

(2020) 10 SHI CK 0069

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 2734 Of 2020

Tek Singh Raghav

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 09-10-2020

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2020) 10 SHI CK 0069

Hon'ble Judges : Tarlok Singh Chauhan, J;Jyotsna Rewal Dua, J

Bench : Division Bench

Advocate : Varun Rana, Ashok Sharma, Vikas Rathore, Vinod Thakur, Shiv Pal Manhans, Seema Sharma, Bhupinder Thakur, Yudhvir Singh Thakur

Final Decision : Dismissed

Judgement

Jyotsna Rewal Dua, J

1. Aggrieved against rejection of his technical bid and declaration of respondent No.5 as the lowest bidder, petitioner has preferred the instant writ petition.

2. Facts:-

2(i). A Notice Inviting e-Tenders (in short 'NIeT') was issued by the respondents on 22.05.2020 for the work 'Providing lift Irrigation Scheme from River Beas to Pali & Silag Tehsil Padhar Distt. Mandi (HP). (SH:- Supply & Installation of Centrifugal Pumping Machinery at 1st stage, 2nd stage & 3rd stage with allied accessories and providing, laying, jointing, testing and carriage of MSERW pipe in Rising Main (Flanged with butt welding and C/o Thrust Block = 235 Nos.) with estimated cost of Rs.7,23,03,987/-'. The tenders were to be opened on 06.06.2020. The eligibility information with respect to Technical Bid was to be provided in Cover 1, whereas Cover 2 was to contain Financial Bid on the prescribed form. Clause 2 of the tender document pertaining to Cover 1 reads as under:-

"2. Cover 1 shall contain scanned copies of following "Eligibility Information" (Scanned copies to be uploaded).

i) Earnest money: FDR of any nationalised bank/NSC/Saving Account of any Post Office of Himachal Pradesh duly pledged in the name of Executive Engineer IPH Division Padhar.

ii) The cost of tender form (Non-refundable) in shape of demand draft (Preferably non account payee) duly pledge in favour of Executive Engineer IPH Division Padhar Distt. Mandi (HP).

iii) Certificate of valid registration with HPIPH in appropriate class and latest renewal thereof.

iv) Income tax, GST and EPF valid registration as on date.

v) The contractor have to upload curve chart/Performance chart of pumping machinery being offered by them, failing which financial bid will not be opened.

vi) Scan copy of undertaking that I have carefully studies all the terms and conditions stipulated in the contract document before quoting the rates in the BOQ chart and also visited the sited of work before quoting the rates.

vii) Authorization letter regarding digital signature certificate (DSC) of the person authorized by the registered tenderer.

viii) +- Average annual financial turn over during the last 3 year ending provision financial year should be at least 30% of the estimated cost.

ix) Experienceof having successfully completed /commissioned similar work during last 7 year ending last day of the month previous to the one in which application are invited should be either of the following.

a. Three similar completed works costing not less than the amount equal to 40% of the estimated cost. Rs.2,89,21,595/-.

OR

b. Two similar competed works costing not less than the amount equal to 50% of the estimated cost. Rs.3,61,51,994/-.

OR

c. One similar completed work costing not less than the amount equal to 80% of the estimated cost. Rs.5,78,43,190/-"

2(ii). Petitioner participated in the tender process under the terms & conditions of the tender document. He offered and uploaded his online bid on 05.06.2020. Seven technical bids including that of the petitioner were opened and scrutinized on 08.07.2020. Four participating bidders, i.e. respondents No.5 to 8 herein, were found satisfying the eligibility criteria as per the terms & conditions of the NIeT, hence, were held eligible for opening of financial bids. Petitioner's technical

bid was rejected as the similar works done by him were found to be of less value and not meeting the requirements of NIeT. Petitioner was accordingly held ineligible for opening of his financial bid. On the recommendations of the Evaluation Committee, respondent No.4 on 09.07.2020 opened the financial bids of all eligible bidders. Respondent No.5 was found lowest amongst the successful bidders. Aggrieved, petitioner has preferred the instant writ petition, praying for quashing the order dated 08.07.2020, rejecting his technical bid and order dated 09.07.2020, whereby respondent No.5 has been held as the lowest bidder with further prayer to direct respondents No.1 to 4 to consider the petitioner as eligible bidder and to open his financial bid.

3. Contentions:-

Learned counsel for the petitioner contended that:-

3(i). The respondents have wrongly rejected the technical bid of the petitioner on ground of less work done. The petitioner had claimed his eligibility for participating in the bid on the basis of following two similar completed works costing not less than the amount equal to 50% of the estimated cost as per Clause 2(ix)(b) of the NIeT:-

"a. PLWSS to Rewalsar Town (Urban) in District Mandi HP (SH: Supply and erection of pumping machinery and providing, laying, jointing and testing of rising main and C/O anchor block) for Rs.5,11,27,727/- completed 98% work.

b. Providing WSS/LWSS to left out POP in NCPC habitation GP Salaper, Dehar Brotei, Nalag, Chanol, Bobar, Salwan, etc. and Smaun (SH: C/O intake chamber providing, laying gravity main from RD 0 to 16500 mtrs. and C/O pillars of gravity main) for Rs.3,12,04,194/- completed on 15.04.2017 and by giving 7% per annum enhancement over the actual value of completed work calculated from the date of completion to the date of bid opening which comes to Rs.65,52,881/-. Total Rs.3,77,57,075/- (3,12,04,194 + 65,52,881)."

