the time of proceedings of Tender Allotment.

(v) May please pass any other Order/Direction in favour of the Petitioner, which is deemed proper in the present set of facts & circumstances.

(vi) May please award the cost in favour of the petitioner." 4. It is also noticed that from perusal of Ground (f), (h) of the writ petition and paras No.4 and 9 of the rejoinder, the petitioner has also questioned the wisdom of the respondents in putting the condition in the bid document regarding submission of the evaluation certificate by the CBRI in respect of insulated panels proposed to be supplied.

The case as set up by the petitioner in this writ petition is this that from the tender conditions and the specifications, it is clear that there was no requirement of furnishing an evaluation certificate by the CBRI in respect of the insulated panels which are manufactured by any bidder and proposed to be supplied. It is contended that even if such certificate is required then only the same is required at the time of supply of those insulated panels if the order is placed and not

before that.

5. It is also contended that though from perusal of the terms and conditions of the E-tender and Appendix-E of the tender, it is clear that there is no requirement of submission of evaluation certificate by the CBRI for the insulated panels along with E-bid and the respondents have illegally added the said condition for extending undue advantage to the respondent No.4. Several questions have also been raised about the CBRI evaluation certificate submitted by respondent No.4 along with its bid on the ground that the same is of the year 2009 and is in respect of only 25 mm panel, whereas the thickness of the panel required under the tender is 40 mm. It is also contended that the respondents have illegally taken into consideration the CBRI evaluation report submitted by the respondent No.4 while accepting its bid.

6. As stated earlier, the petitioner has also questioned the wisdom of the respondents of putting a condition of furnishing CBRI evaluation certificate for the insulated panels. The petitioner has also questioned the process adopted by the respondents of opening of the financial bid and alleged that the procedure adopted by the Purchase Committee ? respondent No.3 in opening the financial bid of the respondent No.4 is violative of provisions of Rajasthan Transparency in Public Procurement Act, 2012 (for short "the Act of 2012" hereinafter) and Rajasthan Transparency in Public Procurement Rules, 2013 (for short "the Rules of 2013" hereinafter).

7. In support of the above contention, learned counsel for the petitioner has placed reliance on decisions of Hon'ble Supreme Court rendered in Reliance Energy Ltd. and Anr. vs. Maharashtra State Road Development Corporation Ltd. & Ors., SCC (2007) 8 SCC and Chhatisgarh State Industrial Development Corporation Limited & Anr. vs. Amar Infrastructure Limited & Ors., (2017) 5 SCC 387.

8. The stand of the State is this that as per Appendix-E enclosed with the E-tender, it is clear that the firm intending to supply the Porta Huts is required to submit a certificate, on the basis of certification issued by the CBRI in respect of insulated panel proposed to be supplied. It is contended on behalf of the State that as the petitioner has not submitted the required certificate of CBRI along with its bid, it was requested to send the same vide letter dated 06.02.2017 (Annexure-P/2), however, when the petitioner has failed to furnish the said certificate, the respondent No.3 has rightly rejected the bid of the petitioner and of one another bidder, who has also failed to furnish such certificate and accepted the bid of the respondent No.4, who has furnished the said certificate along with its bid.

9. It is further contended that the CBRI certificate issued by respondent No.4 in respect of 25 mm panel cannot be ignored for the reason that it certifies only the insulated panel of 25 mm thickness because 25 mm thickness is the minimum thickness and for the thickness of more than 25 mm, no separate certificate is

required. Respondent Nos. 1 to 3 have also denied the violation of any of the provisions of the Act of 2012.

10. Learned counsel for the respondents-State has also contended that the petitioner had an alternate remedy to file an appeal as provided under the provisions of the Act of 2012 and Rules of 2013, which he did not avail and, therefore also, the writ petition of the petitioner is not liable to be entertained.

11. Reply to the writ petition has also been filed on behalf of respondent No.4 justifying the action of the respondents of accepting its bid.

12. In support of the above contentions, learned counsels for the respondents have placed reliance on decisions of Hon"ble Supreme Court rendered in Siemens Public Communication Networks Private Limited & Anr. vs. Union of India & Ors., (2008) 16 SCC 215, Rashmi Metaliks Limited and Anr. vs. Kolkata Metropolitan Development Authority & Ors., (2013) 10 SCC 95 and in Sri Ram Builders vs. State of M.P. & Ors, [2014] 4 Supreme 746. Learned counsels for the respondents have also placed reliance on decision of this Court rendered in Smt. Anju Prajapat vs. The Hindustan Petroleum Corporation Ltd. & Anr. (SBCWP NO.5837/2014 decided on 21.09.2015).

