

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No. 24101 of 2017

Date of decision: 25.10.2017

**M/s Gupta & Company, Government Contractor and Engineers,
2236, Sector-7, Urban Estate, Karnal, through its Partner Sh. Ajay
Gupta**

.....Petitioner

Vs.

State of Haryana and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Mr. Amit Jhanji, Advocate for the petitioner.

Ajay Kumar Mittal,J.

1. Prayer in this petition filed under Articles 226/227 of the Constitution of India is for quashing the order dated 10.10.2017, Annexure P-12, wherein a decision has been taken to recall the tender in public interest. Further, prayer has been made for a direction to respondents No.1 to 3 to consider and open the financial bid of the petitioner. In view of the order dated 11.09.2017, Annexure P.6, passed by respondent No.3, who found the same as valid and responsive. A direction has also been sought to the respondents to award the tender in favour of the petitioner being the lowest bidder, after comparing the same with the financial bid of private respondent No.4. The petitioner also prays that during the pendency of the petitioner operation of the impugned order dated 10.10.2017, Annexure P.12, may be stayed and the official respondents be restrained from recalling the tender.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner firm is working under the name and style of M/s Gupta & Company. It is Government Contractor for earth work, supply of material building and bridges etc. The firm is situated in District Karnal. Respondent No.3 issued a detailed notice inviting tender for the construction of road along Drain No.2 Sanoli and Panipat road to Panipat Barsat Road. The petitioner submitted its tender alongwith technical bid as well as the financial bid. Necessary instructions were given to the bidders in invitation for bid (IFB). The petitioner has submitted the details of its turnover vide ITR for the financial year 2008-09 to 2015-16. The petitioner came to know, that its technical bid was opened on 19.07.2017 which was rejected. Though no written order in this regard was conveyed to the petitioner, it came to know that its bid had been primarily rejected on the ground that its turnover was not up to the required limit. The reason for the same was that the petitioner had submitted its turnover for the year 2008-09 till 2015-16 and thus, the turnover was not up to the prescribed limit. The petitioner was under the impression that only audited turnover was to be submitted. According to the petitioner, there was a mistake on the part of the official respondents wherein the escalation factor was not added to the turnover for the year 2008-09 till 2015-16, which was later on pointed out the by respondent No.3 in his speaking order. The petitioner came to know regarding these proceedings around 28.08.2017 and thereafter submitted a representation dated 31.08.2017/01.09.2017, Annexure P.5 (Colly). The petitioner asserts that in the documents for notice of invitation of tender (DNIT) as per clause 23(4), the official respondents

were supposed to seek a clarification or grant an opportunity to modify the technical bid with respect to rectifiable defects and seven days time was to be granted, to respond to the clarification letter and then the evaluation committee was supposed to finalise the list of responsive bidders whose financial bid was eligible for consideration. The petitioner has represented its case that in view of above clause no opportunity had been granted to it to clarify or modify its technical bid in lieu of rectifiable defects. Its technical bid was not considered only because of non-submission of ITR for the year 2016-17, the petitioner submitted its ITR for the year 2016-17 and thereafter he represented his case on 11.09.2017 alongwith detailed reasons for non-submission of the ITR in question. Thereafter respondent No.2 issued a memo dated 08.09.2017 to respondent No.3 to pass a speaking order on the representations of the petitioner. Respondent No.3 passed order on 11.09.2017 and accepted the request made by the petitioner. After the passing of the above order the petitioner came to know that the Tender Approval Committee in its meeting held under the Chairmanship of respondent No.2 on 13.09.2017 accepted the order passed by the respondent No.3 and directed him to open the financial bid of the petitioner after holding the technical bid as valid. In spite of that the official respondents kept on allotting the tender in favour of respondent no.4. Aggrieved, thereby the petitioner filed Civil Writ Petition No. 22335 of 2017 in this Court. Vide order dated 29.09.2017, Annexure P.7, the said writ petition was withdrawn by the petitioner in view of the fact that financial bid of the petitioner and the respondent No.4 had not been opened. The petitioner also came to know that respondent No.4, it also made a representation dated 28.09.2017 challenging the

speaking order passed in favour of the petitioner before the Engineer-in-Chief. The said representation was forwarded to respondent No.2 to review the decision taken in the meeting held on 13.09.2017 in continuation of the above mentioned memo dated 28.09.2017. The Superintendent Engineer, Karnal issued an another memo dated 03.10.2017 stating that the speaking order was widely discussed in the Tender Approval Committee and it was finally decided to various the Superintendent Engineer, Karnal to go head as per the speaking order and there was nothing substantial to review the same. It was further requested that the financial bid of the petitioner should be opened and considered for approval. Similar memo was issued again on 03.10.2017. According to the petitioner, inspite of the recommendations made in its favour by the official respondents, respondent No.4 used his influence to ensure that the financial bid was not opened. Respondent No.4 even made a representation to the Chief Minister, Haryana. Subsequent to the above mentioned representation which was forwarded by the Chief Minister, the Tender Approval Committee in its meeting dated 10.10.2017 passed an order recalling the tender in public interest. Hence, the instant petition by the petitioner.

