
(2015) 04 UK CK 0017
In the Uttarakhand High Court
Case No : Special Appeal No. 150 of 2015

Tawwar

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Citation : AIR 2015 Utt 98

Hon'ble Judges : K.M. Joseph, C.J.;V.K. Bist, J

Bench : Division Bench

Advocate : Sudhir Kumar, for the Appellant; P.C. Bisht and Dushyant Mainali,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, C.J.—The appellant is the party respondent in the writ petition filed by the 4th and 5th respondents in the Appeal (hereinafter referred to as the writ petitioners). Tender notice for transportation of food-grains was issued on 4th February, 2015. It is, no doubt, mentioned that the tender notice contemplated technical and financial bids. Both the appellant and respondent Nos. 4 & 5 bid. The scope of work was transportation of food-grains and sugar from the railhead Haldwani/Ramnagar to the food-grain stores for the year 2015-16. The appellant quoted for Sl. Nos. 15, 17, 18, 20 and 22. The appellant passed muster at the technical stage. The matter passed on to the consideration of the financial bid. The bid of the appellant in respect of Sl. Nos. 17, 18 and 22 was found to be the lowest. The Government decided to accept the bid of the appellant. According to the learned counsel for the appellant, the contracts were actually entered into in respect of the three works. It is at this stage, the writ petition was filed questioning the acceptance of the bid of the appellant. The case of the writ petitioners was that the tenderers were expected to provide earnest money, which is provided in Rule 20 of the Uttarakhand Procurement Rules. The appellant deposited an FDR for a sum of Rs. 2,27,000/-. He did not deposit separate FDRs or demand drafts, as contemplated in law in respect of the five

works, for which he had bid. At any rate, the amount of Rs. 2,27,000/- fell short of the total amount required as earnest money in respect of the five works by a sum of Rs. 45,100/-. This argument of the writ petitioners was accepted by the learned single Judge, who took the view that Rule 20 of the Procurement Rules stood violated and the Government should not have accepted the bid of the appellant. Accordingly, the relief was granted to the writ petitioners. Feeling aggrieved, the appellant is before us. We heard Mr. Sudhir Kumar, Advocate for the appellant, Mr. Dushyant Mainali, Advocate for the writ petitioners and Mr. PC. Bisht, Standing Counsel for the State.

2. Learned counsel for the appellant would contend that the learned single Judge has erred in relying on Rule 20 of the Procurement Rules. He would point out that Rule 20 is not even applicable to the case at hand as we are not concerned with "goods" and Rule 20 figures in Chapter-2, which relates to "goods". On the other hand, he drew our attention to the definition of word "service" to be found in Section 2(h) of the Uttarakhand Procurement Rules and he would then refer us to Chapter-4, which comes under the general heading "Service". He would submit that there is no similar provision as Rule 20 in the said Chapter. There is also no provision, which makes the Rule 20 applicable in procuring the service. In this connection, he particularly drew our attention to Chapter-3, which relates to work, wherein he would point out that the general provision in Chapter-2 relating to goods shall be made applicable, whereas this is conspicuous by its absence in Chapter-4, therefore, in regard to the contract in question Rule 20 does not apply. He would also submit that in the year prior to the year in question, the tenders were floated, specifically, permitting giving of one FDR in respect of several works. It is on that basis and the mistake, no doubt, has been committed by the appellant, by which, he has given a single FDR. The amount of Rs. 2,27,000/- covered by the FDR sufficed for legally considering the case of the appellant in respect of the three works, for which, he had quoted the lowest sums. He would, in fact, point out that after the judgment of this Court, a fresh advertisement has been issued. In the said advertisement, it has been explicitly made clear that the FDR in respect of the earnest money must be in respect of each work. Such a requirement was not there in the present advertisement. Moreover, he would submit that the whole purpose behind furnishing the bid security or earnest money is to see that the Government is not prejudiced by a bidder wriggling out of his bid. That is to say, the Government is empowered to take down the bidder to his bid as he enters into the contract. In this case, the question of earnest money, which is relevant at the stage of the technical bid, in a manner of speaking faded into insignificance when the Government decided to act on the FDR, passed on to the financial status, found the appellant to be the lowest and what is more decided to enter into the contract with him in respect of the same. Therefore, the importance of the bid has ceased to exist as the purpose stood achieved, inasmuch as the appellant has entered into the contract and he has not run away from his obligation.

