

(1999) 10 GAU CK 0012

In the Gauhati High Court

Case No : Writ Appeal No. 155 of 1999 and Civil Rule No. 6011 of 1998

Subhash Projects and Marketing Ltd.

APPELLANT

Vs

The State of Mizoram and Others

RESPONDENT

Date of Decision : 11-10-1999

Acts Referred:

Citation : (2000) 1 GLT 99

Hon'ble Judges : Brijesh Kumar, C.J;B. Biswas, J

Bench : Division Bench

Advocate : G.N. Sahewalla, A.K. Goswami, P. Bora, S. Senapati and Islam, for the Appellant; K.P. Pathak, D. Das, Raj Sekhar, N. Dutta and I. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

D. Biswas, J.—This appeal has been preferred against a common judgment delivered on 28.4.99 by the learned Single Judge in writ petitions numbered as Civil Rule No. 6011 of 1998 and Civil Rule No. 43 of 1998. The Appellant M/s Subhash Project and Marketing Limited filed Civil Rule No. 6011 of 1998 challenging the process of opening and consideration of the tenders submitted by the Appellant and others in response to a notice inviting Tender (No. CE/PHE/1 of 1997-98) issued by the Chief Engineer, Public Health Engineering Department, Mizoram on 29.12.97 for construction of greater Aizawl Water Supply Scheme, Phase-II. The learned Single Judge after hearing both the parties dismissed the writ petitions for various reasons highlighted in the impugned judgment. Aggrieved thereby, the Appellant M/s Subhash Project and Marketing Limited has preferred this appeal challenging the validity and propriety of the said judgment.

2. It would, therefore, be appropriate at this stage to clear the facts which eventually brought the matter before this Court for adjudication. The N.I.T. issued was a two-bid system tender. Envelop-A pertains to technical bid while Envelop-B pertained to price bid as indicated in the N.I.T. The eligibility criteria for the tenderers were set out in Clause 2.5 of the N.I.T. and the estimated cost

of the project was Rs. 32.07 crores. The allegation of the Appellant in Civil Rule No. 6011 of 1998 is that the aforesaid N.I.T. was not published and notified adequately with necessary details and it was so done to avoid fair competition. The initial notice published in the "Assam Tribune" issue dated 20.1.98, did not contain all the detailed of the N.I.T. The Appellant which has its offices at the State of Mizoram could purchase the N.I.T papers and on perusal thereof detected some technical errors. The Appellant, therefore, suggested to the authorities by letter dated 17.1.98 and 19.1.98 to alter the scheme after necessary consultation with public institutions like Indian Institute of Technology. However, the Appellant submitted its tender along with others. On 27.2.98, the Respondent No. 3 opened technical bids in presence of the Appellant and others. The Appellant pointed out certain deficiencies relating to the eligibility criteria of Respondents Nos. 4, 6 and 7. It is further averred that the last date for submission was indicated as 29.2.98 and it was thereafter extended to 27.2.98 on request. According to the Appellant, the opening of the technical bid has been in violation of the norms generally followed and that the technical bid of the Respondents No. 4, 6 and 7 suffered from various infirmities. It has specifically been averred that the offer of the Respondent No. 7 for a number of deficiencies was liable to be rejected outright as the evaluation of the technical bid undertaken was vitiated for consideration of the price bid. It has been submitted that the Respondent-authority ought not to have taken the opinion of Design Group, Bangalore, a consultancy firm, which lacks competence in the matter. It is further pointed out that the Design Group while clearing the technical bid of the Respondent No. 7 made a mention of proposed discount in the price and this is suggestive of the fact that the Technical Committee was influenced by said offer of discount while evaluating its technical bid. The Petitioner's technical bid which was not accepted by the Respondents were valid in all respects and they had offered most competitive price having due regard to the estimated cost of the project. According to the Appellant, they being the lowest bidder ought to have given priority for the contract. That apart, the price evaluation of the technical committee has been assailed on the ground of lack of consultation process with the tenderers in order to clear the discrepancies noticed by the Respondent authorities. The Respondent No. 7 which quoted Rs. 132.00 crores, much higher than the estimated cost, ought not to have been recommended by the Technical Committee.

3. The Respondent-State in their affidavit-in-opposition however, maintained that the Appellant did not challenge the findings of the Expert Committee to the effect that the technical bid of the Appellant is not acceptable and, as such, not relief can be given to them. It is further submitted that the scheme prepared is technically sound and it was approved by the Central Public Health Engineering and Environmental Organisations etc.

