
(1997) 01 AP CK 0035

In the Andhra Pradesh High Court

Case No : Writ Petition No. 21399 of 1996

V.S.N. Benarji, Engineers and Contractors

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 16-01-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 299

Citation : AIR 1998 AP 29

Hon'ble Judges : Syed Saadatulla Hussaini, J

Bench : Single Bench

Advocate : Siva Rama Sastry, for the Appellant; G.P. for Municipal Administration (for No. 1), N. Subba Reddy, (for No. 2) and Mohd. Ali, (for No. 3), for the Respondent

Final Decision : Dismissed

Judgement

Syed Saadatulla Hussaini, J.—All the counsels appearing for the parties submitted that the main writ petition itself may be disposed of.

2. The petitioner in this writ petition is seeking a writ of mandamus, order or direction directing the respondents to allot all items of package-I for which the petitioner has submitted its tender in response to the Tender Notification in Chit Tender Notice No. HUDA/DEV/GL.U/13/95-96 dated 1 -3-1996 issued by the 2nd respondent.

3. The learned Senior Counsel, Mr. Siva Rama Sastry appearing for the petitioner submitted that the 2nd respondent has invited tenders from registered pre-qualified contractors for executing works on lump sum contract and on turn-key basis by the notification bearing Chit Tender Notice No. HUDA/DEV/GL.U/13/95-96, dated 1-3-1996. The tenders were invited in six packages for construction of bridges and flyovers within twin cities of Hyderabad and Secunderabad. The petitioner has been recognised by the 2nd respondent vide his letter No. 10369/ HUDA/DEV/CE/FO 95, dated 1-3-1996. It has been

qualified for tendering for the works for which the tenders were invited. The petitioner submitted its tenders in respect of package-I for construction of flyovers at Ameerpet junction, b. Panjagutta junction and c. Visveswarayya statue junction on 10-5-1996 along with 10 other tenderers including the 3rd respondent offering to execute the works in terms of the package at lump sum basis. The petitioner's tender was for Rs. 21,62,21,534/- and the 3rd respondent's tender was for Rs. 23,28,00,000/-.

4. It is submitted that the petitioner by a separate letter along with the tender had sought for enhancement of 15% in all over and above the quoted value of the work viz. Rupees 18,72,36,121/-. Exclusive of load testing, the amount derived at Rs. 21,53,21,534/- as being the tender amount on behalf of the petitioner.

5. The learned Senior Counsel appearing for the petitioner submitted that the petitioner received the work orders by the proceedings vide letter No. 10377/HUDA/DEV/CD/FC/PKC.I/96, dated 5-10-1996 accepting the tender of the petitioner and awarding the works in respect of construction of flyovers at Amirpet junction and Panjagutta junction only. The 2nd respondent did not permit the petitioner even to make endorsement that the work orders are accepted without prejudice to the rights of the petitioner. The petitioner then addressed a letter dated 7-10-1996 protesting against the illegal action of the 2nd respondent in splitting up the items of work in the package and restricting the same to two items of work in the package. It is reliably learnt that the 2nd respondent is proposing to issue work orders in respect of item-C in package-I to the 3rd respondent i.e. the construction of flyover at Visveswarayya Statue junction. The action of the 2nd respondent in splitting up item-C in package-I and not awarding the contract to the petitioner for the entire items, is assailed in this writ petition.

6. Mr. N. Suhba Reddy, Senior Counsel appearing for the 2nd respondent submitted as per the averments in the counter-affidavit that Traffic and Transportation Sector is one of the components of the Hyderabad Mega City Project. The State level Sanctioning Committee constituted for this purpose under the said project, consists of the nominees of the Central and State Governments and the Planning Commission of India and this Committee approved the construction of flyover in the Twin Cities of Hyderabad and Secunderabad in its meetings held on 6-11-1995 and 8-1-1996. The Government of Andhra Pradesh have also accorded Administrative sanction vide their orders Nos. 1. G.O.Ms. No. 463, MA. dated 10-11-1995, 2. G.O.Ms. No. 55, MA. dated 8-2-1996 and 3. G.O.Ms. No. 114, MA. dated 8-3-1996. For quick and effective processing and speedy implementation of the works, while ensuring quality, a Technical-cum-Tender Committee has been constituted by the Government in G.O.Ms. No. 463, MA, dated 10-11-1995 with the following Members :

Chairman 1. Engineer-in-Chief, WBP, Roads & Admn., R&B, Dept. Hyderabad.
Member 2. Engineer-in-Chief, Hyderabad Metro Water Works & Sewerage

Board, Hyderabad. Member 3. Chief Engineer, M.C.H. of Hyderabad. Member 4. Joint Secretary to Govt. Finance Dept., Hyderabad. Member Convenor. 5. Chief Engineer, HUDA.

