
(2006) 08 GAU CK 0068
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 2130 0/2006

Subhas Mitra

APPELLANT

Vs

State of Arunachal Pradesh and Ors.

RESPONDENT

Date of Decision : 20-08-2006

Acts Referred:

Citation : (2007) 3 GLT 203

Hon'ble Judges : B.K.Sharma, J

Bench : Single Bench

Advocate : M.Hazarika, A.Ajitsaria, C.Baruah, N.K.Baruah, M.Bora, Advocates appearing for Parties

Judgement

1. By means of this writ petition, the petitioner has prayed for interference with the decision of the respondents to execute the works in question departmentally, which was initially sought to be executed through tender process. This decision communicated by the impugned Annexure D and E letters dated 23.3.2006 and 20.3.2006 has also stated that upon evaluation of the technical bid documents of the petitioner and others, they have been found not qualified in the technical bid. The decision to execute the work departmentally has been taken as any fresh tender process, according to the respondents, would cause delay as the particular scheme is required to be implemented by 31.3.2007.

2. The petitioner is a class 1A contractor. He responded to the NIT dated 12.9.2005 issued by the respondents. The works involved is "Improvement of Margherita Sanglang Road (SH : construction of single lane bridge at Chainage 35.900 KM and 37.500 KM)". The approximate value of the work was estimated at Rs. 99,48,179. It appears that three other parties also submitted their tenders in response to the NIT. Their technical bids were approved and they were requested to attend the office for opening of the financial bids. However, by letter dated 23.3.2006, the decision to go for fresh tender process was communicated and thus the tender process initiated came to an end without finality.

3. After the aforesaid abandonment of the first tender process with the decision to go for a fresh tender, the respondents issued fresh NIT on 7.1.2006 with the same terms and condition. This time also, the petitioner alongwith others responded to the same by submitting tenders. However, by the impugned decisions as conveyed by Annexure D and E communications dated 23.3.2006 and 20.3.2006, this tender process has also come to an end with the further decision to execute the work departmental/having regard to paucity of time, the scheme under which the work is to be executed being a time bound one.

4. The basic ground of challenge made in the writ petition against the impugned decisions is that the petitioner having been found to be qualified in the technical bid at the first instance, could not have been held to be not qualified in the second instance, when the terms and conditions of both the tenders remained the same. In the counter affidavit filed by the respondents, they have, inter alia, contended as follows:

"5. That with regard to the statements made in paragraph 4 of the writ petition, the deponent states that only 4 parties, namely, (1) M/s. Kameng Engineering, Bhalukpong (A.P), (2) M/s. Arunachal Iron & Steel Traders, Basar (A.P), (3) Sri Subhash Mitra, Ledo, Assam and (4) Sri Krishno Lynhdoh, Smith Meghalaya submitted tenders against 1st Tender Notice. But two tenders namely (1) M/s. Kameng Engineering, Bhalukpong (A.P) and (2) M/s. Arunachal Iron Steel Traders, Basar (A.P) withdrawn their tenders with earnest money for reason best known to them. So only two tenders of (3) (3) Sri Subhash Mitra, Ledo, Assam and (4) Sri Krishno Lyngdoh, Smith Meghalaya above remained.

6. That with regard to the statement made in paragraph 5 of the writ petition the deponent states that as stated earlier initially the tender for construction Margherita Changlang Road (SH : Single lane bridge at chainage 35,900 and 37,500 Km) was purchased by four parties mentioned above. But the two contractors namely M/s. Kameng Engineering, Bhalufepung, Arunachal Pradesh and M/s. Iron and Steel Traders, Basar, Arunachal Pradesh with drawn their tenders with their earnest money without assigning any reason thereof. Thereby, the competition reduced to only among the two tenders left in the field, i.e., Sri Subhash Mitra, Ledo, Assam and Sri Krishno Lynhdoh, Smith Meghalaya.

After opening of the financial bids of the two contractors, the comparative statement and evaluation against the various items of works covered in the contract for construction of Single lane bridges at Chainage 35,900 and 37,500 Km was done. The following were observed

(1) The rates offered by the two contractors, viz., Sri Subhash Mitra, Ledo, Assam and Sri Krishno Lynhdoh, Smith Meghalaya, were exactly same including fractions in all of the 28 items except in item Nos. 9 and 16 where the contractor Sri Krishno Lyngdoh has quoted a marginally higher rates, thereby causing overall higher cost amounting to Rs. 42,643, thus, giving an advantage to the other contractor Sri Subhash Mitra. This shows a possible collusion between the

two firms with the firm Sri Krishno Lyngdoh, Smith Meghalaya playing a supporting role to the other firm Sri Subhash Mitra, Tedo, Assam. This has vitiated the process of fair competition.

(2) The two contractors have quoted the same figures at 849.19 above the justified rate for item No. 17 and 5628.28% above the justified rate for item No. 18 for item No. 16, Sri Subhash Mitra has quoted 237.40 above the justified rate while the rate of Sri Krishno Lyngdoh is 340.00% above the justified rate. These rates are abnormally high and disproportionate to the nature works as evident from the comparative statement.

Further the contractors have also quoted the same rate for RCC work of grade M25 under item No. 5 at 57.95% below the justified rate, for M30 grade concrete under item No. 6 (a) at 91.85% below the justified rate and reinforcement of steel S415 (HSYD) at 37.19% below the justified rate under item No. 7 (a) the rates of these items related to RCC works quoted by the two firms were found to be abnormally low and unworkable. No quality work could have been possible under such unworkable rates.

