

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)

WP(C) 433 (AP)/2018

M s R.T.T. Enterprises

.....*Petitioner*

-Versus-

State of A.P. & Ors.

.....*Respondents*

For the Petitioner : Mr. L. Perme, Advocate

For the Respondents : Mr. G. Tarak, SC, Rural Works Department.

**BEFORE
THE HON'BLE MR. JUSTICE MIR ALFAZ ALI**

Decided on : 31.01.2019

JUDGMENT & ORDER (ORAL)

Heard Mr. L. Perme, learned counsel for the petitioner and Mr. G. Tarak, learned Standing Counsel, Rural Works Department.

2. This writ petition under Article 226 of the Constitution of India, has been filed challenging the minutes of the Technical Bid Evaluation Committee dated 31.08.2018, whereby, the Technical Bid Evaluation Committee declared the petitioner firm as non-responsive.

3. In pursuance of the Notice Inviting Tender (NIT) No. EE/KYG/PMGSY/NIT/2018-19 dated 27.07.2018, issued by the Executive Engineer/PIU-I, Kaying Division, Camp Office Aalo, West Siang District, inviting electronic tendering for PMSGY road works from Jomlo Bari to Jomlo Mobuk (3.92 KM) stage-I, in the district of Siang. The petitioner being an eligible Class-I contractor, participated in electronic tender process. The tender paper of the petitioner was complete in all aspects as per the NIT. However, the petitioner was surprised to know that his technical bid was

declared non-responsive by the Technical Bid Evaluation Committee in the minutes of its meeting held on 31.08.2018. The said minute of the Technical Bid Evaluation Committee revealed that the technical bid of the petitioner was declared non-responsive under Clause 4.2 (K) of the Instruction to Bidder(ITB) and Clause 1.10 of Section 3 of the Standard Bidding Document of the PMSGY. The petitioner further stated that he also submitted tender for three other works and in all the three works, same documents were annexed. However, the respondent rejected the technical bid and declared it non-responsive on a different ground. It is submitted that the decision of the Technical Bid Evaluation Committee was arbitrary and mala fide and therefore prays for directing the respondents to accept the technical bid of the petitioner and further direction to open the financial bid of the petitioner for the aforementioned work.

4. The respondents No. 2, 3, 4, 5 and 6 submitted their affidavit-in-opposition. In paragraph-7 of the affidavit-in-opposition, the respondents explained the reasons, for which the technical bid of the petitioner was declared non-responsive. The paragraph 7 of the affidavit-in-opposition is quoted below for better appreciation.

"That with regard to the statement made in para-5 of the writ petition, the deponent begs to state that it is admitted that petitioner's technical bid was declared as non responsive under clause 4.2(k) of the ITB, and Section 3 Clause 1.10 of SBD. It is apposite to mention that the work schedule Methodology and quality assurance document submitted by the petitioner was beyond the scope of the project. The e-tender were invited for construction of road from Jomlo Moba (3.92 KM) stage-I, with estimated cost of Rs. 419.24 lakh only. The scope of project as per SBD is for formation cutting RCC slab, culvert, earthen side Drain R/B/wall, setting out road furniture work. But the work schedule methodology submitted by the petitioner's firm show for construction of long span bridge (LSB) and protection work of long span bridge (LSB) which is not within the scope of work schedule."

5. As regards the allegation of the petitioner, that he submitted three other tenders with the same documents, it is stated in the counter affidavit

that such averment of the petitioner in the petition was misconstrued, inasmuch as, the nature and scope of the work involved in the present writ petition was totally different, inasmuch as, the works for construction of road in this writ petition is only for stage-I, whereas, the other tenders relate to full stage work. Therefore, there could not be same document for all the tenders which were in respect of works of different scope and different specification. The petitioner also submitted a reply to the counter affidavit, wherein the petitioner stated that the respondent has been trying to mislead this court by stating that construction of bridge is beyond the scope of the work schedule. It is also stated, that even if it is assumed for the sake of argument that construction of bridge was beyond the scope of the project, some other bidders, who were declared responsive, also mentioned about the bridge in their work project/chart and methodology and therefore, the decision of the Technical Bid Evaluation Committee declaring the technical bid of the petitioner, 'non-responsive' was arbitrary and malafide.