7. As per the decisions of the Technical-cum-Tender Committee, a notice was issued on 20-11-1995 calling for pre-qualification tenders to reach HUDA on or before 30-12-1995 for shortlisting enabling to bid for construction of flyovers/Bridges/Road over Bridges (ROBs) on the specified terms and conditions mentioned therein.

8. It is further submitted that Chit Tender Notice along with a letter dated 1-3-1996 were communicated to the shortlisted contractors/firms for submitting tenders. The shortlisted contractors/firms include the petitioner and the 3rd respondent. Originally 30-3-1996 was the date for receiving and opening of the tenders but later it was postponed to 10-5-1996. A pre-bid meeting was also held on 6-4-1996 to clarify any doubts or points and the clarifications that were made were also communicated to them vide letter dated 10-4-1996. Tenders were opened on 10-5-1996 and for package No. 1, 10 tenders were received including the petitioner and the 3rd respondent. The technical evaluation of the tenders was got done by the Jawaharlal Nehru Technological University. The technical and financial evaluation of the tenders were placed before the Technical-cum-Tender Committee.

9. He denies the allegations of the petitioner in the affidavit which are devoid of truth, baseless and without merits and made for the purpose of the writ petition and which are false. He submits that it is incorrect to state that the decision of the Technical-cum-Tender Committee dated 4-10-1996 awarding the contract in respect of package-I for construction of flyovers deleting item-C in the package, is arbitrary, mala fide and contrary to the terms and conditions and opposed to principles of natural justice. Each package consists of distinct and different flyovers. The tenderers are directed to submit lumpsum amount separately for each one of the flyovers in the package. The following flyovers are included in the package No. 1 :

1. Flyover at Ameerpet junction.
2. Flyover at Panjagutta junction.
3. Flyover at Visweswaraiah Statue.

10. He invites my attention to page-6 of the counter-affidavit filed by the 2nd respondent wherein the difference of the tendered amount between the writ petitioner and the 3rd respondent is mentioned as follows :

ITEM Petitioner's tender 2nd Lowest tender 3rd respondent's tender.

1. Ameerpet Jn. 6,62,48,039 8,20,00,000 8,84,00,000
2. Punjagutta Jn. 5,77,48,250 6,00,00,000 6,24,00,000

3. Visweswarayya Statue Jn. 9,22,25,250 8,20,00,000 8,20,00,000

21,62,21,534 22,40,00,000 23,28,00,000

Reduction 10,00,000 -- --

Difference for (3)(--) 1, 02,25,250 (+) 1,02,25,250 1,02,25,250

If the reduction is proportioned the tendered rate of Item 3 is : 9,17,98,719
8,20,00,000 8,20,00,000

Difference (--) 97,98,719 97,98,719 97,98,719

11. It is submitted that the petitioner is fully aware of conditions and has not raised any clarifications in the pre-bid meeting. In the tender submitted by the petitioner, Clause-38 forms part as one of the essential terms of the tender and as since the petitioner has not questioned the clause, it is not open to him now to question the clause of deletion of awarding the contract to the lowest tenderer, 3rd respondent.

12. It is also submitted that no favour, whatsoever is shown to the 3rd respondent in awarding the work of flyover of Visweswaraiah Statue junction to it. Relying on condition 38 of the Lumpsum Hyderabad Urban Development Authority Tender, in short "Tender document" at page 19, he submits that the competent authority having regard to the facts and circumstances of the case thought it fit to delete one of the flyovers and award it to the lowest tenderer and there is no prohibition in the tender conditions after deletion of flyover in the package to award the same to the lowest tenderer provided the authority has acted in the best interest of the institution and the same is in accordance with the tender conditions wherein also, there is a saving of amount of about Rs. 1.00 crore.

13. He denies the allegation that the award of item-C of package-I to the 3rd respondent was done at the behest of the 1st respondent. The Technical-cum-Tender Committee which consists of high officers and technical experts who have performed their duties and acted independently and evaluated all the facts and circumstances of the case, had taken unanimous decision.