3. Per contra, learned counsel for the writ petitioners would submit that there

has been arbitrary State action in this matter. He would draw our attention to the General Financial Rules of 2005 of the Govt. of India. According to him, the Procurement Rules in question is modelled on the same. In this connection, he drew our attention to Rule 157, which reads as follows:

"Rule 157. Bid Security:

(i) To safeguard against a bidder's withdrawing or altering its bid during the bid validity period in the case of advertised or limited tender enquiry, Bid Security (also known as Earnest Money) is to be obtained from the bidders except those who are registered with the Central Purchase Organisation, National Small Industries Corporation (NSIC) or the concerned Ministry or Department. The bidders should be asked to furnish bid security along with their bids. Amount of bid security should ordinarily range between two per cent to five per cent of the estimated value of the goods to be procured. The exact amount of bid security, should be determined accordingly by the Ministry or Department and indicated in the bidding documents. The bid security may be accepted in the form of Account Payee Demand Draft, Fixed Deposit Receipt, Banker's Cheque or Bank Guarantee from any of the commercial banks in an acceptable form, safeguarding the purchaser's interest in all respects. The bid security is normally to remain valid for a period of forty-five days beyond the final bid validity period.

(ii) Bid securities of the unsuccessful bidders should be returned to them at the earliest after expiry of the final bid validity and latest on or before the 30th day after the award of the contract."

4. He would point out that with reference to the said Rules if the default is on the part of the bidder to give bid comprehensive enough to embrace the total amount for each of the work, it would entail the rejection of the entire bid; such a condition is not to be found in the Rules though. He also drew our attention to the judgment of Apex Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, AIR 2001 SC 682 : (2001) 2 JT 524 : (2001) 1 SCALE 255 : (2001) 1 SCR 352 : (2001) AIRSCW 322 : (2001) 1 Supreme 154 , wherein the Hon'ble Apex Court has held, inter alia, as under:

"30. The submission that remains to be considered is that as the price bid of respondents 1 to 4 is lesser by 40 crores and 80 crores than that of respondents 11 and 10 respectively, public interest demands that the bid of respondents 1 to 4 should be considered. The Project undertaken by the appellant is undoubtedly for the benefit of the public. The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public

works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is obvious that the bid of respondents 1 to 4 is the lowest of bids offered. As the bid documents of respondents 1 to 4 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it cannot be directed to be considered along with the other bids on the sole ground of being the lowest."

"31. We find no force in the submission that as under Clause 14.2 items against which no rate or price is entered by the bidder will not be paid by the employer when executed and shall be deemed covered by the other rates and prices in the bill of quantities, the unit price in items containing errors be ignored and the bid be considered on the basis of the total price bid which is the lowest. In our view, there is a basic distinction between a case where against some items no rates or prices are quoted and a case where some rate is quoted. Whereas in the former case the bidder will not be entitled to claim any specific amount for the work done by him in the absence of any rate for that work, because in the aforementioned clause it is clarified that the bidders will not be paid by the employer and that the execution of the work shall be deemed covered by other rates and prices in the bill of quantities, but in the latter case the bidder will be entitled to claim for the work executed on the basis of quoted price/rate."

5. He would emphasize that the fact that the bid is the lowest cannot be the only consideration and to avoid arbitrariness, the Rules must be adhered to.

6. Rule 2(f) of the Uttarakhand Procurement Rules, 2008 defines "goods", which reads as follows:

"2(f) "Goods" means all articles, products, materials, commodities, live stock, furniture, fixtures, raw materials, spares, equipments, machinery, industrial plant, stationery etc."