3(ii). Learned counsel further submitted that for calculating the cost of already executed similar works, the formula provided in CPWD Manual (Annexure P- 3) has been used by the petitioner for bringing the value of the work done in past to the current costing level by enhancing the actual value of work at simple rate of 7% per annum calculated from the date of completion to the date of bid opening. Learned counsel contended that this formula of enhancement by 7% is to be treated as an integral part of the conditions of the NIeT and cannot be segregated from Clause 2(ix) of the NIeT. Therefore, even if this formula of calculating the cost of old works to arrive at their current costing level is not expressly incorporated in the NIeT, still it is to be deemed to have been automatically incorporated in the tender in question as CPWD Manual has been adopted by the respondents.

3(iii). It is further contended that in case the above referred formula is used, then the value of two similar completed works quoted by the petitioner in his bid

will become Rs.3,77,57,075/-, i.e. more than Rs.3,61,51,994/-(50% of the estimated cost) required under Clause 2(ix)(b) of the NIeT, thereby making petitioner's technical bid conforming to the terms stipulated in the tender document.

4. Learned Advocate General, while opposing the prayers of the petitioner argued that:-

4(i). Initially a Draft Notice Inviting Tenders (DNIT) for the construction work in question was prepared and approved by respondent No.2 on 23.08.2019 on 75% of the estimated cost for Rs.5,42,17,360/-. The DNIT did not have any provision for enhancing the actual value of similar works executed in past to bring the same to the current level by calculating the same annually at simple rate of 7% per annum. The tenders for the work were floated accordingly on 28.08.2019. None of the participating bidders questioned about non-inclusion of 7% indexing clause at that time. The work, however, could not be awarded as the negotiations with the eligible bidder had failed.

4(ii). The State thereafter issued office memorandum dated 10.01.2020, laying down guidelines/terms & conditions to be followed for tenders valuing more than Rs.2 Crores. Accordingly, the DNIT for the work in question was also revised and reframed in accordance with the memorandum dated 10.01.2020 on 100% of the estimated cost. This was approved by respondent No.2 on 06.05.2020 for Rs.7,23,03,987/-. Since the office memorandum dated 10.01.2020 did not contain 7% indexing clause, therefore, no such provision was adopted while reframing the DNIT. The tender in question was thereafter floated by respondent No.4 on 22.05.2020. The estimated cost of the work was Rs.7,23,03,987/-. One of the eligibility condition for the bidder was to have executed similar works during last seven years as defined in Clause 2(ix) with values indicated there. Petitioner applied under Clause 2(ix)(b) claiming to have executed two similar works costing not less than 50% of the estimated amount of the tendered work.

4(iii). 50% of the estimated cost of the work (Rs.7,23,03,987/-) comes to Rs.3,61,51,994/-, whereas the completed cost of the works relied upon by the petitioner is Rs.3,12,04,194/-. The cost of the similar works relied upon by the petitioner was below 50% benchmark, therefore, the technical bid of the petitioner was rejected by the Evaluation Committee as he did not fulfil the eligibility criteria as per the NIeT requirement.

4(iv). Respondent No.1 in its affidavit dated 21.09.2020 filed pursuant to an order passed by this Court on 26.08.2020 has admitted that the respondent-Jal Shakti Vibhag has switched over to CPWD Manual with upto date amendments w.e.f. 03.10.2018. However, the tender in question was issued subsequently on 22.05.2020 in accordance with the Government office memorandum dated 10.01.2020 as per the guidelines/terms & conditions laid down therein, to be followed for tenders costing more than Rs.2 Crores, which contained no provision for 7% indexing.

5. Observations:-

Admittedly, it is not the case of the petitioner that any condition of 7% indexing was actually incorporated in the NIeT in question. In fact, the petitioner wants to read this condition in the tender document by falling back upon CPWD Manual (Annexure P-3) and asserts that the respondents were bound to bodily lift all the conditions contained in the CPWD Manual including the condition of 7% indexing and to incorporate them in the NIeT in question. The precise argument raised by learned counsel for the petitioner is that irrespective of incorporation of this condition in the NIeT, the calculation of the cost of previous similar works done by the bidder has to be assessed at 7% enhancement per annum to ascertain their current value.

The fact remains that the NIeT does not contain any such condition of 7% indexing. All the bidders including the petitioner have participated under the specific terms & conditions of the tender document.