14. Mr. Md. Ali, learned Counsel appearing for the 3rd respondent while reiterating the averments of the 2nd respondent and relying on conditions 38 and 39 at page 19 of the Tender document, submits that with regard to award of the contract in respect of item-C in package-I to the 3rd respondent there is no illegality or the question of violation of principles of natural justice, for the tender of the 3rd respondent was the lowest and the 2nd respondent has authority to split up the tenders, which has saved the public money substantially and no bias against the petitioner or favour of 3rd respondent, has been shown by the 2nd respondent in awarding the contract. He also submits that it has acceded to the proposal of the 2nd respondent to provide obligatory span of 60 mtrs. as desired instead of 52 mtrs. earlier furnished by it, within the same quoted price for item-

C in Package-I viz. Visweswaraiah Statue junction.

15. Firstly, the learned Senior Counsel appearing for the petitioner submits that the tender notification was for each package and the Earnest money deposit was for each package. He has invited my attention to conditions-1, 4, 10, 11, 20, 21, 26, 27, 37 and 38 of the Tender document, which are at pages 12 to 21 of the material papers. He urges that deleting of item-C from package-I which is now allotted to the 3rd respondent, is illegal for deletion pre-supposes that the deleting could be done only after the contract is allotted, completed or concluded and there is no right vested in the 2nd respondent to split the package and either the entire package which consists of three items, should be accepted or it should be rejected. He also submits that as each pre-qualified tenderer is supposed to tender for the entire package the intendment of the tender notice is for the entire items of package and the 2nd respondent will not accept the tender for any one of the items in the package.

16. He relies on the Division Bench decision reported in *Radha Kishan Nathani and Others Vs. Union of India (UOI) and Others*, wherein Section 75(1) of the Railways Act, 1890 (as it stood before amendment of 1947 and 1949) has been considered where the meaning of words "Parcel" or "Package" is considered and it is held as under (Para 16) :

"The true meaning, and, correct interpretation of the words "parcel or package" occurring in Section 75(1) of the Railways Act is that the word "parcel" or "package" means the singular and not the plural, and, it contemplates each individual "parcel" or package and not the entire "consignment" or "package" consisting of several parcels or packages. But in order to form a "parcel" or "package" there should not only be one article, but two articles; and one should play the role of container to the other. In its primary significance a "parcel" is a number of quantity of things put up together. A package or parcel is an entity by itself. The goods may be wrapped up in a single package or parcel, or they may be kept loose, in which case each article, with a container thereto, would be different parcel or package. In order, therefore, that Section 75(1) should apply there should be declaration regarding the contents and their value, both of each parcel or package separately and not in respect of the entire "consignment" or "luggage" consisting of the different parcels or packages, booked under one luggage receipt u/s 74, collectively or in one lump. It is the parcel or package that is lost or destroyed which should have contained excepted goods of the value of more than Rs. 100/- and in respect of which there should have been declaration of its contents and their value, as required by Section 75(1) of the Act."

He also relies on the decision of the Apex Court reported in *Dutta Associates Pvt. Ltd. v. Indo Merchantile Pvt. Ltd.*, (1996) 4 ALT 34, wherein their Lordships have held that procedure the Government proposes to follow in accepting tender shall be stated in tender notice -- It should be transparent, fair and open.

17. Secondly, referring to the Minutes of the Technical-cum-TenderCommittee meeting dated 4-10-1996, he also submits that there has been failure to comply with the mandatory specifications wherein item-C, Visweswaraiah Statue junction flyover's span was originally fixed at 52 mtrs.; later the requirement was changed to 60 mtrs. and the willingness/consent was sought from the 3rd respondent for providing obligatory span of 60 mtrs. instead of 52 mtrs. for Panjagutta side as indicated in the tender, within the quoted price.

18. On the other hand, Mr. N. Subba Reddy, the learned Senior Counsel appearing for the 2nd respondent submits that there are three distinct flyovers in package-I, the tenderers were required to tender separately for each flyover; the 2nd respondent reserves the right to delete any flyover in any package which the Technical-cum-Tender Committee considered the tenders and items-a and b of Package-1 were awarded to the petitioner and item-C of Package-I was awarded to the 3rd respondent. The difference in tender amount between the petitioner and the 3rd respondent in respect of item-C is Rs. 1.00 crore. Thus, there is a saving of 1.00 crore for the 2nd respondent. The deletion of item-C from Package-I is not illegal for under Clause-38 of the Tender document, the 2nd respondent reserves the right to delete any number of flyovers in any package.