6. Learned counsel for the petitioner, Mr. L. Perme submits that the decision of the Technical Bid Evaluation Committee was arbitrary and as such required to be set aside. Mr. G. Tarak, learned counsel for the respondents submits, that apparently the construction of long span bridge and protection work of long span bridge were beyond the scope of the work schedule and the Technical Bid Evaluation Committee having considered the scope of the work schedule and other technicalities declared the three technical bids, including that of the petitioner as non-responsive and other seven bids were declared responsive, and as such, there was no question of arbitrariness. Mr. Tarak further submits, that this court while exercising extra ordinary writ jurisdiction, shall not re-evaluate the technical bid nor act as an appellate court to review the merit of the decision of the Technical Bid Evaluation Committee, unless there is malafide or arbitrariness or public interest is involved. In support of his submission, learned counsel placed reliance on a decision of this court reported in **2008 (2) GLT 564 (Larsing M. Vs. Meghalaya Tourism Development Corpn Ltd. & Anr.**, wherein his court

having discussed in detail the scope of interference with the administrative decision, in commercial transaction held in paragraph-18 as under:

"In Air India Ltd. Vs. Cochin International Airport Ltd. (2000) 2 SCC 617, the Apex Court also observes that 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, that the court should always keep in larger public interest in mind in order to decide whether its intervention is called for or not and that only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene. 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 tenders, the court must be very carefully 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 maybe considerably delayed thus escalating the cost far more than affidavit-in-reply 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 Tender Evaluation transaction is entered into mala fide, the court should not intervene under Article 226 and disputes between two rival tenderers (See Raunaq International Ltd. I.V.R. Constructions Ltd. (1999) 1 SCC 492. The law relating to the contractual power of the Government and the inherent limitation of judicial review in connection therewith have been thoroughly examined by a three judge Bench of the Apex Court in the leading and epoch-making case of Tata Cellular Vs. Union of India, (1994) 6 SCC 651, and the following principles can be called out therefrom:

- 1. It is not for the court to determine whether a particular policy or decision taken in the fulfillment of that policy is fair. It is only concerned with the*

manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as (i) *Illegality*, which means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it; (ii) *Irrationality*, namely, *Wednesday unreasonableness*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

2. It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. In all these cases, the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention." (emphasis mine)
3. The modern trend points to judicial restraint in administrative action.
4. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
5. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
6. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often

- than not, such decisions are made qualitatively by experts.*
7. *The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
 8. *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

7. Learned counsel for the respondent also relied on a decision of the Apex Court in ***Municipal Corporation, Ujjain & Anr. Vs. BVG India Ltd. & Ors.*** reported in ***(2018) 5 SCC 462***, wherein the Apex Court held as under:

"64.1 Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2 A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.

64.3 It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint."

8. The minutes of the Technical Bid Evaluation Committee annexed as Annexure-2 to the petition in page-15 mentioned the reasons for declaring the technical bid of the petitioner non-responsive as under:

"Minutes of Technical Bid Evaluation

1. Name of work: L043 0 Jomlo Bari to Jomlo Mobuk (3.92 Km) Stage-I
2. Estimate Cost: Rs. 419.24 lakhs
3. Package No.:- AR/12/10/007 [tender id: 2018_CEAR_67010_1]
The "technical bid evaluation" of all the bidders started just after opening and downloading the documents of eh first cover one by one, by the board in accordance with clause 3, 4, 12.1, 22, 23, 24 and 25 of ITB of the "Standard Bidding Document" (PMGSY). The bidders have shown their original documents as and when the board asked for, in accordance with clause 4 of the ITB. The detailed evaluation of the technical bid have entered in the check list in the tabular form, and the list of qualified bidders for opening of the "financial bid opening" in pursuant to clause 22 of ITB, are as follows:
 1. M/s KKKK Enterprises, Aalo
 2. M/s KBM Enterprises, Pasighat
 3. M/s RD Enterprises, Bomdila
 4. M/s Pamong Enterprises, Yingkiong
 5. M/s Parpi Wire Products, Aalo
 6. M/s Modern Engineering, Pessing
 7. M/s ML Enterprises, Aalo

The technical bid evaluation could not be completed in scheduled time as there was a workshop on DRRP by NRIDA, MoRD, Govt. of India at Itanagar for all the engineers of Rural Works Department on the 24th August, 2018. So the financial bid opening reschedules for the 7th September, 2018 at 1100 hrs at the Conference Hall of the Chief Engineer, Rural Works Department Itanagar Govt. of Arunachal Pradesh.

