(2012) 02 CHH CK 0039

In the Chhattisgarh High Court

Case No : Writ Petition C. No. 7327 of 2011

Virgo Softech Limited APPELLANT

Vs

State of Chhattisgarh and Others RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:
Constitution of India, 1950 — Article 14, 19(1)(g), 226

Citation : (2012) 02 CHH CK 0039

Hon'ble Judges : Sunil Kumar Sinha, J;R.S. Sharma, J

Bench : Full Bench

Advocate : Ashish Shrivastava, Mr. Pancham Surana and Mr. Harsh Wardhan, for the Appellant; Kishore Bhaduri, Additional Advocate General for the respondents 1 to 3, Mr. Vivek K Tankha and Mr. Prashant Jaiswal, Sr. A., for the Respondent

Final Decision : Dismissed

Judgement

Sunil Kumar Sinha, J.—Transport Department, Government of Chhattisgarh/ employer, issued Notice Inviting Tenders (NIT)/Request for Proposal (RFP) dated 11th of April, 2011 from qualified bidders for their proposed service delivery project relating to smart card based Driving Licences, Vehicle Registration and other IT related activities. Key objectives of the project, scope of work and qualifying criteria were specified in a classified manner in the tender documents. Clause 10, 11 & 16 of the qualifying criteria read as under:-

10. The bidder should have an experience in providing centralized web based solution integrated with a payment gateway system to at least one state department on a state wide basis. A satisfactory performance certificate from the client along with contact details of the client (Name, Designation of Client, Address, Phone, Fax Number, etc to be submitted along with the bid.

11. The bidder should have an experience in developing, creating and managing of Data Centers. At least one data centre of the bidder should be ISO 27001:2005 complaint. Proof of such certificate must be submitted along with

the bid.

16. The company must have integrated the secured payment gateway solution under any e-Governance project (using SSL certificate from any of the globally recognized agencies such as Verisign of equivalent) with at-least one nationalized bank of India. A proof of such integration should be submitted along with the bid.

Clause 2 of the NIT deals with general terms & conditions. It deals with submission and withdrawal of bid; amendment of RFP document; evaluation of bid; and evaluation framework. Under evaluation framework, Clause 2.1.5 deals evaluation marking system in the following manner :-

Criteria

Maximum marks

Legacy Data entry of old manual data of Vehicles (minimum 10 lac data entry for each project) in digital system for Transport Department in India

20

Data entry in 1 State -

10 marks

Prior experience in implementation of Smart Card personalization application with NIC based "VAHAN / SARATHI"

10

Implementation in 1 State

5 marks

Implementation in more than 1 State

10 marks

Prior experience in implementation & management of Centralized Web based applications in Transport Department in India

20

Implementation in 1 State

10 marks

Implementation in more than 1 State

20 marks

Prior experience in setting-up & managing data centre in Transport Department in India

20

1 State

10 marks

More than 1 State

20 marks

Turnover in last 3 financial years

10

More than 50 Crore

10 marks

Technical Presentation including demonstration of proposed application (s)

20

Total

100

The bidder would be required to obtain minimum 60 marks as per above matrix & qualify as technically suitable for the said project and be eligible for next round i.e. price proposal under this tender.

It was defined under Clause 2.2 that after Technical Proposals are opened and evaluated, a list of short listed Vendors will be prepared. The short-listed Vendors will be required to make a presentation cum real time full-fledged demonstration, with all required applications, to the Department. The components of the presentation shall include at least personalization and printing of a SCOSTA smart card as per the National Standard for Transport Application; description on the smart card project experience of the vendor or its smart card technology partner; and description of the implementation plan. It was further reiterated that the minimum Technical Score required for qualifying for the Financial Proposal is 60 Points. The financial proposals of bidders whose technical score is less than 60 points will not be opened.