19. Mr. Md. Ali, the learned Counsel appearing for the 3rd respondent relying on conditions-20 and 38 of the Tender document, submits that there is no illegality in splitting package-I and awarding item-C in package-I to the 3rd respondent. He relied on a decision reported in New Horizons Limited and Another Vs. Union of India (UOI) and Others, , wherein it is stated that the terms and conditions of tender should be construed from the stand point of prudent businessman.

20. He also relied on Division Bench Judgment of this Court reported in Avanti Business Machines Pvt. Ltd. Vs. The State of A.P. and Others, , wherein it is held thus :

"Tenders called for supplying laminating machines and laminating films -- Both the items notified in different paras in tender notice --Separate rates quoted by tenderers -- Even petitioner-appellant treated them as independent items -- When offers are invited for more items for which separate rates have to be quoted tender of each item can be finalised without clubbing them together -- such a procedure does not amount to splitting the tender."

21. While dealing with the second contention of Mr. Siva Rama Sastry, the learned Senior Counsel appearing for the petitioner first, that there has been failure to comply with the mandatory "Specifications wherein item-C Visweswaraiah Statue junction flyover's span was originally fixed at 52 mtrs. and the requirement was changed to 60 mtrs. and the willingness/consent was sought from the 3rd respondent for providing obligatory span of 60 mtrs. instead of 52 mtrs. for Panjagutta side as indicated in the tender within the quoted price, a perusal of para-10 at page 36 of the original Minutes of Technical-cum-Tender Committee filed by the 2nd respondent in the Court shows that the Technical-

cum-Tender Committee held that the 3rd respondent shall be asked to modify the obligatory span to 60 mtrs. for the Panjagutta side as indicated in tender instead of 52 mtrs. within the quoted cost. Accordingly, the 3rd respondent has acceded to the proposal of the Technical-cum-Tender Committee to provide obligatory span of 60 mtrs. as indicated in the tender instead of 52 mtrs. earlier furnished by it within the same quoted price for the flyover at Visweswaraiah Statue junction i.e. item-C in package-1 in its letter dated 7-10-1996 filed at pages-9 to 10 of the material papers.

22. Nodoubt, this is a slight variation from the tender; but the 3rd respondent has acceded to the proposal to increase the span from 52 mtrs. to 60 mtrs. within the same quoted price, which no doubt will cost something more as construction cost to the 3rd respondent. When the 3rd respondent has acceded to the proposal, there need be no objection from the petitioner and it cannot be said that this variation has vitiated the fair-play in processing the tender; as such, there is no substance in the said submission.

23. The first submission of the learned Senior Counsel appearing for the petitioner, which is the main plank of the argument, is that the 2nd respondent has no authority to delete item-C of package-I and the same is contrary to the tender conditions; as such it is illegal. In order to appreciate this contention, it is necessary to have a look at the terms and conditions of the tender document. The relevant conditions of the tender document are 20, 36, 38 and 39 which are as follows :

"CONDITION 20.

The tenderer should quote lump sum (L.S.) amount for the entire package of work for which he will undertake to do the whole work. The tenderer shall also quote L.S. amount for each flyover/bridge/ROB in a package in Schedule A. The L.S. amount should be written both in words and figures legibly free from any overwritings in Schedule A and corrections where unavoidable should be made by crossing out, duly signed with date and rewriting.

CONDITION 36. PRE-TENDER CONFERENCE

A pre-tender conference open to all pre-qualified tenderers will be held at Hyderabad on 21-3-1996 at 11 a.m. in the office of the Chief Engineer, HUDA, Hyderabad, wherein the prospective tenderers will have an opportunity to obtain clarification regarding the work and tender conditions."

CONDITION 38 :

Hyderabad Urban Development Authority (HUDA) reserves the right to delete any number of flyovers in any package. No claims of whatsoever will be entertained from the contractor on this account.

CONDITION 39 :

The Chief Engineer, Hyderabad Urban Development Authority or other

sanctioning authority reserves the right to reject any tenderer all the tenders without assigning any reason therefor."