3. We have heard learned counsel for the petitioner.

4. The matter was examined by the Tender Approval Committee under the Chairmanship of Engineer-in-chief, Haryana PWD (B&R) Department on 10.10.2017 for the tender work in question. It has been categorically recorded therein that the tender in question was received from the petitioner on 21.07.2017. The same was returned to Superintendent Engineer, Karnal vide letter dated 25.08.2017 with reference to the technical evaluation thereafter the

tender was put up in tender approval committee meeting held on 08.09.2017 and after deliberations it was decided that the Superintendent Engineer, Karnal passed a speaking order on the representation of the petitioner dated 31.08.2017. Vide order dated 11.09.2017, Superintendent Engineer, Karnal passed the order in respect of technical evaluation and declared the tender of the petitioner as responsive and recommended for opening of the financial bid. The matter was again put up in the tender approval committee meeting held on 13.09.2017 and the speaking order passed by the Superintendent Engineer, Karnal were endorsed. Thereafter, representation was made by respondent no.4 to the Chief Minister. It was further recorded in the minutes of the meeting of the tender approval committee that as per (DNIT) the price bid and technical bid were to be submitted mandatorily online and were not to be accepted in any physical form. After submission of technical bid online, clarification modification in respect of rectifiable defects could be taken in physical form. The matter was thoroughly examined by the Tender Approval Committee and it was concluded that since both the contractors i.e. the petitioner and respondent No.4 are making representation/complaints at various levels and leveling allegations against various officers and the fact that the rectifiable facts had not been defined in the bid document, the tender was ordered to be recommended difficult recalled to give for fair opportunity to both the contractors in public interest. The relevant findings recorded by the tender approval committee read thus:-

“The tender was received on 21.07.2017 and was examined in the Road Section, Head Office and returned to SE (Karnal) vide letter dated 25.08.2017 w.r.t technical evaluation done by SE (Karnal). The tender was put up in

the TAC meeting held on 08.09.2017 and after deliberations TAC decided that SE (Karnal) should pass speaking order on the representation of M/s Gupta & Co. dated 31.08.2017. SE (Karnal) passed detailed speaking order on 11.09.2017 in respect of technical evaluation, wherein he has declared the tender of M/s Gupta & Co. as responsive and recommended for opening of the financial bid. The tender was again put up in the TAC meeting held on 13.09.2017 and TAC endorsed the speaking orders passed by the SE (Karnal) and authorized SE (Karnal) to go ahead as per his speaking order.

SE (Karnal) has resubmitted the case for review of the TAC order vide letter No.202688 dated 28.09.2017. Further a representation has been given by Shiv Shakti Construction Company wherein it has been ordered- "CM would like the technical bid be got checked at the level of tender Allotment Committee in view of A&B."

The main issue raised in the representation dated 04.10.2017 by Shiv Shakti Construction Company is that taking any document in physical shape is clear violation of DNIT and that why an officer is changing his report time to time it is a clearly case of corruption.

In this case the SE (Karnal) who has recommended differently were actually two different officers and not one.

Regarding submission of document in physical shape is concerned, there are two conditions in the approved DNIT which are reproduced as under:-

- (a) In the present case the agency/the then SE relied on clause No.23.4 where stated that as below "After receipt of confirmation of the bid security, the bidder will be asked in writing (usually within 10 days of opening of the Technical Bid) to clarify or modify his Technical Bid, if necessary, with respect to any rectifiable defects."
- (b) Whereas, the detailed notice inviting tender specifically stated as below. "Online Bidders are

required to submit the physical BS in a physical BS Envelop-BS Price Bids and Technical Bid are to be submitted mandatory online and shall not be accepted in any physical form.”

In view of the above provision in the DNIT, it is clear that technical bid has to be submitted mandatorily online and is not to be accepted in physical form. However, after submission of technical bid online clarification/modification in respect of rectifiable defects can be taken in physical form. However, rectifiable defects have not been defined in the bid document.

TAC, in view of the above provisions in the DNIT, has again examined the technical evaluation, speaking order dated 11.09.2017 passed by SE and the representation of Shiv Shakti Construction Company dated 4.10.2017 and found that there is no new fact in the representations. Since both the contractors are making representation/complaints at various levels and also leveling the charges against the various officers and the fact that the rectifiable defect have not been defined in the bid document, TAC is of the opinion that the tender shall be recalled to give fair opportunity to both the agencies and in the public interest.”

5. Learned counsel for the petitioner has not been able to produce any material on record to show that the findings recorded by the respondent authority are illegal or erroneous. Moreover, the respondents had recalled the tender due to making of representations/complaints at various levels by the petitioner and respondent No.4 who had also leveled allegations against various Officers. Accordingly, it was considered appropriate and just in public interest to recall the tender, which cannot be said to be illegal or

untenable in law. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

October 25, 2017
‘gs’
Whether speaking/reasoned
Whether reportable

(Amit Rawal)
Judge
Yes
Yes