2. The NIT further specifies the method relating to proposal evaluation. 3 Stages are specified there under.Stage I relates to General Examination of Proposals (Evaluation of Pre-Qualification); Stage II relates to Examination of Short-listed Technical Proposals (Weightage: 70%); & Stage III relates to Examination of Financial Bids (Weightage: 30%). It was clarified in the NIT that the bidder scoring the maximum final Marks (F) shall be declared as the Preferred Bidder. Transport department,Chhattisgarh may either choose to accept the FinancialProposal of the Preferred Bidder or invite him for negotiations. Upon acceptance of the Price of the Preferred Bidder with or without negotiations, Transport department, Chhattisgarh may declare the Preferred Bidder as the Successful Bidder.

3. A corrigendum was issued on 26.5.2011 and certain corrections were made in the NIT/RFP dated 11.4.2011. By the above corrigendum Clause No. 10,11 & 16 of the qualifying criteria were declared to be "Not Mandatory" and last date of receipt of tender which was 18.5.2011 was extended to 6th June, 2011.

4. The petitioner and respondents 4 & 5 offered their bids in response to the above NIT/RFP. The technical bids of above tenderers were opened on 14.7.2011. All above 3 tenderers were found eligible for the next round i.e. for technical evaluation and presentation. Later on technical bids of the above 3 tenderers were evaluated and marks were allocated to them under the above 6 heads contained in Clause 2.1.5 of the evaluation marking system (supra) and financial bids of the petitioner and respondent No. 4 were opened on 26.8.2011. The petitioner was L-1 as it had offered comparatively lower rate than respondent No. 4. The petitioner had offered rate of Rs.42.25 and respondent No. 4 had offered rate of Rs.70.29. Since, according to the employer, respondent No. 4 was Preferred Bidder, they called respondent No. 4 for negotiation who agreed to work at the L- 1 rate. Therefore, a Letter of Acceptance (LOA) dated 7.12.2011 was issued in favour of respondent No. 4.

5. Mr. Ashish Shrivastava, learned counsel appearing on behalf of the petitioner, contended that the petitioner was the Preferred Bidder; if qualifying criteria No. 10 & 11 were declared as not mandatory, then no marks would have been kept under these criteria in evaluation marking system. He further contended that the allocation of the marks to the petitioner under Clauses 3 & 4 corresponding to the above criteria 10 & 11 was also incorrect. He also contended that the evaluation marking system was only for the purpose of qualifying in technical bid and once the petitioner had qualified in technical bid by obtaining 60 points and was L-1 in financial bid, the LOA would have been issued in favour of the petitioner. According to him, the entire process was vague and the action was malafide and arbitrary.

6. Mr. Kishore Bhaduri, learned Additional Advocate General appearing on behalf of the State/respondents 1 to 3, opposed these arguments. He argued that the petitioner was not the Preferred Bidder; qualifying criteria No. 10 & 11 which were declared not mandatory were only with relation to qualify in pre-qualification bid evaluation; allocation of marks against the above criteria, therefore, was not unreasonable; the State has chosen the best bidder strictly adhering to the tender conditions; marking system was never challenged by the petitioner; and the petitioner knowing all well participated in the tender process. After being unsuccessful, he cannot be allowed to challenge the essential conditions of the NIT.

7. Mr. Vivek Tankha, learned Sr. Advocate and Mr. D.K. Singh, learned counsel for respondent No. 4 supported the arguments advanced by the counsel for the State. Referring to various decisions of the Supreme Court as also this Court, they vehemently argued about the scope of judicial review in such matters.