The following firms are declared to be 'Non-responsive' as follows

1. M/s BM Enterprises, Naharlagun 'Non-responsive' under clause 4.4B(b)(ii) of the ITB of the SBD for the PMGSY.
2. M/s RTT Enterprises, Itanagar 'Non-responsive' under clause 4.2(k) of the ITB and Clause 1.10 of the section 3 of the SBD for the PMGSY.
3. M/s Tenzing Enterprises, Bomdila 'Non-responsive' under clause 4.2(d) of the ITB and clause 1.4 of section 3 of SBD (PMGSY)."

9. Clause 4.2 (k) of the ITB reads as under:

"The proposed programme of construction and Quality Management Plan proposed for completion of the work as per technical specifications and within the stipulated period of completion."

10. Clause 1.10 of Section 3 of the SBD for PMGSY reads as under:

"Proposed Programme. Descriptions, drawings, and charts as necessary, to comply with the requirements of the bidding documents."

11. All the bidders, who participated in the tender process, submitted their work programme/chart and methodology as per the provision of ITB and SBD for PMGSY, copies of which are also annexed with the writ petition. The basic contention of the learned counsel for the petitioner is that mentioning about the construction of bridge and protection work for bridge cannot be considered as beyond the scope, inasmuch as, the other two bidders, who were declared 'responsive' by the Technical Bid Evaluation Committee also mentioned about the bridge in their work programme/chart and methodology. Referring to Annexure-2 of the reply submitted by the petitioner against the counter affidavit, Mr. L. Perme contends that two other firms, namely, M/s Marpi Wire Products and M/s KBM Enterprise also mentioned about the bridge and therefore declaration of the technical bid of the petitioner non-responsive on the ground that his work programme and methodology were beyond the scope was arbitrary. It appears from the documents, annexed at page-7, 8 & 9 of the counter affidavit of the State respondent, that the work chart and methodology of the petitioner clearly mentioned about the construction of long span bridge (SPB) and protection work for such long span bridge, but the above two bidders as referred to above, apparently did not mention about the long span bridge (LSB). Therefore, the technical bid of the above two firms as to methodology cannot be considered to be the same with the present petitioner, even by a layman's consideration. Be that as it may, the impugned minutes makes it appears that out of 10 bidders participating in the tender process, 7 were found responsive and 3 including the petitioner were declared non-responsive. It is not a case, that the respondent authorities choose someone with the intention to favour him and as such arbitrariness cannot be attributed to the Technical Bid

Evaluation Committee. Apparently, no public interest is also found to be involved in the instant writ petition.

12. When apparently, out of 10 bidders, the Technical Bid Evaluation Committee found seven bids to be responsive and three including the petitioner's as non-responsive, for the reasons stated above, after evaluation of the bids by the expert committee, in my considered view this court cannot re-evaluate or review the merit of such decision taken by the expert committee. Apparently, from the materials as indicated above, the writ petition does not demonstrate involvement of any public interest nor it can be said that the respondents choose someone with the intention to favour him, inasmuch as, 7 bidders have been found responsive. Therefore, the writ petitioner also fails to demonstrate any arbitrariness in the decision making process of the expert committee. It is settled position, that it is the decision making process and not the merit of administrative decision is amenable to juridical review. Therefore, even if there is some error in the decision of the Technical Committee, the same cannot be cured by this court in exercise of writ jurisdiction.

13. Thus, having regard to the principle and scope of interference with the administrative decision of the State or its instrumentalities, more particularly in commercial transaction and the facts demonstrated by the writ petitioner, this court is unable to persuade itself to interfere with the impugned minutes/decision, in absence of any biasness or arbitrariness in the decision making process of the Technical Bid Evaluation Committee. Apparently, as indicated above, there is also no public interest involved.

14. For the reason stated as above, this court is of the view that this writ petition is without any merit and accordingly dismissed.

JUDGE

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