IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 07.05.2015

C.W.P.No.24083 of 2014 (O&M)

M/s Shivalaya Construction Co. Pvt. Ltd. ...Petitioner

Versus

Greater Mohali Area Development Authority & others ...Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Deepak Saini, Advocate, for the petitioner.

Mr. Rupinder S. Khosla, Senior Advocate, with
Mr. Aman Sharma, Advocate, for the respondents.

HEMANT GUPTA, J.

The petitioner, a Private Limited Company registered under the Companies Act, has invoked the writ jurisdiction of this Court for directing the respondents to consider the tenders submitted by it for Work Nos.3 & 6 mentioned in the Short Tender Notice dated 31.10.2014 (Annexure P-2).

The petitioner-Company is enlisted as Class-I Contractor with the CPWD, New Delhi. The Greater Mohali Area Development Authority (GMADA) invited tenders for four works, which was later on extended to seven works vide Press Note dated 31.10.2014. The last date and time for on-line submission of bids was 12.11.2014 up to 3.00 PM. The petitioner submitted its bids for Work Nos.3 & 6. However, the bids submitted by the petitioner have been rejected on the ground that the petitioner does not fulfill the qualifications. On 13.11.2014, the petitioner communicated respondent No.3 that some of the original documents as required by the respondents are with the Executive Engineer, RCD Road Division, Simdega (Jharkhand), where the petitioner has been awarded work for the contract price of more than Rs.70 crores. Earlier, the petitioner has submitted hard copy of the tender documents on 27.10.2010. There were 10 tenderers including the petitioner, who submitted their bids. In such tender process, the petitioner is lowest bidder, but without considering the bid of the petitioner, the respondents considered the other bidders. The petitioner has also filed an affidavit dated 10.11.2014 that the statements made in the bid documents are true and correct. It is alleged that the wrongful exclusion of the tender offer of the petitioner has caused loss of Rs.1.20 crores to the respondents.

In the written statement, the stand of the respondents is that as per Condition Nos.7 & 9 of the Short Tender Notice, the bidder was to submit original documents in order to prove their eligibility and to be declared as qualified bidder. Since the petitioner never deposited the same, its bids were not considered. The bids were rejected for want of original documents.

On 07.04.2015, learned counsel for the respondents sought some time to file an additional affidavit to justify the production of original documents, which are procedural only when scanned copies have been uploaded while submitting e-tender. Thereafter, the respondents have filed an additional affidavit stating that the documents scanned/uploaded by the petitioner cannot be accepted without verifying the originals. The reasons in respect of 24 documents relied upon by the petitioners have been detailed. It is pointed out that there is urgency in the execution of the contract, but if the uploaded documents are subsequently found to be fake, thereby creating a situation where the successful fake bidder is not in a position to either execute the project or for that matter not execute the same within the specified timeframe, therefore, it would lead to not only great public harm, but also cost escalation. It is pointed out that a bidder with mischief in mind or in connivance or collusion could upload fake documents and create a situation, where the bid would have to be necessarily re-tendered, thereby creating a multitude of situations where the entire execution of the project could go haywire. In respect of another tender for Road Works, it was pointed out that when the office of the respondents asked for the original documents pertaining to the performance bank guarantee amount, it was refused to be en-cashed for the reason that it being a 'void' certified cheque. Since the petitioner itself is admitting that the original documents were not submitted, the petitioner has been rightly excluded from the grant of contract.

The Short Tender Notice inviting e-tenders has been appended as Annexure R-1. The relevant conditions from such Notice are as under:

> "6. Bidders shall up load scanned copies of all the papers i.e. Enlistment Certificate; PAN Card; VAT No.; latest copies of E.P.F. Challans duly acknowledged by the concerned department and other certificates/documents required in prescribed format as mentioned in Bid Document/DNIT in the eligibility criteria, without which the tenders would be rejected even if any one of the document/certificate is not available.
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> 7. Original receipt of earnest money and tender processing fee paid online, originals of enlistment certificate; PAN Card; VAT No. and other certificates as required in the Bid Document/DNIT should be deposited with the undersigned before date of opening of technical bid (originals to be returned after verification). If the bidder fails to deposit the

above documents before the time, the bid shall be rejected and the bidder shall be disqualified.

8. To verify the authenticity of uploaded scanned copies of required documents and to give equal opportunity to all bidders, originals of only those documents/certificates should be submitted, which have been uploaded on the website duly scanned."