8. We have heard learned counsel for the parties at length and have also perused the records of the writ petition.

9. Qualifying criteria No. 10 & 11 relates to pre- qualifying bid evaluation. In all 16 criteria have been defined under a distinct heading of "qualifying criteria". A perusal of the entire NIT would show that these criteria were essentially required to be fulfilled by the bidders and the bidders fulfilling the above 16 criteria were entitled to participate in tender process. Out of 16 qualifying criteria, by the corrigendum dated 26.5.2011 the above 3 criteria i.e. 10, 11 & 16 were declared as "not mandatory". The effect of declaring the above 3 criteria as not mandatory would be that even if a bidder does not fulfill the above 3 criteria, he may be allowed to participate in bidding process. This shows that the purpose of declaring these criteria as not mandatory was limited to permit maximum bidders to participate in tender process and nothing more. According to the contents of the NIT, marking evaluation system was wholly independent. The marking evaluation system and the qualifying criteria therefore cannot be correlated as has been argued by Mr. Shrivastava. As contained in the NIT, the qualifying criteria were solely for the purpose of pre-qualification bid evaluation. The calling of tenders in the realm of commercial law is a contest for trade. Therefore, if relaxation in pre- qualifying criteria was given with a view to give opportunity to more bidders, it was certainly with an idea to increase competition for selection of best bidder. We are of the view that the above relaxation was restricted for the purpose of pre-qualification bid evaluation and no one can claim that if criteria No. 10 & 11 were declared as "not mandatory" for the purpose of pre-qualification bid evaluation, then no marks would have been kept under these criteria in evaluation marking system.

10. In Reliance Energy Ltd. and Another -Vs- Maharashtra State Road Development Corpn. Ltd. and Others, (2007) 8 SCC 1, the Supreme Court held that "When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. The "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field" which is an important concept while construing Article 19(1)(g) of the Constitution. In the said case, the State had not specified the accounting norms with clarity for calculation of the "net cash profit" for a certain number of years, one of the criteria specified in the tender conditions, that had let to confusion and uncertainty as to whether the petitioner had met the criterion in question, leading ultimately to their disqualification form the bidding process.

11. In the instant case, by the aforesaid corrigendum, though the above criteria No. 10,11, & 16 were declared as not mandatory, but Clauses 3 & 4 of the evaluation marking system were never deleted. These Clauses are clear and unambiguous. What are required under these Clauses for allocation of marks are mentioned with legal certainty. Even the manner of allocation of marks under these Clauses are clear and unambiguous and there is no vagueness or

subjectivity. The petitioner has not challenged the validity of Clauses 3 & 4 (relevant Clauses) of the evaluation marking system. The petitioner, knowing fully well about the existence of these Clauses participated in tender process and after being unsuccessful the petitioner is raising questions relating to the existence of above Clauses which cannot be permitted at this stage. We are of the view that the contents of the NIT would be read as a whole and the Clauses in the evaluation marking system including Clauses 3 & 4 shall be taken as the fixed norms by the employer for evaluation of the bids.

12. It was argued that allocation of marks/points to the petitioner under Clauses 3 & 4 were incorrect. The evaluation of the technical bids was done by the evaluation committee on 10.8.2011. According to the return of the State, the evaluation committee comprised of 4 members namely- Additional Transport Commissioner, Joint Transport Commissioner, Dy. Director Finance & Scientist D, NIC. The above expert committee evaluated the technical bids of the 3 competitors and awarded marks to them in the following manner:-

Criteria

Maximum marks

Marks obtained

M/S Effective Enterprises

M/S Virgo Softech Limited

M/S Smart Chip

Legacy Data entry of old manual data of

Vehicles (minimum 10 lac entry for each project) in digital system for Transport Department in India

20

0

10

20

&Bull; Data entry in 1 State

10 marks

&Bull; Data entry in more than 1 State

20 marks

Prior experience in implementation of Smart Card personalization application with NIC

Based "VAHAN/SARATHI"

10

5

10

10

• Implementation in 1 State

5 marks

• Implementation in more than 1 State

10 marks

Prior experience in implementation & management of Centralized Web based application in

Transport Department

in India

20

0

10

20

• Implementation in 1 State

10 marks

• Implementation in more than 1 State

20 marks

Prior experience in setting up &

managing data centre

in Transport

Department in

20

0

0

20

• 1 State

10 marks

• More than 1 State

20 marks

Turnover in last 3 financial years

10

10

10

10

• 20 to 50 crore

5 marks

• More than 50 Crore

10 marks

Technical Presentation including

Demonstration of proposed application(s)