(3) From the above evaluation at subparas 1 and 2 it is clearly evident that the bidding had been done by mala fide collusion between the two bidders and there is no sanctity or spirit of fair competition in the bidding process. Sri Krishno Lyngdoh has acted as supporting candidate for Sri Subhash Mitra.

Further it was apprehended with unworkable rates quoted for critical items such as RCC works the overall quality of the work would be at stake. Hence, the tenders were rejected and it was decided to reinvoke the tender in the interest of works. It may further be pointed out that as per condition laid out in the I.T.B. of the bid documents the respondents had the right to reject all or any bid or part thereof without assigning any reason.

5. Mrs. M. Hazarika, learned senior counsel assisted by Ms. A. Ajitsaria, learned counsel for the petitioner emphasizing on the need for transparency and fair play in the matter of initiation and finalization of tender process submits that the respondents having decided to execute the work by calling for tenders could not have abandoned the same mid way on nonexistent ground. She submits that the petitioner having qualified in the technical bid on the first occasion, a negative view could not have been taken, when the terms and conditions of both the NITs remained the same. On the other hand Mr. C. Baruah, learned senior counsel assisted by Mr. N.K. Baruah, learned counsel representing the State respondents submits that the respondents having acted bona fide as reflected in the counter affidavit and the records, the writ court exercising its power of judicial review under article 226 of the Constitution of India will not sit on appeal over the impugned decision arrived at by the respondents upon meaningful evaluation of all pros and cons.

6. I have considered the submissions made by the learned counsel for the parties. I have also carefully gone through records produced by the learned State

Counsel. As regards the decision to execute the work departmentally, no fault can be attributed to the respondents. It is an admitted position that the work in question is to be executed under a time bound scheme with the target date of 31.3.2007. It is also an admitted position that at the time of entertaining the writ petition and passing of the interim order, the departmental authorities had already started the works and materials etc. involving huge amount were also collected. The respondents have indicated the expenditure already incurred towards execution of the works, which is Rs. 3,044,897. However, after the interim order passed, the works have come to a stand still.

7. After having held that the decision of the respondents to execute the work departmentally cannot be faulted with, I now proceed to deal with the basis on which the decision has been taken and the ground on which the technical bid of the petitioner has been rejected. The decision for execution of the work departmentally has been taken, as issuance of fresh NIT and the completion of the process thereof will be time consecutive. Although the petitioner has contended that the respondents do not have the expertise to execute the work, but the respondents in their counter affidavit have categorically stated that they have got the infrastructure to execute the work and in fact, they have executed various similar nature of work. They have also stated about their men and machinery power. It is also on record that by the time the writ petition was filed, the works were in progress. Thus, it cannot be said that the department like that of Public Works is not empowered to execute the work. The stand of the respondents in their counter affidavit has also not been denied by the petitioner by filing any. reply to the same.

8.1 now proceed to deal with the basic and primary ground of arbitrary exercise of power by the respondents towards rejection of the technical bid of the petitioner. The plea of the petitioner is that since his technical bid was found to be valid on the first occasion, the respondents could not have held the same to be invalid on the second occasion as the terms and conditions of both the tenders were same. The stand of the respondents in this regard in their counter affidavit has been noted above, I have also gone through the records produced by the learned State Counsel. On perusal of the same it appears that after submission of tenders by the petitioner and others, their bids were evaluated at the appropriate level. The tender committee evaluated the tender documents and it was on that basis found the petitioner to be not qualified in the technical bid. Merely because his technical bid was found to be in order, when the first NIT was issued, it cannot be said that the same yardstick should be applied and there cannot be any deviation in the second NIT.

9. The respondents have given their detail reasons in the counter affidavit towards rejection of the technical bid of the petitioner and others. They have even smelt collusion among the tenderers. On perusal of the tender documents available on records, it is revealed that the rates quoted by the tenderers in majority of the items are identical. All these factors led to the rejection of the

technical bid of the petitioner and others. The records have revealed that there was threadbare discussion on the bids offered and it was only thereafter, the impugned decision was taken. Sitting in writ court and exercising the power of judicial review under article 226 of the Constitution of India, this court does not have the expertise to come to its own conclusion so as to substitute the decision taken by the expert body.

10. It is not for the writ 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 the decision has been taken. The extent of the duty to act fairly will necessarily vary from case to case. Though the principle of judicial review cannot be denied so far as contractual powers of Government are concerned, but it is only intended to prevent arbitrariness or favoritism and it is exercised in the larger public interest or if it is brought to the notice that in the matter of awarded a contract, power has been exercised for any collateral purpose. In the instant case, on examining the facts and circumstances involved and on going through the records I am of the considered opinion that no interference is called for to the impugned decision.

11. There is another aspect of the matter, it is not a case of finalization of the tender process by awarding the contract to the petitioner and then of cancelling the same. The second tender process initiated did not attain its finality. The bids offered by all the tenders have been rejected on valid grounds and it is only thereafter, the respondents under compelling circumstances have taken the decision to execute the work departmentally. No vested right of the petitioner has been infringed by the impugned decision. As has been held by the Apex Court in the case of State of Orissa v. Harinarayan Jaiswal (1972) 2 SCC 36, the inference of the Government, as in the instant case, that there was a collusion among the bidders may be right or wrong, but it would not be open to judicial review so long it is not proved that it was a make-believe one. The impugned decision arrived at by the respondents does not affect any one's right not to speak of any vested right.

12. In view of the above, I do not find any merit in the writ petition and accordingly it is dismissed. The interim order passed on 12.4.2006 stands vacated.