4. Mr. Sahewalla, learned senior counsel, highlighted the points of objection raised in the petitions argued that the decision of the Technical Committee recommending Respondent No. 7 to the exclusion of the Appellant-company

suffers from various infirmities. The infirmity projected by the learned Counsel are listed below:

- (a) There was no prompt and adequate publicity of the N.I.T.
- (b) The price bid was opened on the same day along with technical bid;
- (c) The Respondent authority ought not to have taken opinion of a private consultancy firm, namely M/s Design Group.
- (d) The price bid was taken into consideration while evaluating the technical bid;
- (e) No consultation/discussion was made with the Appellant company before rejecting the technical bid of the Appellant company; and
- (f) The price offered by Respondent No. 7 was much higher than the estimated cost.

5. So far the allegation relating to inadequacy of publicity is concerned, it deserves mention that the N.I.T. was published in the issue dated 20.1.98(Annexure-in) of Assam Tribune and the last date of submission of bidder was indicated as 29.1.98. Sri Pathak, learned Advocate General, pointed out that the Appellant purchased bidder papers on 21.1.98 and applied for extending the last date for submission of bidders. Accordingly, it was on the request of the Appellant that the last date was extended upto 27.2.98. According to him, the Appellant submitted the bidder on 27.2.98 and having participated in the process cannot now at this belated stage and that too after rejection of its technical bid cannot be allowed to find fault with the publication of the notice. After considering the material on record and the submission of the respective parties we do not find any necessity to disturb the process of consideration of bidders on the ground of inadequate publicity.

6. It would appear that the technical bid was opened on 27.2.98 in presence of the representatives of all the tenderers including the Appellant company. This is also the case of the Appellant. There is nothing on record to show that the price bid was opened on the same day and it was taken into consideration along with the technical bid. This submission on behalf of the Appellant goes unfounded and needs no further discussion.

7. It is an admitted fact that the Respondent authority took the opinion of M/s Design Group, a private consultancy firm of Bangalore. The Respondent authority forwarded the technical bids to the said firm for opinion. Mr. Sahewalla, learned senior counsel, objected to the procedure adopted by the Respondent authority in forwarding the technical bids to a private party. It is true that a department of State Government having qualified engineers and a hierarchy ranging from Assistant Engineer to Chief Engineer should not normally seek advice and opinion from a private firm. This shows lack of confidence on the part of the officers of the department itself. They could have taken the opinion of the Central Electrical Agency or any other Government agency having expertise and experience in this

matter. Be that as it may, the opinion tendered by M/s Design Group, though a private firm, will not itself vitiate the decision making process of the technical Committee in evaluating the technical bid unless infirmities inherent in the process are discernible from the opinion. In our considered opinion, the decision of the Technical Committee cannot be rejected merely on the ground that it had taken into consideration the opinion of a private consultancy firm.

8. It has been submitted by Mr. Sahewalla that the price bid was also taken into consideration by M/s Design Group while evaluating the technical bid. This has been explained by Mr. Pathak, learned Advocate General, Mizoram referring to Clause 2.20 of the N.I.T. which pertains to Envelop-"A", the technical bid. It has been explained that it contained a column for showing discount offered by the parties and that it is this discount which has been reflected by M/s Design Group in their report. This does not in any way show that the price offered by the Respondent No. 7 was placed before M/s Design Group for consideration. The reference to the percentage of the discount in the report is casual in nature and has not in any way been a factor for consideration and evaluation of the technical bid. Referring to the decision of the technical committee which evaluated technical bids of the tenderers on 15.7.98 and submitted its report on 2.11.98, Mr. Pathak submitted that neither percentage of the discount nor the price factor has been discussed anywhere in the report while clearing the technical bid of Respondent No. 7.

The argument as above, when considered along with terms and conditions of N.I.T. relating to Envelop-"A", shows that the Respondent No. 7 quoted the discount to be given by it was mentioned in the report of M/s Design Group in a casual manner. This does not in our opinion appear to have influenced the ultimate decision of the Tender Committee in evaluating the technical bids.

