

13.06.2024
Ct. No. 02
Sl. No.27
srm/Cp

Calcutta High Court
In the Circuit Bench at Jalpaiguri

WPA No. 1099 of 2024

ABS Construction
Vs.
The State of West Bengal & Ors.

Mr. Biswarup Bhattacharya,
Mr. Subhasish Chakrabarty,
Mr. Debjit Kundu,
Mr. Sunny Nandy
.....for the petitioner.

Mr. Joyjit Choudhury, Ld. AAG
Mr. Pretom Das,
Ms. Rima Sarkar
....for the State.

Mr. Jagriti Mishra,
Ms. Ananya Bhattacharya,
Mr. Raj Kumar Mitra,
Ms. Mrinmayee Das,
Mr. Manish Gupta

....for the respondent no. 4.

1. Supplementary affidavit and affidavit-of-service are taken on record.
2. The subject matter of challenge in this writ petition is the selection of the respondent No.4, as the successful bidder in the technical round. The respondent No.4 has since been awarded the tender as the lowest bidder. The work order has been issued.

3. Mr. Bhattacharya, learned advocate appears for the petitioner. The petitioner was one of the participants who also qualified along with the respondent No.4 in the technical round. The list of the qualified bidders in the technical round was published on April 16, 2024. The petitioner, along with another qualified technical bidder filed objections before the authorities with regard to the qualification of the respondent No.4 in the technical round. Mr. Bhattacharya submits that instead of considering the major deviations and defects in the documents submitted by the respondent no. 4, the authorities justified why such documents could be accepted even at a later stage. The law relating to evaluation of the technical bids had not been followed. The justifications given by the authorities to each and every query/objection raised by the petitioner with regard to acceptance of the technical bid of the respondent No.4, only displayed bias and favouritism on the part of the authorities. The respondent No.4 was allowed to supply documents after the bidding process was over. Grant of such opportunity only smacked of arbitrariness and *mala fide* intention. Specific instances have been put forward

before this court to demonstrate how the entire decision making process was vitiated.

4. First of all, reference has been made to Clause 36 of the notice inviting tender which provides that all forms should be uploaded in a specified folder in the eNIT, failing which the tender would be treated as non-responsive. Mr. Bhattacharya submits that the financial statement given by the Chartered Accountant with regard to the turnover as per 3CD was not in order. The date of birth of the chartered accountant was mentioned as January 1, 2018 which was a gross error and could not have been overlooked. The turnover was not uploaded in the exact format as had been depicted in the annexures to the notice inviting tender. The Chartered Accountant should have supplied the information in the format annexed to the tender document. The same was done in a manner not in consonance with such format, but as per the Chartered Accountant's own procedure.
5. Next discrepancy was with regard to Form-IIC which was the credit facility certificate to be given by the bank. According to Mr. Bhattacharya, the format was not followed. The details of work experience, the financial statement and the bank certificate, were not in the

prescribed forms. The documents which were uploaded were defective. Relying on the reply dated May 27, 2024, issued by the Superintending Engineer, North Bengal Construction Circle-1, Public Works Directorate, Coochbehar, Mr. Bhattacharya submits that the authority had passed off all non-compliances as mere rectifiable mistakes or typographical errors. Most of the defects were subsequently permitted to be rectified without any authority of law. The bidder did not upload proper documents and such defect was condoned by allowing the successful bidder to resubmit the essential documents. According to Mr. Bhattacharya, if all the documents were allowed to be resubmitted after the technical bid was opened, the whole idea of prescribing terms and conditions and fixing the time lines for submission and opening of tender papers etc. become an empty formality.

6. Mr. Bhattacharya relies upon the decision of the Hon'ble Apex Court in the matter of National High Speed Rail Corporation Limited vs. Montecarlo Limited & anr., reported in 2022(6) SCC 401. Special emphasis has been put on paragraph 28 of the said decision, to support his contention that only to favour the respondent No.4, the

tendering authority repeatedly allowed the respondent No.4 to resubmit fresh documents.