13. Heard learned counsels for the parties and perused the material available on record.

14. The scope of judicial review in contract matters has been defined by the Hon"ble Supreme Court from time to time in various decisions. Ultimate conclusion of the decisions of the Hon"ble Supreme Court is that the High Court can interfere in the contractual matters when the action of the tendering authority is found to be malicious, discriminatory or the process adopted or decision made is so arbitrary and 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. It has also been held that where the public interest is affected, the court can also interfere in the contractual matters.

15. A Three Judge Bench of the Hon"ble Supreme Court in Tata Cellular vs. Union of India, reported in 1994 (6) SCC 651 at paras 77 and 94, has held as under: "77. The duty of the court is to confine itself to the question of legality. Its concern should be:

(1) whether a decision-making authority exceeded its powers? (2) committed an error of law,

(3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached or,

(5) abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the

grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decisionmaking power and must give effect to it.

(ii) Irrationality, namely, wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secy. of State for the Home Deptt., ex Brind* [[1991] 1AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention. 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 reviews 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 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."

16. Relying on the decision rendered in *Tata Cellular vs. Union of India* (supra), the Hon'ble Supreme Court in *Jagdish Mandal vs. State of Orissa & Ors.*, (2007) 14 SCC 517, has held as under: "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially

commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or 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 Whether the process adopted or decision made is so arbitrary and 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."

(ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

17. In the light of the above principle, if we examine the facts of the present case, it would appear that along with E-tender dated 29.12.2016 (Annexure-P/1), the main conditions of the tender has also been specified and out of the said conditions the Condition Nos.16 and 17, which are very relevant, read as under: "VERNACULAR MATTER OMITTED"

18. Along with E-tender (Annexure-P/1) Appendix-E is also appended. The same is reproduced hereunder: "VERNACULAR MATTER OMITTED"

19. SPECIFICATION FOR PUF INSULATED PREFABRICATED PROTA HUT FOR 30 PERSON

Description The prefabricated shelter shall be suitable for mounting on ready made concrete floor/Pillars the components shall be fabricated at factory for easy to assembly at site Size of Shelters a) Porta Hut for 30 Persons : 21.0mt X 9.0mt X 3.0mt ? as per enclosed drawing M.S. Structure The supported M.S. Structure like column, truss/portal truss, purlin, tie member etc shall be made out with suitable size rolled/ tube/ folded sections. The structure shall be painted with One coat of red oxide as primer and two coats of good quality oil paint. PUF

Insulated wall The insulated walls shall be made of Sandwich panels, The sandwich panels shall be made out of 0.35mm. Thick Pre coated steel sheet on both side of PUF(Polyurethane foam) The total thickness of panel shall be 40mm. The panels are join together by tongue and groove method. PUF insulated Roof The insulated Roof cladding shall be done with Sandwich type panels.

The panels shall be made out with 0.35mm thick Pre coated Profile steel sheet at outer side and 0.35mm thick Pre coated plain sheet at inner side of PUF(Polyurethane foam) total thickness of roof panel shall be 30mm. Suitable ridge shall be made out from Pre coated steel sheets. The roof shall have minimum projection of 0.3m from the eaves wall and 0.15m from the gable walls.

Door The door frame shall be made out with MS Folded section. The sutter shall be made out with Pre coated steel. Sheets both side of PUF. The door shutter shall be fixed with the door frame hinges. The door shulter shall be provided with 1 No. aldrops at out side, 1 no. Tower bolts at the center inside and handles shall be provided on both the sides.

MS Openable window The frame for openable type window shall be made from pressed steel using 1.5mm thick. Shutter shall be made out of steel hollow box profile of 1.25mm thick. The window shall be complete with all necessary hardware for locking from inside Clear glass sheet of 4mm thick shall be fixed using glass putty. The frame shall have grills made from MS square bar of 10mm having equal spacing with mosquito mesh. Certified Insulated panel evaluation is evaluated by CBRI (central building research institute) roorki Plinth & Flooring Foundation & Plinth work to be done with civil construction material which is locally available. The main load bearing wall foundation shall be maximum 600mm deep. The Kota Stone (600 X 600mm) shall be laid over 100mm thick PCC in plinth area for flooring. The Plinth height will be maximum 300mm from ground level. All civil work shall be carryout with standard engineering practice. Electric Fitting Points for Ten Fan, Ten Tubelight with wiring.