9. The next contention of the Appellant was that no consultation/discussion was made with the Appellant company before rejecting its technical bid. It appears that the Respondent authority did not enter into negotiation with any of the tenderers or initiate any discussion for clarification of any matter with tenders. It is not the Appellant's case that the Respondent No. 7 was picked up to the exclusion of others for discussion. That would have been sufficient ground for interfering with the evaluation and assessment made by the Technical Committee. This being not the case of the Appellant, it would be futile to direct the Technical Committee to have a discussion with the Appellant company alone. That apart, as pointed out, the Appellant company omitted to quote in respect of vital items and, as such, there is no scope for any discussion for clarification of any matter. The data-sheet was also not filled up by the Appellant company and the defects in these trade were known to the Appellant when the technical bid of all the tenderers were opened on 27.2.98. According to him, there was no scope for any discussion whatsoever in view of the omission made by the Appellant company to file a complete tender. After consideration of the respective submissions and the materials on record, we have no reason to disagree with the

learned Advocate General that when tender documents submitted by a firm is incomplete, the authority to consider such tender is not bound to enter into a discussion with a defaulting firm.

10. It was further pointed out that the Respondent No. 7 quoted Rs. 132.00 crores in the price bid and this amount is much higher than the estimated cost of Rs. 32.00 crores. Mr. Sahewalla, learned Counsel argued that the State being the guardian of public finance is not to accept a bid with such a huge price difference as it would amount to extravagance at the cost of public finance. Mr. Pathak, learned Advocate General explained that the accepting authority is yet to apply its mind and to take a decision thereof. Unless a decision is taken, the court in its writ jurisdiction cannot interfere with the process of finalisation of contract on surmises and presumption. According to Mr. Pathak, the accepting authority is duty bound to apply its mind to the price factor as well and, unless a final decision is taken, no relief can be given to the Appellant company at this stage.

11. The submission made by Mr. Pathak makes it clear that the accepting authority has not yet taken a final decision. The accepting authority, in our opinion, is under the obligation to apply its mind to explain the decision making process undertaken by the technical committee and also the amount quoted by the firm (Respondent No. 7) before final decision is taken. The cost of the project appears to have been estimated about 4 years back and certainly there has been escalation of price in the meantime. There will naturally be variation in the price as on today. Therefore, unless the accepting authority takes a final decision, it would be premature on our part to conclude that the accepting authority is likely to settle the contract with the Respondent No. 7 at the price quoted by them.

12. It would further appear that the Appellant company as writ Petitioner did not challenge the decision of the Technical Committee and no relief has been sought for setting aside the recommendation of the Technical Committee. That being the position and for omission and lapses on the part of the Appellant company in filing a complete tender, it would not be possible for this Court to interfere with the recommendation made by the Technical Committee. Situated thus, it would be appropriate at this stage to have a look at the prayer made in the writ petition. The reliefs sought are as follows:

In the premises aforesaid, the Petitioner prays that your Lordships may be pleased to call for the records, issue a Rule calling upon the Respondents to show cause as to why a writ of Mandamus should not be issued directing them to act in accordance with law and to open the price bid of the Petitioner and to consider the bid of the Petitioner along with other tenderers who fulfilled the eligibility criteria in order of its merit and/or why the action of the Respondents in not opening the price bid of the Petitioner be declared illegal, null and void and on cause or causes being shown and after hearing the parties make the Rule absolute and/or pass such further or other order (s) as your Lordships may deem fit and proper.

-And-

During pendency of the Rule be further pleased to direct the Respondents not to award the work to any tenderers and not to act upon the price bid as opened on 20.11.98.

13. In our opinion, the reliefs sought in the writ petition for opening the price bid of the Petitioner and to consider the same along with other tenderers will be of no assistance since the technical bid was not cleared by the Technical Committee. We find no justification to interfere with the recommendation of the Technical Committee and that too, when there is no specific prayer to this effect. The relief sought in the writ petition not to act upon the price bid of the Respondent No. 7 opened on 20.11.98 cannot be granted. The writ petition appears to be premature and also incomplete in respect of reliefs sought.

14. We, therefore, find no valid reasons to interfere with the impugned judgment. The learned Single Judge has dealt with all the points raised by the Appellant in details and eventually found no tangible ground to interfere with the process of finalisation of the contract. The appeal, therefore, deserves dismissal. Accordingly, it is ordered to be dismissed.

15. Before parting with the record, we would like to add a few words as to the price factor. We are certain that the accepting authority will apply its mind in its proper perspective while examining the recommendation of the technical committee vis-a-vis the price factor involved in the project and take the best decision possible under the given circumstances in public interest. No order as to costs.