7. The learned Additional Advocate General appearing on behalf of the tendering authorities have drawn the attention of the court to the fairness and transparency with which the authorities proceeded. A meeting was held by the tender evaluation committee. Each and every objection raised by the petitioner had been dealt with and answered. According to Mr. Choudhury, the objections of the other participants against the respondent No.4, were considered and negated by proper answers. Mr. Choudhury further refers to the supplementary affidavit filed by the petitioner. The authority intimated the petitioner, point by point, as to how the allegations against the respondent No.4 were not valid. It is further submitted that the project relates to strengthening of a village road at Coochbehar during the monsoon season, in order to make the said road motorable, i.e., the road should have proper rideable quality. The work is to be completed within 130 days and time is the essence. The public project should not be stalled as the work order has already issued. According to the learned Advocate, the objections raised were an expression of internal disputes between the tenderers, which

would not affect the quality of the work. Interference by this court would hinder public interest. Mr. Choudhury prays for rejection of the writ petition.

8. Mr. Mishra, learned advocate appearing for the respondent No.4 submits that the financial bid was opened after the complaint was filed by the petitioner and the respondent no. 4 was the lowest bidder. He submits that Clause 36 of the tender document would not be applicable as all the documents had been uploaded.
9. Mr. Mishra submits that clause 6 of the instructions to bidders makes a provision for tenderers to produce original copies of every document as may be demanded by the tender evaluation committee, in case of failure to produce such documents or if any deviation is detected from the uploaded soft copies.
10. By invoking such provision, not only the respondent No.4 but all other participants were called upon by the tender evaluation committee to supply documents and to rectify the minor shortfalls. In this connection, reference has been made to the letter dated May 27, 2024 issued by the Superintending Engineer, North Bengal Construction, Circle-I, to the petitioner. The same has been annexed by the petitioner in the supplementary affidavit. The first

paragraph of the said letter has been placed before the Court.

11. Mr. Mishra submits that all the four participants had qualified in the technical bid, including the petitioner. Thus, the question of bias towards the respondent No.4 or an endeavour to oust the other participants from the bidding process, do not arise. The minor discrepancies which were noted by the authority in respect of all the bidders were rectified in a proper manner, by calling for proper documents. Even if the format was not completely followed, all the required information as per the format which indicated and established the technical knowhow, the financial viability and the overall standing of the bidder were available from all certificates and documents which were uploaded and later re-submitted. The latest profession tax challan was also submitted.

12. Reliance has been placed on several decisions of the Hon'ble Apex Court in support of the contention that minor deviations should not be interfered with if the author of the document, (notice inviting tender), was satisfied that the participant had substantially complied with the process and was otherwise eligible.

13. Heard learned Advocates for the respective parties. First of all, the work order has been issued. All the necessary documents relating to eligibility had been uploaded. The contention of Mr. Bhattacharya, that the tender should be treated as non-responsive, is not accepted.
14. In the notice inviting tender, the authorities reserved the right to call for further documents if there were discrepancies or minor deviations. Accordingly, the profession tax challan (up to date), profession tax payment certificate (up to date), up to date GST Return, Tax audited Report in 3CD Form for the financial year 2018-19, Form No.26AS for the financial year 2018-19, up to date PF challan, up to date ESI challan, documents relating to prime machineries declaration, UDIN certificate, related bid capacity calculation were called for. The respondent No.4 deposited the documents. The shortfall in the documents was all corrected.
15. The letter issued to the petitioner, as a response to every objection raised by the petitioner towards the qualification of the respondent No.4 in the technical round, indicates that similar opportunity was given to the other participants as well.

16. Next comes the question of adhering to the format. The turnover as per 3CD was given by the respondent No.4 in the form of a table containing the value of the engineering works in respect of the projects undertaken by the said bidder during the past five years. The bidder's net worth, the value of projects along with the updation factor had been explained and the assessed bid capacity was justified as hereunder:

"Name of Bidder: Hindusthan Contract & Construction Co.

