

(2017) AIR(J&K) 17 : (2016) 4 JKJ 281

Jammu & Kashmir High Court

Case No: Others Writ Petition (OWP) No. 1531 of 2015, MP No. 01 of 2015 and MP No. 01 of 2016

TBA Infrastructure Pvt.
Ltd.

APPELLANT

Vs

State of J&K

RESPONDENT

Date of Decision: Oct. 18, 2016

Acts Referred:

- Constitution of Jammu and Kashmir, 1956 - Section 103

Citation: (2017) AIR(J&K) 17 : (2016) 4 JKJ 281

Hon'ble Judges: Mr. Alok Aradhe, J.

Bench: Single Bench

Advocate: Mr. Faraz Iqbal, Dy. AG. and Mr. K.K. Pathan, Advocate, for the Respondent Nos. 1 to 4; Mr. R.K. Gupta, Sr. Advocate with Mr. Prem Sadotra, Advocate, for the Appellant\Petitioner

Final Decision: Dismissed

Judgement

Mr. Alok Aradhe, J. - In this writ petition under Article 226 of the Constitution of India read with section 103 of the J&K State Constitution, the

petitioner, which is a private limited company registered under the Companies Act, seeks quashment of impugned order dated 19.09.2015, by

which respondent No. 2 has awarded the contract in question in favour of respondent No. 5. The petitioner also prayed for writ of certiorari for

quashment of order passed by respondent No. 2, whereby the technical bid of respondent No. 5 in respect of NIT No. 08 of 2015-2016 has

been accepted. The petitioner has also prayed for allotment of contract to it in terms of NIT and to prohibit respondent No. 5 from execution of

the contract work in question. In order to appreciate the petitioner's grievance, few facts need mention, which are stated infra.

2. The petitioner is a private limited Company registered under the Companies Act and is engaged in the business of infrastructure development

with specialization in building of Roads/Highways Runways and Bridge construction for the last about one decade. The Executive Engineer,

PW(R&B) Division, Katra issued Notice Inviting Tender, being NIT No. 02 of 2015-16 dated 18.04.2015, by which tenders were invited on

item rate basis from approved and eligible contractors registered with J&K State Govt./CPWD and Railways for the allotment of the contract

work of ""improvement (Periodic Renewal) of NH-IC (New NH-144) Domel-Katra Road from Km 5th to 10th (length 5.00 Km) in the State of

J&K"". The petitioner as well as respondent No. 5 and other bidders submitted their bids in response to the aforesaid NIT. The bidders were

required to submit technical bid as well as financial bid.

3. On 30.05.2015, the Chief Engineer, PW (R&B), Jammu declared the names of the bidders whose bid were found technically viable. Along with

the petitioner, respondent No. 5's bid was found technically suitable. Thereupon, the petitioner lodged protest with respondent No. 2 vide

communication dated 20.07.2015 informing him that respondent No. 5 does not fulfil the eligibility criteria in terms of Clause 4.5.5 of the NIT. It is

case of the petitioner that respondent No. 2 without satisfying the eligibility criteria proceeded illegally and considered the financial bid of

respondent No. 5 who was found to be the lowest bidder. Being aggrieved, the petitioner approached the Ministry of Road Transport and

Highway, Government of India by submitting a representation. Thereupon the Ministry of Road Transport and Highway vide communication dated

07.08.2015 asked respondent No. 2 to act on the representation of the petitioner and submit action taken report. It is the case of the petitioner

that respondent No. 2 conducted a sham inquiry and even before conclusion of the inquiry, issued the order of allotment dated 19.9.2015. In the

aforesaid factual background, the petitioner has approached this Court.

4. Learned Senior Counsel for the petitioner while inviting attention of this Court to the instruction to bidders submitted that respondent No. 5 did

not furnish any proof before respondent No. 2 either of ownership or assured ownership of the equipments, which are mentioned in annexure-II of

the instruction to the bidders. It is further submitted that respondent No. 5 does not fulfil the eligibility criteria as per Clause 4.5.5 of the instruction

to the bidders and respondent No. 2 declared respondent No. 5 to be the lowest bidder and awarded the contract to him on 19.09.2015. It is

further submitted that from the perusal of the rent agreement produced by respondent No. 5 on 01.05.2015, no inference can be drawn that

respondent No. 5 is an owner of the equipments/machinery in question as respondent No. 5 has miserably failed to prove ownership or assured

ownership in respect of the equipments in question. It is further submitted that the contract has been awarded to respondent No. 5 on

misrepresentation of the definition of ownership.

5. It is submitted that for the first time communication was sent to the Executive Engineer on 22.09.2015. However, prior to receipt of aforesaid

communication, the Chief Engineer, PW (R&B) on 11.09.2015 inspected the plant and issued order of allotment of work in favour of respondent

No. 5. It is submitted that communication dated 11.09.2015 has been ante dated and not genuine. It is submitted by the learned counsel for the

petitioner that the petitioner is ready to execute the work in question at the rates, which has been awarded to respondent No. 5. In support of the

aforesaid submissions, reliance has been placed on the decisions of Hon'ble the Supreme Court in the case of Tata Cellular v. Union of India,

(1994) 6 SCC 651, Central Coalfields Limited and anr. v. SLL-SML (Joint Venture Consortium) and ors. 2016 (6) Supreme 353 and

Ramna Dayaram Shetty v. The International Airport, 1979 AIR 1628.

