(2012) 08 GAU CK 0065

In the Gauhati High Court

Case No : Writ Petition (C) No. 2148 of 2011

Universal Enterprise (M/s.) APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Citation : (2013) 2 GLD 255 : (2013) 2 GLT 931

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : S.N. Sarma, Mr. J.I. Borbhuyan and Mrs. K.H. Choudhury, for the Appellant; R.P. Sarma and Mr. M.R. Adhikari, for the Respondent

Final Decision : Allowed

Judgement

Biplab Kumar Sharma, J.—The petitioner, a registered Firm in the name and style of M/s. Universal Enterprise situated at Bongaon, Beltola College Road, P.O. & P.S. Beltola, Guwahati, is aggrieved by the Annexures - 4 and 5 serious orders dated 25.02.2011 and 28.09.2011 by which the particular contract/work orders have been issued in favour of the private respondents. Annexure-I is the tender notice dated 29.9.2010 by which Assam Govt. Marketing Corporation Ltd. (respondent No. 4.) had invited bids (Technical and Commercial) from the interested suppliers for supply of the following utensil for 36998 Nos. of Upper/ Lower Primary Schools in the offices of D.I. of Schools IS/Block Elementary Education Officers in different District of Assam.

1) Iron Kerahi (Iron Sheet) 25'' dia 15 Kg. (approx) 100 users (Best Quality)

2) Iron Khanti/Dabber Big size weight 500 gm (approx) (Best Quality)

3) Stainless steel service spoon (Best Quality) length 35 cm.

4) Stainless steel Mug 1 Lit. capacity weight 200 gm. (approx) (Best Quality)

2. In response to the said tender notice, the petitioner offered its bid/tender by putting the following price in respect of the items:

3. The petitioner also deposited the earnest money of Rs. 5 lakhs. When it was the expectation of the petitioner that it would be entitled to work order at the quoted rated of Rs. 1814/-, impugned work orders were issued in favour of the private respondents at the rate of Rs. 1936/-. Situated thus, the petitioner made an application dated 08.03.2011 under the provision of RTI Act, 2005 seeking information in respect of the processing of the bids and issuance of the work orders.

4. The petitioners has annexed a copy of the application dated 08.03.2011 (Annexure-3) and information furnished on 20.03.2011 (Annexure-3 B (I)). For a ready reference, the said Annexure-3B(I) (English version) is quoted below:

Information furnished with relevant documents by the Business Cell AGMC Ltd. Ambari, Guwahati-1, under RTI Act, 2005, as required by petitioner, Shri Nripen Das, Beltola, Guwahati

1. Serial No. 1: Total 49 No. tenderers have participated. Their address and phone number has been given. Two sheet, page No. 2

2. Serial No. 2.

The work order has been issued as per the order of the Director, Elementary Education Department, Assam Kahilipara to a total 30 Nos. of institutions at the rate of Rs. 1936/-. Copy enclosed. Two sheets, page No. 2.

The value of the goods are given below:

(1) Iron Kerahi of Rs. 1939/-, (2) Iron Kanti of Rs. 59/-, (3) Service Spoon of Rs. 59/- and (4) Mug of Rs. 79/-.

3. Serial No. 3 and 4

The work order has been issued as per direction of the Director of Elementary Education Department. Kahilipara. Assam. Copy enclosed. Two Sheets, 2 page.

4. Serial No. 5 Note sheet of the file and the copy of remaining documents are enclosed. 25 pages.

5. Serial No. 6

The work has been issued as per verbal directions of the Hon''ble Education Minister, Education Department, Assam and the Commissioner and Secretary (Elementary) Education Department Assam. No list has given.

6. Serial No. 7 - The copies of the agreement are enclosed. 40 pages.

5. Pointing out to the above information furnished to the petitioner, it is submitted by Mr. S.N. Sarma, learned Sr. Counsel assisted by Mr. J.M. Borbhuyan, learned counsel for the petitioner that everything was done on extraneous consideration and that there was no semblance of consideration of tenders worth the name.