1. The Bidder's Net Worth for the last year calculated on the basis of capital, profit and free reserve available to the firm should be positive.

2. Bidders, who meet the minimum qualification criteria, will be qualified only if their available bid capacity at the expected time of bidding is more than the total estimated cost of the works. The available bid capacity will be calculated as under:

Assessed Available Bid Capacity = $[A \times N \times 2 - B]$
 = Rs.478.02(A) X 0.55 (N-200 DAYS) X 2-0.00(B)
 Rs.525.82 Lac

Where,

A = Maximum value of engineering works in respect of projects executed in any one year during the last 5 (five) years (updated to the price level of the year indicated in table below under note) taking into account the completed as-well-as works in progress. The projects include turnkey project/item rate contract / construction works.

N = Number of years (i.e. year) prescribed for completion of the works for which Bids are invited

B = Financial Liability of the bidder to incurred for existing commitments and on-going works during the period of the subject contract."

17. The financial statements as per Section B Form II was duly prepared and endorsed by the Chartered Accountant. The date of birth mentioned at the bottom of said statement was the date of the incorporation of the company and not the date of birth of the Chartered Accountant. Such slip was a *bona fide* mistake. The bank certificate, Form IIC may not have been exactly printed in the format provided, but the bank had certified that they were willing to provide overdraft/credit facility to the respondent No.4 to the extent of Rs.100 lakhs.

18. Thus, if the authorities were satisfied that similar nature of work had been executed in the past and the assessed available bid capacity was rightly explained with the details of the value of engineering works undertaken by the respondent No.4, this Court cannot examine such deviations from the format with a magnifying glass. Admittedly, no argument has been advanced by the petitioner that the capacity was wrongly mentioned or there were misstatements and suppressions. There are no allegations that similar works had not been executed by the respondent No.4 or that information supplied were false and the documents were fabricated. The credit facility available from the HDFC Bank is apparent from the bank's

certificate. The experience in executing several works of construction of bituminous roads for the past five years is available and the project values are of substantial amounts. Moreover, the issues which were raised by the petitioner have been answered point by point by the tendering authority, upon holding a meeting of the tender evaluation committee. Several notifications were also relied upon to show that minor rectifications were permissible.

19. Answers to the queries and objections of the petitioner as given by the authority are quoted below:

"1) Address correction is going on as said by the agency and it is acceptable as per G.O. No.- IM 66/18/71-R/PL. Date- 15.01.2019 by Principal Secretary to the Govt. of West Bengal, Public Works Department.

2) Uploaded Bid Capacity calculation containing UDIN no. has typographical mistake done by the Chartered Accountant. Already concerned bidder was asked for this matter in accordance with PWD notification which is mentioned SL. NO. 01 and bidder has submitted the same after rectification and such Bid Capacity calculation has no effect due to this type of minor clerical mistake. **In terms of notification no. -45-W(C)/IM-23/15, Di- 13.02.2015** of Principal Secretary to the Govt. of West Bengal, P.W.D., it is seen the Bid Capacity of the concerned bidder is more than estimated value put to tender. So, concerned bidder is justified for being eligible in this eNIT.

3) In terms of same notification of Public Works Department (mentioned in Sl. No. 01) their Financial year wise Turnover was asked and it has been submitted by the bidder in proper way.

4) Form-IIC submitted by the bidder is almost same as given Form in e-NIT. So it is minor rectifiable deficiency which can be overcome as per

departmental notification vide G.O. No.- IM-66/18/71- R/PL Date- 15.01.2019 by Principal Secretary to the Govt. of West Bengal, Public Works Department.

5) It is already rectified as per departmental notification which is mentioned sl. no. 2.

6) The said agency (Hindusthan Contract & Construction Co) has paid the Professional Tax vide Cerlis Payment ID: 220920232023132139 Construction Co) upto 31.07.2024 vide Enrolment Certificate No: 192043190095. In terms of notification no.1M-66/18/71-R/PL, Dt- 15.01.2019 of Principal Secretary to the Govt. of West Bengal P.W.D. and concurrence of Group - T of Finance Department, U.O. No.- GroupT-2018-2019-1115, Dt- 26.12.2018, during tender evaluation process TIA has the power to take the rectifiable minor short fall documents from the concerned bidder to give an opportunity for vast competition in favour of Govt.