A perusal of the additional affidavit shows that the failure to produce the original documents have been made basis to reject the tender submitted by the petitioner even though most of the documents submitted by the petitioner may not have the originals at all. Out of such 24 documents, documents at Sr.Nos.6, 7, 8, 10, 19, 21 & 22 were either accepted or found to be verifiable on-line. However, certain other documents such as registration/certificate of incorporation; undertaking of bidder and annual turnover format were not accepted in the absence of original documents.

Having heard learned counsel for the parties at length, we find that the action of the respondents proceeds on the assumption that the tenderers will be committing forgery. In fact, it should be other way around. Even in case of any criminal offence of fraud and forgery, the presumption is of innocence. If some person commits any offence, the respondents have liberty to take recourse to law, but to presume that every tenderer will submit documents after committing forgery is mistaken approach. It defeats the very purpose of e-tender, when the scanned copies are required to be submitted. Though the tenders were required to be submitted in soft copies, but the archaic mindset is that hard copy should be produced. Both things do not co-exit. Therefore, mere fact that there is a possibility of forgery or some tenderers have committed forgery is not a valid reason to insist for the original documents. In fact, the PAN No. and VAT No., which are required to be disclosed are verifiable on-line. Condition No.7 was of production of other certificates, as required in the bid documents with further condition that originals would be returned after verification. The bid was to be rejected if the bidder fails to deposit the documents before time.

The total lack of application of mind is apparent, when the respondents have rejected the tender bid of the petitioner. Even the compilation produced by the petitioner such as list of machinery and equipments and detail of the technical personnel proposed to be employed have been rejected on the ground that the originals have not been produced. The list of machinery and equipments and the details of the technical personnel proposed to be employed is the compilation of data by the petitioner, therefore, there could not be any original, which could be produced for verification by the respondents. Such other documents like registration/certificate of incorporation; partnership deed and power of attorney; structure & organization and format of annual turnover is again a compilation of data of the tenderer alone. Documents at Sr.Nos.17, 18 & 24 i.e. Particulars of construction experience records; filing of certain affidavit/undertaking and undertaking as to bid capacity respectively are the documents produced by the tenderer itself. What would be required for verification, is not made clear. Condition No.7 in the Short Tender Notice talks about the certificate required in the bid documents means the certificates issued by persons other than the tenderer. Every document submitted by the tenderer is a document prepared by him. Therefore, the rejection of the tender submitted by the petitioner on the ground that the originals were not produced shows lack of application of mind. In exercise of power of judicial review, this Court can examine decision making process alone. Reference may be made to the judgment reported as Tata Cellular Vs. Union of India (1994) 6 SCC 651, wherein the Hon'ble Supreme Court has culled out the following principles:

> "**70.** It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *The 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.
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> xxx xxx xxx
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> **77.** The duty of the court is to confine itself to the question of legality. Its concern should be:
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> (1) Whether a decision-making authority exceeded its powers?
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> (2) committed an error of law,
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> (3) committed a breach of the rules of natural justice,
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> (4) reached a decision which no reasonable tribunal would have reached, or
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> (5) abused its powers.
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> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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 under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. ….”

In the present case, as against 24 documents, mentioned in the additional affidavit, some of the documents have been accepted by the respondents themselves, whereas in respect of others, there could not be any originals, as it is only a compilation of data. We find that the fair and reasonable appraisal of the tender documents has not been made by the respondents. It has, thus, caused manifest injustice to the petitioner. It is not a mechanical process to seek production of originals of all documents, but it is required to be examined, whether the originals could be produced or are required by the respondents before opening financial bids. The necessary documents could be produced at the time of consideration of the financial bid as well. The rejection of technical bid only for the reason that the originals of certain documents were not produced, could not be said to be fair and reasonable.

Mr. Kholsa, learned senior counsel representing the respondents, states that the period to complete the works was for six months and that the work is about to be completed. Therefore, at this stage, no substantive relief can be granted to the petitioner.

We find that rejection of the technical bid of the petitioner is arbitrary, unreasonable and illegal, but since the contract period is almost coming to an end, we do not find that any substantive relief can be granted to the petitioner except nominal costs.

Consequently, the present writ petition is disposed of with a direction to the respondents to pay compensatory costs of Rs.25,000/- to the petitioner for illegal and arbitrary rejection of the bid of the petitioner subject to the right of the petitioner to claim damages from appropriate court in accordance with law.

(HEMANT GUPTA)
JUDGE

07.05.2015 (LISA GILL)
Vimal JUDGE