24. Condition 36-Pre-Tender Conference has provided an opportunity to all pre-qualified-tenderer to participate in the pre-tender conference which was held in the office of Chief Engineer, HUDA, Hyderabad, to obtain clarifications regarding the work and tender conditions. But, no such objection or clarification was sought by the petitioner, in respect of conditions 20 and 38 of the Tender document nor any protest was raised in that regard.

25. Conditions 20 and 38 are couched in plain and unambiguous simple language. Condition 20 lays down that a tenderer should quote lump sum for the entire package work for which he undertakes to do the whole work. The tenderer shall also quote L.S. amount for each flyover/ bridge/ROBs in a package in the schedule.

26. The true internment/meaning of this condition is that apart from the tenderer quoting lump sum amount for the entire package, the tenderer has also to quote price/amount separately/ individually in respect of each item of the package. Condition 38 reserves the right of 2nd respondent to delete any number of flyovers in any package, that would clearly mean that any items of any package could be deleted at the time of awarding the contract.

27. It is significant to note that the petitioner has not challenged the validity of either condition-20 or 38 of the Tender document.

28. Analysing as above the conditions-20 and 38 rationally, it cannot be said that the action of the 2nd respondent in deleting item-C from package-I suffers from any illegality, as the 2nd respondent has right or competence to exercise its discretion. Assuming and not admitting keeping in view the conditions-20 and 38 of the Tender Document that the 2nd respondent has no right to delete any item of the package and either it should be accepted in entirety or it should be rejected, it would be doing violence to the language used in those conditions and putting letters upon the discretion which is vested with the 2nd respondent under condition-38.

29. From the perusal of para-10 at page 36 of the Minutes of Technical-cum-Tender Committee, which is extracted hereunder :

"The Committee has gone through the above details and as seen from the comparative statements M/s. VSN Benerjee & Co. is the lowest for flyovers at Aineerpet and Panjagutta and whereas M/s. U.P. Slate Bridge Corporation is the lowest for the other flyover at Visweswaraiah junction. But this firm in spite of clear indication given in the bid documents has submitted designs assuming S.B.C of 100 Tons/Sq. mtr. against 45 Tons/Sq. mtr. In view of the deviation from tender condition the offer even though the lowest in this flyover at Visweswaraiah junction is not considered. M/s. Sain Koh Engineers who are the third lowest in the above entire package has quoted Rs. 8.20 crores for the

above flyover (which is incidentally same as U.P. State Bridge Corporation rate of Rs. 8.20 crores for the same flyover) is less than the amount quoted for the above flyover by M/s. VSN Benerjee and Co. M/s. Zain Koh Engineers have followed the tender parameters for foundations etc. The above proposal will result in saving of Rs. 1.00 crore. However, M/s. Zain Koh Engineers shall be asked to modify the obligatory span to 60 Meters for the Punjagutta side as indicated in tender, instead of 52 Mtrs. provided in their drawings within the quoted cost," it reveals that in deleting item-C of package-I and allotting the same to the 3rd respondent, it has resulted in saving of Rs. 1.00 crore to the 2nd respondent.

30. Nothing has been brought to my notice in the instant case that the deletion of item-C of package-I is at the behest of the 1st respondent or for any other collateral extraneous reasons. In a decision reported in Union of India and others Vs. Hindustan Development Corpn. and others, , the Apex Court has held thus :

"If the Government reserves right either to accept or reject lowest offer and the validity of the conditions in the tender as such are not questioned then the Government can accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds."

In recent decision reported in Tata Cellular Vs. Union of India, , the Apex Court while laying principles of judicial review for interference by the Courts in respect of contractual powers exercised by Governmental Bodies, held thus (Para 85) :

"The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review, Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

In the contractual obligations, the terms and conditions of contract in a given case, forms the basis of decision on facts of each case. The decisions referred to by either parties have no relevance to the instant case which has been based on the interpretation of conditions-20 and 38 of the Tender Document.

30A. In the view which I have taken, in analysing and interpreting conditions-20 and 38 of the Tender document and the facts of the instant case, the decisions and the Guidelines of the Apex Court in awarding the Contracts as indicated above, it cannot be said that the process of deleting item-C of package-I and awarding it to the 3rd respondent, suffers from any illegality, arbitrariness,

irrationality, unfairness or procedural impropriety and not in public interest, as such, no interference is called for at the hands of this Court, accordingly, the writ petition is devoid of merits.

31. In the result, the writ petition is dismissed with costs. Advocate's fee is fixed at Rs. 5,000/-