6. On the other hand, learned Deputy Advocate General for respondent Nos. 1 to 4 submitted that expression 'ownership' has been dealt with by

the Division Bench of Allahabad High Court in the case of Ram Deo Singh v. Executive Engineer PWD, AIR 1977 Allahabad 527 and

submitted that even though bidder may not be a proprietor of the equipments while he had obtained the same on lease and is entitled to ownership

of the property, he will be deemed to be the owner. It is submitted that respondent No. 5 has obtained the equipments in question on lease

agreement; therefore, he has rightly been awarded the contract. It is further submitted that the contention of the petitioner that the document dated

11.09.2015 is forged, is incorrect. In support of the aforesaid submissions, learned Deputy Advocate General has referred to the decision of the

Supreme Court in the case of Utter Pradesh Avas Evam Vikas Parishad and Ors. v. Om Prakash Sharma, (2013) 5 SCC 182 and

submitted that the petitioner cannot seek writ of mandamus as the contract has been awarded and the petitioner has no fundamental right to

challenge it. It is further submitted that in absence of the concluded contract, no legally enforceable right accrues to the petitioner. Learned Deputy

Advocate General, while inviting attention of this Court to Clause 21 of the NIT, submitted that the process of awarding contract is confidential

and therefore, none of the objections raised by the petitioner was responded to, prior to the awarding the contract in question. Learned counsel for

respondent No. 5 has supported the stand taken by learned Deputy Advocate General.

7. I have considered the respective submissions made at bar and have perused the record. The Supreme Court in the celebrated case of R. D.

Shetty (supra) approved the principle enunciated by Frankfurter J. that it is a well settled Rule of the administrative law that an executive authority

must be rigorously held to the standards by which it professes its action to be adjudged and it must scrupulously observe those standards on pain

of invalidation of an act in violation of them. Accordingly, it was held that having regard to constitutional mandate of Article 14 as also the judicially

evolved rule of administrative law a tender or contract cannot be awarded arbitrarily and a tenderer must fulfil the eligibility criteria. In G. J.

Fernandez v. State of Karnataka and others (1990) 2 SCC 488, it was held that tenderer is required to fulfil the criteria, with regard to

eligibility. It was also held that if an authority has bona fide interpreted the standards prescribed by it in a particular manner, the court should not

interfere with though it may be inclined to read or construe the conditions differently. It is equally well settled legal proposition that when power of

judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind, namely, evaluating

tenders or award of contract are essentially commercial functions. If the decision relating to award of contract is bona fide and is in public interest,

the Courts will not interfere, even if, procedural aberration or error in assessment or prejudice to a tenderer is made out and the power of judicial

review will not be permitted to protect private interest at the cost of public interest or to decide contractual disputes and view of authority on

fulfilment of a condition has to be respected unless the decision making process is either irrational or biased. (See Sterling Computers Ltd. v.

MRN Publications Ltd. (1993) 1 SCC 445, Rounaq International Limited v. IVR Construction Ltd, (1999) 1 SCC 492, BSN Joshi and

Sons Ltd. v. Nair Coal Services Ltd. (2006) II SCC 548, Jagdish Mandal v. State of Orissa and others (2007) 14 SCC 517 and Central

Coal Fields Ltd. and another v. SLL-SML (Joint Venture Consortium) 2016 (6) Supreme 353.

8. In the backdrop of the aforesaid settled legal proposition, facts of the case in hand may be seen. Clause 4.5.5 of the NIT is reproduced below

for facility of reference:

4.5.5 Equipment Capabilities

The applicant should own or should have assured ownership to the following key items of equipment, in full working order, and must demonstrate

that, based on known commitments; they will be available for use in the proposed contract.

From the perusal of clause 4.5.5, it is evident that the applicant should own and should have assured ownership of the equipments in a working

order and will be available for use in the proposed contract. The Executive Engineer inspected the site to ensure that the equipments, particulars of

which were mentioned by respondent No. 5, were in the working condition. The Executive Engineer found that the equipments have been taken on

rent by respondent No.5 from one M/s R. A. Engineers and Contractors and have been in possession of respondent No. 5 and are in working

condition. Accordingly, recommendation was made to the Chief Engineer by the Executive Engineer. Thereafter, by order dated 19.09.2015,

order awarding the contract in favour of respondent No. 5 was issued as respondent No. 5 fulfilled the entire eligibility criteria and was the lowest

bidder.

9. Thus, the official respondents have taken the rent agreement to be assured ownership of plant and equipments as defined in Clause 4.5.5. The

object of incorporation of clause 4.5.5 is to ensure that contractor must have the requisite plant or equipments so as to ensure timely completion of

contract awarded to him. Viewed from this angle the decision of official respondents that respondent No. 5 fulfils the eligibility criteria as laid down

in clause 4.5.5 can neither be termed as arbitrary or irrational as owner in context of any processing plant means lessee or other person in

possession of such plant (See Advanced Law Lexicon P. Ramanatha Aiyar 3rd Edition) and decision in the case of Ram Deo (Supra). It is

pertinent to note that the petitioner was appraised about the eligibility of respondent No. 5 by communication dated 23.09.2015 and there are no

allegations of mala fides against the official respondents.

10. The decision has been taken by the official respondents bona fide and is in public interest, as admittedly respondent No. 5 is the lowest bidder

and difference between the bid of the petitioner and respondent No. 5 is approximately 30 lacs. This Court in exercise of extra ordinary

discretionary jurisdiction under Article 226 of the Constitution of India read with Section 103 of the State Constitution is not inclined to interfere

with contractual dispute between two tenderers in which no element of public interest is involved.

11. In view of the preceding analysis, I do not find any merit in this writ petition, the same fails and is hereby dismissed.