

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 07.02.2017
Judgment delivered on: 02.03.2017

+ W.P.(C) 683/2017

INDERJIT MEHTA CONST PVT LTD

..... Petitioner

versus

UNION OF INDIA AND ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sandeep Sethi, Sr. Adv. with Mr Praveen Chauhan, Mr Abhishek Gupta, Ms Janhavi Mahana & Ms Arpita.

For the Respondents : Mr Sanjeev Narula, CGSC with Mr Abhishek Ghai.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

CM 3137/2017 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 683/2017

1. The petitioner, which is a construction company, is aggrieved by the issuance of a fresh tender for construction of family quarters at group centre, CRPF, Siliguri by respondent No.2 (CPWD through Executive

Engineer, Gangtok Central Division, Gangtok, Sikkim) on behalf of respondent No.1 (Union of India through Ministry of Urban Development, Nirman Bhawan, Delhi), when in an earlier tender for the same work the petitioner had participated and was adjudged as the lowest bidder.

2. The petitioner, therefore, has prayed for the following reliefs:-

“a) Pass a writ of mandamus or any other writ quashing the notice 28/17/EE/CE/GCD/GTK/SCSD-IV/2P16-17 for retender issued by respondent no.2.

b) pass a writ of mandamus or any other writ directing the respondent no.2 to award the tender to the petitioner being L-1 and rates being very reasonable.

c) to grant any other relief which this Hon’ble Court may deem fit and proper in respect of the facts and circumstances of the present case.”

3. A notice inviting tender dated 12.08.2016 was issued by respondent No.2 for construction of family quarters at CRPF Group Centre at Siliguri with an estimated cost of Rs.79,90,77,039/-.

4. The petitioner, finding itself eligible on going through the terms of the tender, participated by depositing earnest money in the form of FDR in the office of Executive Engineer, Safdarjung Enclave, New Delhi.

5. On 15.09.2016, the technical bids were opened and 11 out of 12 bidders, including the petitioner were found to be qualified to participate in the financial bid. The bids were to remain valid till 14.12.2016. Out of the 11 successful participants, one M/s J.K. Engineering Pvt. Ltd was later found to be ineligible for non-fulfilling the criterion of NIT.

6. It has been submitted on behalf of the petitioner that on the asking of respondent No.2, the petitioner extended the validity of the bid till 30.01.2017. The petitioner was thereafter intimated that the financial bid would be opened on 21.12.2016.

7. The petitioner was adjudged the lowest tenderer and his price was 12.6% lower than the estimated cost of the tender.

8. All of a sudden, thereafter, without any reason the petitioner received a communication through email dated 13.01.2017 that the tender in question had been recalled.

9. The learned counsel appearing for respondent No.2 on the other hand submitted that though the financial bids were opened but a doubt arose as to whether all the participants were communicated about the requirement of getting their tender validity extended. It was also pointed

out by the learned counsel for the respondent No.2 that the financial bid of one of the participants namely M/s C.K. Construction was not opened as its consent for extension of the validity of the tender beyond 14.12.2016 was not received by the respondent No.2.

10. In order to ascertain as to what had actually happened, we called for the relevant files and perused the same. We found that on 29.12.2016, the Chief Engineer sought an explanation from the executive engineer as to whether one of the participants namely M/s C.K. Constructions was intimated in writing for extending the validity of its tender to which the executive engineer had replied that there was only telephonic communication for extension of validity with the office of M/s C.K. Constructions.

11. The learned counsel for the respondent No.2 further pointed out that on 09.01.2017, there was a meeting of the Regional Works Board, Eastern region at Calcutta and the Board was of the opinion that despite the validity of the tender being 90 days as against the Director General's instruction for 60 days, decision on technical bid could not be taken; thus necessitating further extension of the validity of the tender and that there were no definite proof of the formal and authentic communication to the

tenderers regarding the requirement of extending the validity of tender. The board, in its meeting, took note of the fact that even though the technical bid of one of the participants namely M/s C.K. Constructions was approved but its financial bid could not be opened because its validity was not extended and that is why on 14.12.2016, M/s C.K. Construction requested for the release of its EMD as the validity had expired on 13.12.2016.