7) The credentials for similar nature of work already were described in clause no.05 of the said eNIT. Now, it is further mentioned here that the Similar nature of works means, bidder having experience in Flexible type Road Project work like strengthening of flexible pavement or improvement of riding quality or widening and strengthening of flexible pavement or Surfacing work. Now the concerned agency having plentiful experience in bituminous road work has already executed such work and it is duly certified by Executive Engineer & Head of PIU, WBSRDA, Alipurduar Division.

8) Further, on scrutiny all Prime Machineries documents by the TIA, it has been observed that all are same as per requirement of tender clause and some other relevant papers have been submitted by the concerned bidder during tender evaluation as per departmental notification which is already mentioned in Sl. No. 1.

Also it is to inform that "Soil Compactor" is not under Prime Machineries (vide memo no. 242-ENC/2023, Dt. 30.03.2023 of Engineer-in-chief to the Govt. of West Bengal, P.W.D) and this machine is treated under other machineries group. As per eNIT clause, bidders have to provide the said machine as per site requirement and given direction of E-I-C.

9) In terms of notification of Public Works Department (mentioned in Sl. No. 01) their upto date ESI was asked and Challan (04122129993254) has been submitted by the bidder accordingly."

20. Reference is made to the decision of the Hon'ble Apex Court in the matter of M/s. Poddar Street Corporation vs. M/s. Ganesh Engineering Works and others reported in (1991) 3 SCC 273, wherein the Hon'ble Apex Court was of the view that if the documents were sufficient for achieving the object of the tender, it would not be correct to hold that an authority did not have the power to waive a literal technical compliance. As a general proposition, it could not be held that an authority inviting tender was bound to give effect to each and every term mentioned in the notice by meticulously following the details. It was not a general proposition that the authority could not waive a technical irregularity of little significance.

21. In the decision of The Shlppi Constructions Contractors vs. Union of India & Anr. etc. etc. reported in AIR ONLINE 2019 SC 2430, the Hon'ble Apex Court was of the view that the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear to be a big blunder. In fact courts must give a fair play in the joints to the government and the public sector undertakings in matters of contract. Courts must also not

interfere where interference would cause unnecessary loss to the public exchequer.

22. In the decision of *The Bharat Coking Coal Ltd. & Ors. vs. AMR Dev Prabha & Ors.* reported in AIR ONLINE 2020 SC 466, the Hon'ble Apex Court held that unless the court was satisfied that public interest would suffer if a tender process was allowed to continue or was not interfered with, courts should restrain themselves from entertaining writ petitions challenging such tender process.

23. In the decision of *Maa Binda Express Carrier & Anr. vs. North-East Frontier Railway and Ors.* reported in (2014) 3 SCC 760, the Hon'ble Apex Court held:

“ 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 consideration 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. award of contracts the

9. Suffice it to say that in the matter of 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.”

24. In the decision of *Uflex Limited vs. Government of Tamil*

Nadu & Ors. reported in (2022) 1 SCC 165, the Hon’ble

Apex Court held:

“42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular* and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be

awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

43. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a court ought to play. 44. The checks and balances before the tendering process itself has been provided by constitution"

25. In this case, the court does not find any act of favouritism.

The petitioner also qualified in the technical round. The petitioner has failed to prove that the respondent No.4 lacked the eligibility to participate. Public interest has not been compromised in any manner which would justify interference by this Court. Rather, stoppage of a time bound public project would be detrimental to the development of the road conditions in the village in the monsoon season.

26. Under such circumstances, I do not find any reason to interfere with the tendering process.

27. The writ petition is accordingly dismissed.

28. There shall be no order as to costs.

29. Urgent photostat certified copy of this order be given to the parties, on usual undertakings.

(Shampa Sarkar, J.)