20

15

20

20

Total

100

30

60

100

The challenge is mainly to the allocation of marks to the petitioner under Clauses 3 & 4. If the marks allocated under these Clauses are found to be correct, even if the petitioner gets full mark in Clause 1, as is claimed, would make no difference. Therefore we shall firstly examine the marks allocated in Clauses 3 & 4. In these Clauses the petitioner got 10 and 0 marks, whereas respondent No. 4 got 20 marks against each Clause. The evaluation committee found that regarding web based application development and maintenance for any Transport Department in India (Clause 3), the petitioner did not submit any proof. A copy of certificate issued by IDBI was submitted which states that M/s Venture Infotek Global Pvt. Ltd. has provided web based solutions for its clients. The work order of Managing Director, Himachal Road Transport Corporation, Shimla indicates that

M/s Virgo Softech Limited was assigned the project execution including web based application for the department. The evaluation committee, therefore, held that the petitioner has done web based development in one State and 10 marks out of 20 was awarded to the petitioner under this Clause. About Clause 4 i.e. setting up & managing data centre in Transport Department in India, the evaluation committee found that no evidence was submitted establishing that the petitioner has done any project of setting up and managing data centre. Therefore, the petitioner was awarded 0 mark under Clause 4. On the contrary respondent No. 4 had submitted following certificates for allocation of marks under each Clause :-

1. Certificate from Dy. Transport Commissioner, M.P. and Addl. Commissioner, Orissa have been attached confirming entry of more than 10 Lac records of legacy data for Transport Department.

2. The above certificates show that the company has executed project of Smart Card personalization application with NIC based SARATHI in MP and VAHAN/ SARATHI in Orissa.

3 Certificates of Dy. TC M.P. and ATC, Orissa confirm that the company is carrying out project including Web based applications in transport department.

4. Certificates of Dy. TC M.P. and ATC, Orissa also indicate that the company has done Data centre setup and maintenance for transport department.

5. Auditor''s certificate regarding turnover of more than Rs.50 Crore in last three financial year has been attached.

The evaluation committee having considered the above documents filed by respondent No. 4 awarded 20 : 20 marks to respondent No. 4 and as shown in the evaluation chart, the petitioner in all got 60 marks/points and respondent No. 4 got 100 marks/points. Learned counsel for the petitioner could not show any perversity in the marks awarded to respondent No. 4. He tried to demonstrate by showing a certificate dated 22nd October, 2010 issued by Bureau Veritas Certification Pvt. Ltd. certifying that the Management System of the Venture Infotek Global Pvt. Ltd., 701, Building 11, Interface, Malad (W) Mumbai - 400 064, Maharashtra, India has been audited and found to be in accordance with the requirements of the standard detailed in the certificate. We are unable to understand how this certificate helps the petitioner. Admittedly the certificate was not issued by any authority of the Transport Department of any State in India. It relates to Venture Infotek Global Pvt. Ltd. Therefore, it does not fulfill the requirement of Clause 4 and the evaluation committee has rightly awarded 0 marks to the petitioner under Clause 4 as the petitioner could not show any document to establish their prior experience in setting up & managing data centre in Transport Department in India.

13. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , quoting many earlier decisions including that of Raunaq International Limited Vs. I.V.R.

Construction Ltd. and Others, , the Supreme Court held that the award of 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 considerations 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 malafides, unreasonableness and arbitrariness. 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.

14. This Court also held in Delta Construction Systems Limited -Vs- South Eastern Coalfields Ltd. & Others (W.P. (C) No. 3098 of 2008), that when the matter is technical and needs expertise and a decision by the Expert Committee has been taken within the norms of contract conditions with a view to choose a best bidder, the Court being a non-expertise cannot take a different view. The scope of interference in such matters, under the power of judicial review, are very limited. The Government or its instrumentalities while making such selection are free to see that the services offered are of requisite specifications and the person tendering is of the ability to deliver the services as per specification. And, if the decision is not vitiated on account of malafides, arbitrariness, extraneous consideration or voilative of provisions of Article 14, procedural impropriety or that the policy adopted has no nexus with the object it seeks to achieve, that should be allowed to continue.