20. Though copy of the Appendix-C containing general and specific conditions for the different categories of tenderers has not been produced by the petitioner along with the writ petition, however, the same is made available by the counsel for the respondent Nos. 1 to 3. The condition No.12 of Appendix-C reads as under: "VERNACULAR MATTER OMITTED"

21. From the above reading of the main conditions of Etender dated 29.12.2016 (Annexure-P/1) and the general and special conditions contained in Appendix-C of the tender, it is clear that while submitting bid in response to the E-tender (Annexure-P/1) every bidder was required to furnish a certificate of evaluation by the CBRI for the insulated panels proposed to be supplied. If the petitioner had any doubt about the said condition, it was open for him to seek clarification from the Director General of Police as per condition No.12 of Appendix-C. It is also to be noticed that in the Appendix-C, condition No.14(iv) speaks that if the tender is not submitted in accordance with the specification given in Appendix-E, the

tender will be cancelled.

22. The averments made by the petitioner in para 3 of the rejoinder to the effect that condition of producing certificate of insulated panel evaluated by the CBRI in Appendix-E only means "material insulated panel is already evaluated by the CBRI (which evaluation is some time done when any new materials are introduced for use in place of traditional materials)", is contrary to the stand taken by the petitioner in the writ petition as well as in its reply filed in response to the respondents' letter dated 06.02.2017 (Annexure-P/2), whereby the petitioner was asked to furnish CBRI certification, because the petitioner in its reply (Annexure-P/3) has categorically stated that the said certificate will be furnished when the order for supplying the insulated panel is given to him.

23. Moreover, the combined reading of the tender conditions and requirement of specification provided in the E-tender clearly reveals that the respondents have issued the tenders for supply of insulated panels which are evaluated by the CBRI.

24. There is another aspect of the matter, which cannot be ignored and the said aspect is that the insulated panels manufactured by the petitioner are not evaluated by the CBRI at any point of time and till date the petitioner has not obtained any evaluation certificate of its insulated panels by the CBRI. For this reason only, the petitioner has questioned the wisdom of the respondents of putting such condition in the tender document by making certain averments in para "f" and "h" of the writ petition and para Nos.4 and 9 of the rejoinder.

25. I am of the candid opinion that such practice adopted by the petitioner cannot be encouraged or approved. The petitioner has participated in the tender process with open eyes, may be with the understanding that it has to furnish a certificate of evaluation of its insulated panels by the CBRI at the time of supply of the material, as claimed by it in the writ petition specifically in para No.6 and ground "i" of the writ petition, but then also now the petitioner cannot turn round and question the condition of the tender to the effect that the insulated panels required to be supplied are to be evaluated by the CBRI. It is settled law that no bidder can dictate the respondents that in place of any material required by them other material can also be used.

26. There is one more aspect which is also to be taken into consideration that even if it is assumed, without admitting, that the requirement of furnishing the evaluation certificate of the manufactured insulated panels by the CBRI is arisen only when such insulated panels are to be supplied and not at the time of submission of E-tender, then also the fact remains that till date the petitioner is not possessing such certificate and as per the averments made in para No.4 (i) of the rejoinder such certification requires at least six months time, whereas as per the tender condition, the required material was to be supplied within thirty days only and looking to such circumstances, it is clear that even if the petitioner is declared as successful bidder and the contract is awarded to it, it is not in a

position to supply the required material within the time period mentioned in the tender documents.

27. So far as the acceptance of the CBRI certificate in respect of the insulated panels manufactured by the respondent No.4 is concerned, the respondents have accepted the same with all their expert knowledge. This Court cannot sit as an appellate court over the said decision while exercising extraordinary jurisdiction.

28. The fact remains that the petitioner has not submitted certificate of evaluation of its manufactured insulated panels from the CBRI as per the requirement of the tender condition and it was provided opportunity by the respondents to produce the same, however, since the same was not produced, the technical bid of the petitioner filed in response to the E-tender (Annexure-P/1) was rejected. This Court is of the opinion that there is no illegality in the action of the respondent authorities.

29. The judgments, on which the counsel for the petitioner has relied, are distinguishable looking to the facts of this case and the facts of those referred cases and, therefore, the same are of no help to the petitioner.

30. After taking into consideration the entire facts and circumstances of the case as discussed above, I do not find any case for interference in the matter. Hence, the writ petition fails and is hereby dismissed. There shall be no order as to costs.