The tender document in question was issued for the second time for the same work. Even when it was issued for the first time, no such condition of 7% indexing was there. None of the bidders voiced any grievance about non-inclusion of 7% indexing clause in the NIeT. Similarly, second time also when the NIeT in question was issued, there was no such clause pertaining to 7% enhancement of the cost of the similar works executed in past. Petitioner as per his admission had never sought any clarification from the respondents with respect to non-inclusion of 7% enhancement clause in the NIeT. After participating under the specific terms & conditions of the tender document, it is not permissible for him to challenge the rejection of his technical bid on the ground that his eligibility was to be determined under a particular clause, which in reality is not part of the tender document. We are not examining the question as to whether 7% indexing clause of CPWD manual was required to be part of the tender document or not. The stage to raise that question has gone for the petitioner. Therefore, even assuming that the respondents were bound to invite tenders as per the CPWD Manual, the fact remains that the tender document was issued in consonance with memorandum dated 10.01.2020 issued by the State Government, which did not provide for calculating cost of similar works carried out in past at 7% indexing rate. The acceptance of contentions of the petitioner would also mean prejudicing various such contractors, who might be interested to bid for the work in question, but might not have submitted their bids because of the eligibility criteria expressly provided in Clause 2(ix) of the NIeT without knowing 7% indexing clause in the CPWD manual.

The petitioner has participated in the bidding process under the specific terms and conditions laid down in Standard Bid Document. The terms and conditions of bid have not even been challenged by the petitioner. Hon'ble Apex Court in Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala, 2019 (2) Scale 134, after considering Bakshi Security & Personnel Service Pvt. Ltd. Vs. Devbishan Computed Pvt. Ltd., 2016 (8) SCC 446 and Afcons Infrastructure Ltd.

Vs. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818, held that essential condition of a tender has to be strictly complied with and that words used in the tender document cannot be ignored or treated as redundant or superfluous. Relevant para from the judgment is reproduced hereinafter:-

"15. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

This Court in CWP No.3583 of 2020, titled M/s Chamunda Construction Company Versus State of Himachal Pradesh and others, decided on 28.09.2020, has held as under vide paras 12 to 14:-

"12. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decisions of the Hon'ble Supreme Court in R.D. Shetty vs. International Airport Authority (1979) 3 SCC 488, Fertilizer Corporation Kamgar Union vs. Union of India (1981) 1 SCC 568, Assistant Collector, Central Excise vs. Dunlop India Ltd. (1985) 1 SCC 260=1984 (2) SCALE 819, Tata Cellular vs. Union of India (1994) 6 SCC 651= 1995 (1) Arb. LR 193, Ramniklal N.Bhutta vs. State of Maharashtra (1997) 1 SCC 134= 1996 (8) SCALE 417 and Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492=1999 (1) Arb. LR 431 (SC).

13. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision consideration which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

14. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision

making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

In Civil Appeal No.2197 of 2020, titled Bharat Coking Coal Ltd. & Ors. Versus AMR Dev Prabha & Ors., decided on 18th March, 2020, the Hon'ble Supreme Court, while considering the legal position settled in Raunaq International Ltd. v. IVR Construction Ltd, (1999) 1 SCC 492; Maa Binda Express Carrier v. NorthEast Frontier Railway, (2014) 3 SCC 760 and Shobikaa Impex (P) Ltd. V. Central Medical Services Society, (2016) 16 SCC 233, observed as under:-

"39. Additionally, we are not impressed with the first respondent's argument that there is a certain public interest at stake whenever the public exchequer is involved. There are various factors in play, in addition to mere bidding price, like technical ability and timely completion which must be kept in mind. And adopting such interpretation would permanently blur the line between contractual disputes involving the State and those affecting public law. This has aptly been highlighted in Raunaq International Ltd. v. IVR Construction Ltd. [(1999) 1 SCC 492]

"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers." (emphasis supplied)

40. Further, the first respondent has failed to demonstrate which public law right it was claiming. The main thrust of AMR Dev Prabha's case has been on the fact that at 1:03PM on 05.05.2015 it was declared the lowest bidder (or L1). However, being declared the L1 bidder does not bestow upon any entity a public law entitlement to award of the contract, as noted in Maa Binda Express Carrier v. North-East Frontier Railway [(2014) 3 SCC 760]:

"8. The scope of judicial review in matters relating to award of contracts by the

State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and nondiscriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process." (emphasis supplied)

47. With regard to other allegations concerning condonation of Respondent No. 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In *Shobikaa Impex (P) Ltd. v. Central Medical Services Society* [(2016) 16 SCC 233], it has been noted that:

"... the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point."

48. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays."

When tender conditions are specific and unambiguous, it is not lawful to bring ambiguity into the same by reading certain clauses from a manual to determine the eligibility of the participating bidders when these clauses were not incorporated in the tender document. Non-incorporation of conditions of the manual in the NIT were not questioned by the petitioner. Having participated under the express terms of the tender document and after failing therein, it is

not permissible for the petitioner to contend that his eligibility was required to be determined as per conditions contained in the manual. We do not find any infirmity in the action of respondents No.1 to 4 in rejecting the Technical Bid of the petitioner.

In view of the above discussion, we find no merit in the instant writ petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.