12. The Board, therefore, felt that equal opportunities and level playing field were not provided to all the participants especially with respect to obtaining extension of validity of the tender. As such, it vitiated the tender process. The Board then took a decision of rejecting the tenders without going into the merits of the tenders received. Pursuant to the Board's decision, the tender in question was recalled on 11.01.2017.

13. The learned counsel for the respondent has, therefore, submitted that only for affording a level playing field to all the participants, the Board has taken a decision to recall the tender which cannot be called unfair, irrational or designed to favouring any particular tenderer.

14. The learned counsel for the respondent No.2 also raised the issue of lack of territorial jurisdiction of this Court to entertain the present petition primarily on the ground that the office of respondent No.2 is located in Gangtok (Sikkim); the impugned decision has been taken in Gangtok and the work under the tender also had to be performed at Gangtok. The aforesaid argument of lack of territorial jurisdiction was countered by the petitioner by demonstrating that part of cause of action arose in Delhi. It has been submitted on behalf of the petitioner that the notice inviting tender was loaded on the online portal of M/s Tender Wizard which has its office in Delhi. The petitioner accessed the website of respondent No.2 and as per the tender condition, deposited earnest money in the form of FDR in the office of Executive Engineer, Safdarjung Enclave, New Delhi. The deposit receipt was uploaded on the website of the tender portal of respondent No.2. The technical and financial bids were also submitted online on the website of respondent No.2 through the tender portal M/s Tender Wizard.

15. For the present and without going into the aforesaid question and especially as to whether any integral or substantial part of the transaction took place in Delhi, we feel that the action of the respondent No.2 in

recalling the tender is not unfair but is plausible and is based on the rationale of providing equal opportunity to all the participants.

16. There is no vested right of a participant in a tender to have an agreement of award concluded in its favour. There cannot be any insistence for carrying on with the tender on the ground that a particular participant was adjudged as the lowest tenderer. All that can be demanded and be ensured to a tenderer is that he is given a fair, equal and non discriminatory treatment in the matter of evaluation of his tender.

17. A decision to cancel the tender process can in no way be said to be discriminatory or malafide if reasonable grounds are provided for recalling the same. In matters of award of contracts, an employer or an agency inviting the tender is required to act reasonably and fairly at all points of time. To that extent, a tenderer can question the decision of the employer in a Court of law but cannot be permitted to question the merits of the decision.

18. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a particular person or not and whether to carry

on with the tender floated but such right is subject to the requirement of reasonableness. The State or the Government agency inviting a tender may find it inexpedient to carry on with the tender or may take a decision of recalling the tender for one or more reasons. The only thing which is required to be seen is whether the reason accorded for either of the decisions is based on logic and the decision is not unfair.

19. A recall of a tender or a decision to re-tender cannot be called arbitrary or discriminatory if good reasons are assigned for either.

20. In **Maa Bindra Express Carrier and Anr v. North East Frontier Railway and Ors:** (2014) 3 SCC 760, the Supreme Court has reiterated the principles enunciated in **Tata Cellular v. Union of India:** (1994) 6 SCC 651; **Raunaq International Ltd v. I.V.R.Construction Ltd:** (1999) 1 SCC 492; **Jagdish Mandal v. State of Orissa:** (2007) 14 SCC 517; **Michigan Rubber (India) Ltd v. State of Karnataka:** (2012) 8 SCC 216; **Meerut Development Authority v. Association of Management Studies:** (2009) 6 SCC 171; **Air India Ltd v. Cochin International Airport Ltd:** (2000) 2 SCC 617 and has held as hereunder:

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by

a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.”

21. Thus we find that there is a justification for recalling of the tender.

No force, now, remains in the petition. Consequently, it is dismissed.

CM 3136/2017

1. In view of the petition having been disposed of, the application has become infructuous.
2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

MARCH 02, 2017

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