6. Mr. Sarma, learned Sr. counsel for the petitioner has also referred to Annexure-4 document dated 25.02.2011 by which also informations sought for had been furnished which also peaks of allotment of work orders as per the verbal direction of the Minister of Education and Commissioner and Secretary, Elementary Education, Assam.

7. Referring to the Annexure-5A work orders, Mr. Sarma further submits that the utensils are sought to be purchased at much higher rate than the actual price. Referring to the counter affidavit filed by the respondent No. 2 in which the minutes of the meeting of the Purchase Committee held on 09.12.2010 has been annexed (Annexure-R/1), Mr. Sarma, learned counsel for the petitioner further submits that after issuance of the tender notice and preparation of the comparative statements, the Purchase Committee could not have approved the particular rate, i.e. Rs. 1936/-, and that too, with exorbitant rate of price escalation (20%) and transportation cost of 10%.

8. Mr. R.P. Sarma, learned Sr. counsel assisted by Mr. M.R. Adhikari, learned counsel representing the respondent Corporation, submits that the action of the respondent Corporation in inviting tender and preparing the comparative statements etc. being based on the request made by the Govt. in the Education Department, no fault can be attributed in processing the tender notice. He further submits that the approved rated having been fixed by the Purchase Committee in the Education Department, Govt. of Assam, the respondent Corporation is bound by it. Mr. B. Choudhury, learned SC, Education Department submits that the Purchase Committee having fixed the approved rate taking into account all the relevant facts, same is not liable to be interfered with. He further submits that the bid offered by the petitioner being not within the viable range fixed by the Purchase Committee, the petitioner could not become successful in the tender process and consequently work order could not be issued to it. He submits that the Purchase Committee was duly constituted by notification dated 15.03.2010 and the said Purchase Committee in its meeting dated 09.12.2010 taking note of the rate offered by various bids/tenders fixed the approved rate of Rs. 1936/- which the petitioner did not conform to.

9. Mr. S.N. Sarma, learned counsel for the petitioner submits that leaving aside the other illegality committed in the tender process, the fixation of approved rate only after preparation of comparative statements on the basis of the bids offered by the tenderers, the tender process is vitiated being not transparent. In this connection, he has placed reliance on two decisions reported in Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, and Mohd. Makrub Khan @ Mohd. Junu Khan Vs. Manuj Kumar Sarmah and Others,

10. In Makrub Khan (supra), the Division Bench of this Court noticing the particular procedure adopted in the tender process in acceptance or rejection of tender, held that rejection of a bid without disclosing the procedure beforehand was bad in law. Referring to the Apex Court decision in Dutta Associates Pvt. Ltd. (supra), it has been held that every NIT must disclose the procedure that would

be followed in the matter of acceptance or rejection of a tender so that entire tender process becomes transparent, fair and open. As in the instant case, in the said case also, the NIT did not contain any condition that the authorities would consider the viability or suitability of the tenderer in accepting the tender for settlement. It was found that only after opening of the tenders and at the stage of preparation of comparative statement, the rate offered by the petitioner was held to be exorbitant and that too, in reference to the last year''s bid. It was held that a hidden criteria in the matter of settlement of contract would lead to grave danger and the same is antithesis to the concept of transparency, openness and fairness.

11. In Dutta Associates Pvt. Ltd. (supra), the Apex Court while considering the matter of permissibility or otherwise of "viability range" held as follows:

firstly, the tender notice did not specify the ''viability range'' nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/government would first determine the ''viability range'' and would then call upon the lowest eligible tenderer to make counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt which accepting the tender. They did nothing of that sort. Secondly, we have not been able to understand the very concept of ''viability range''. . . The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at .11 .14 per LPL or so, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range... Thirdly, the Division Bench states repeatedly in its judgment that having determined the ''viability range'', the government called upon only the appellant-Dutta Associates (third respondent in the Writ Petition/Writ Appeal) to make a counter-offer to come within the ''viability range'' and that his revised offer at the higher limit of ''viability range'' (.15 .71) was accepted. This Division Bench has stretched that no such opportunity to make a counter-offer was given to any other tendered including the first respondent. As the Division Bench has been rightly pointed out, this equally a vitiating factor. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (appellant herein) is unfair and opposed to the norms which the government should follow in such matters viz. openness, transparency and fair dealing. The grounds 1 and 2, which we have indicated hereinabove are more fundamental than the third ground upon which the High Court has allowed the Writ Appeal.