7. Rule 2(h) of the Uttarakhand Procurement Rules defines service as follows:

"2(h) "Service" means professional services, technical services, management services, maintenance services, consultancy services."

8. Rule 20 of the Uttarakhand Procurement Rules reads as follows:

20. Bid Security or Earnest Money-

"20(1) To safeguard against a bidder's withdrawing/altering its bid during the bid validity period in the case of advertised or limited tender enquiry, bid security (also known as earnest money) is to be obtained from the bidders except those who are ex-empted under specific provisions of law or rules. Amount of bid security should ordinarily range between 2% to 5%. The given percentage will

depend on the total cost of the goods as follows:

(2) From time to time the Government may revise such rates. The bid money should be pledged in the name of Government/authority in the form of demand draft or fixed deposit receipt or Bankers cheque or Bank guarantee or deposited in given heads of account through e-banking (if any) to the satisfaction of the competent authority safeguarding the interest of the purchaser in all respects. The bid security is normally to remain valid for a period of 45 days beyond the final bid validity period and the period may also be extended.

(3) Bid securities of the unsuccessful bidders should be returned to them at the earlier after expiry of the final bid validity but not later than 30 days after the award of the contract by the concerned department/authority."

9. Even though we searched for a provision similar to Rule 20 in Chapter-4 dealing with service, we could find none. No doubt, in the definition of word "service" in 2(h), it is not very clear as to whether it falls in service as though the case of the appellant is that it comes under maintenance service; it is not clear whether a transport contract could fall under maintenance goods. It is also not the case of the appellant that it comes under the professional service. As far as, the goods is concerned, learned Government Pleader would, in fact, submit that it could be said to be a case relating to procurement of goods, even though it is a transport contract.

10. We must notice that in the advertisement, the employer contemplated the tenderers furnishing security, earnest money, or bid security as mentioned in the Central Rules. There can be no dispute that the whole object is to see that the bidder enters into the contract, once the bid is accepted and the Government does not suffer any loss by the bidder refusing to enter into the contract after the bid is accepted. There can be no dispute also that it is a matter, which pertains to the technical stage. In this case, it so happened that the appellant, who is a registered contractor, as he professes to be, did give a global FDR for Rs. 2,27,000/-. He has not indicated for which of the contracts it was meant to be. We do notice the argument of the learned counsel for the writ petitioners that the appellant was in a manner of speaking, sitting on the fence and did not choose to indicate as to against which bid he wished the FDR to be adjusted against. We also notice that mere is a reference to Procurement Rules in the advertisement. No doubt, mere cannot be estoppel against a Rule. It is obvious that the Government has adopted the Procurement Rules in the matter of issuing of the advertisement and decided to proceed in terms of the same. For the purpose of our decision, we may not think it certainly necessary to decide under which category it falls namely goods or service, as such. As far as bidder is concerned, it may not be open to the bidder also to say that he can disregard what is provided in the advertisement in the absence of challenge to the same. There is no challenge to the advertisement by the appellant. No doubt, the contract is awarded in his favour and he was respondent in the writ petition. But we must also hasten to remind ourselves that in a judicial review of State action,

in the contractual sphere, the Court must also bear in mind, whether there is overwhelming public interest, which warrants the Court to interfere in the matter also. We stand informed that the bid of the writ petitioners was higher than that of the appellant by nearly 20%. Apparently, the Government also was inclined to accept the bid of the appellant. The Government, probably noting the absence of any specific provision mandating production of separate FDRs for each work, decided to accept the bid of the appellant in respect of which he was the lowest tenderer. What is noteworthy is that for those three bids, the amount of Rs. 2,27,000/- sufficed by way of earnest money. In fact, it was more than what is required. In such circumstances, we would think that in the facts of this case, the interference by the learned single Judge was not justified and we would think that the Appeal must succeed. Accordingly, the Appeal succeeds. The judgment of the learned single Judge is set-aside. The writ petition will stand dismissed. There will be no order as to costs.