15. In the instant case, the Expert Committee has allocated the marks on the norms settled in the NIT. They have strictly followed the norms while allocation of the marks. Nothing could be shown to us that the allocation of marks was improper, irrational or unjustified on factual aspect. Therefore, the challenge of the petitioner to the marks allocated under above Clauses, particularly under Clauses 3 & 4 cannot be sustained.

16. Mr. Shrivastava has next contended that the petitioner was the Preferred

Bidder. This does not appear to be factually correct. In Clause 2.2.1.3, it is mentioned that the bidder scoring the maximum final marks (F) shall be declared as the Preferred Bidder. In case on hand, as stated above, the petitioner secured 60 marks/points and respondent No. 4 secured 100 marks/points, therefore, respondent No. 4 was the Preferred Bidder and the petitioner was not the Preferred Bidder. We have already held the allocation of marks to both the parties as correct and reasonable. Therefore, claim of the petitioner that it was a Preferred Bidder, in light of the above finding, cannot be accepted.

17. It was also argued that the rate quoted by respondent No. 4 was much higher than the rate quoted by the petitioner and when the petitioner passed through the technical evaluation by getting minimum 60 marks, then on comparison of the rates of both the parties the LOA would have been issued in favour of the petitioner.

18. The argument appears to be correct on the first sight, but on deep study it fails. The method relating to proposal evaluation, as contained in Para-3 (supra), shows that the same has been mainly divided into 2 parts. Part 1 relating to technical proposal has been given 70% weightage and Part 2 relating to financial proposal has been given 30% weightage. The above method of giving such weightage is based on the concept of "Quality-Cum-Cost based selection", in which the quality part i.e. the part relating to technical proposal has been given more weightage than the financial part. In such selection, system of stage-wise passing through cannot be applied. It cannot be claimed that if a bidder has obtained 60 marks/points (minimum passing or qualifying marks/points) in technical qualification, then while considering his selection further only his financial bid would be considered and the marks/points obtained in technical bid shall not be taken into consideration. Passing in technical evaluation, shall only make the bidder eligible for further participation in next round, but as per scheme of the NIT the overall qualification of the bidder shall be considered and selection shall be made. In the above circumstances, if the 2 or more bidders secure equal marks in technical evaluation, then of course, the price bid of the L-1 would have to be accepted. The idea behind the above provisions which are contained in proposal evaluation Clause, in form of Stage I, II & III (Para-3 supra), is to select best bidder who posses good qualities/essentially required qualities and whose price is also suitable to the employer, but at any cost much weightage was to be given to the technical qualities in the above ratio. The above policy adopted by employer has nexus with the object it seeks to achieve, and in such selection no one can claim award of contract on being L-1 alone.

19. In Raunaq International (supra), the Supreme Court held that it is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee''s special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are

offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work, can be legitimately paid in order to secure proper performance of the contract and good quality of work- which is as much in public interest as a low price. The Court should not substitute its own decision for the decision of an expert evaluation committee.

20. In the instant case when the petitioner and respondent No. 4 both stood qualified for the next round in their technical evaluation by the Expert Committee by getting 60 & 100 points which was under weightage of 70% as per the norms, the employer thought it better to negotiate with respondent No. 4 making reference of the rate of the petitioner. Respondent No. 4, agreed to work on the rate quoted by the petitioner. The employer, therefore, in terms of the NIT declared respondent No. 4 as the Successful Bidder and issued LOA dated 7.12.2011 in favour of respondent No. 4. The negotiation with the Preferred Bidder and selection of the Successful Bidder in the above manner is provided in the procedure prescribed in the NIT. After considering the entire facts and circumstances of the case, we do not find any mistake in the procedural aspect also. We are of the view that respondent No. 4 has been chosen after adopting proper procedure prescribed in the NIT.

21. In Jagdish Mandal Vs. State of Orissa and Others, the Supreme Court held that "Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

22. For the foregoing reasons, we do not find it appropriate to interfere with the decision taken by the employer. The writ petition, therefore, is liable to be

dismissed and is hereby dismissed. No cost.