12. During the course of hearing of the instant proceeding, it was submitted that some of the private respondents had earlier approached this Court seeking

vacation of the interim order operating in this proceeding by which work orders have been stayed, but upon failure to get the say order vacated, they have abandoned the proceeding. Even today also none has represented the private respondents. By order dated 11.06.2012, Bharalumukh Police Station, Guwahati was directed to get the identity of M/s. Dimasa Iron Co., Kumarpara, Guwahati (respondent No. 9). As per the report furnish by the Bharalumukh Police Station, there is no such firm located at Kumarpara, Guwahati about which mention has been made in the order passed thereafter on 27.06.2012.

13. In the minutes of the meeting on 09.12.2010, the Purchase Committee has fixed the appropriate rate (Rs. 1936) with the following justification:

The Purchase Committee also examined and verified the specification, quality etc. of each sample.

As regards finding out the reasonableness of rates of the utensil for Mid-Day-Meal, the Member-Secretary informed the Committee that Commissioner of Taxes, Assam has provided the market rate vide his letter No. 1749 dated 27.11.2009 addressed to the Commissioner & Secretary, Education (Ele.) Department.

The Committee, thereafter made an exercise for arriving at a reasonable rate of the 4 (four) items taken together in the following manner.

Taking the base price at Rs. 1915.50 for the 4 (four) items taken together, the Committee after threadbare discussion approved the nearest rate (Rs. 1936.00 from the Comparative Department) to the base price Rs. 1915.50. Also the Committee after taking into consideration the fact that there are many valid tenders allowed the AGMC may negotiate with any valid tenderer for procurement of the items whose rate is above the approved rate and who is willing to work at the approved rate (Rs. 1936.00) with prior consultation with the Education (Ele.) Department.

14. The aforesaid approved rate has been arrived after considering the bids offered by the tenderers including the petitioner. As noted above, the bid offered by the petitioner is Rs. 1814/-. The Purchase Committee after arriving at purported marketing price of Rs. 1425/- in respect of different items added 20% price escalation and in addition another 10% transportation cost and 2% AGMC, total amount coming to Rs. 1915/-. Being not contended, the Purchase Committee further added Rs. 21/- so as to make the approved rate Rs. 1936/- which is the rate quoted by the respondent No. 26. The Purchase Committee also allowed the respondent Corporation to negotiate with valid tenderers for procurement of the items whose rate is above, the approved rate of Rs. 1936/-. In the process, the petitioner was excluded from the fray.

15. Mr. S.N. Sarma, learned counsel for the petitioner submits that if transportation cost (10%) is added, then the total transportation cost will be around Rs. 5 lakhs to Rs. 6 lakhs which is even likely to be more than the actual

price of the items. In addition, the Purchase Committee also did not assign any reason for addition of 20% as price escalation. If the utensils are required to be obtained at the earliest, with addition of 20% purported price escalation, same will be a huge loss to the public exchequer.

16. Above apart, when the Purchase Committee has fixed the approved rate only after receipt of the tenders and knowing the rates offered by the tenderers, on that score alone the entire tender process is vitiated due to lack of transparency and openness and fair play.

17. For all the aforesaid reasons, the writ petition succeeds. The impugned work orders (Annexures-5 series) dated 25.02.2011 and 28.02.2011 are set aside and quashed. It is expected that the Govt. will go ahead with the project by re-tendering in fair and transparent manner so that there is no loss to public exchequer. Writ petition is allowed, without, however, any order as to costs.