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SooperKanoon Citation : sooperkanoon.com/443034

Court : Andhra Pradesh

Decided On : Oct-14-1998

Reported in : 1998(6)ALD326

Judge : J. Chelameswar, J.

Acts : [Constitution of India](#) - Article 226

Appeal No. : WP No. 12196 of 1998

Appellant : B. Sudhakar Reddy and ors.

Respondent : Engineer-in-chief, Public Health, Govt. of A.P. and ors.

Advocate for Def. : Government Pleader for Health and Municipal Administration and ;Mr. M.R.K. Choudary, ;for T. Bheemsen, Adv.

Advocate for Pet/Ap. : Mr. C.V. Mohan Reddy, Adv.

Judgement :

ORDER

1. The three petitioners are contractors. Aggrieved by the action of the respondents 1 and 2 in awarding the contract of executing the work relating to laying of sub and main branches and lateral sewers in Tirupathi town in favour of

the third respondent this writ petition is filed. It appears, initially a tender notification for the said purpose was issued on 12-12-1997. After the receipt of the tenders from the various tenderers, the tender documents were burnt down - the reasons and details of the same are not relevant for the purpose of this case. Pursuant to such a mishap, a fresh notification, dated 17-1-1998 was issued. Under the said notification, tenders were invited for executing all packages of work indicated in the tender notification. It is an admitted case that the tenders are governed by a process called as 'Post qualification procedure'. Along with the bid documents, certain book-lets containing the various conditions and stipulations dealing with the tender process and award of the contract were also supplied. The said book-lets contain the procedure to be adopted in finalising the tenders and other formalities connected therewith. These book-lets appear to have been published by the Government of Andhra Pradesh in the Department of Public Health and Municipal Engineering. In response to the tender notification, the three petitioners herein and the third respondent herein along with some others submitted their tenders. The petitioners submitted tenders for packages 1, 6 and 10, whereas the third respondent submitted tenders for packages 1,6,8 and 10 (in all four) out of a total of 11 packages of work covered by the notification. Thereafter the first respondent seems to have issued the work order on 21-4-1998 in favour of the third respondent herein.

2. Questioning the award of the works insofar as it relate to packages 1,6 and 10 in favour of the third respondent, the present writ petition is filed.

3. The case of the petitioners is that admittedly, the third respondent's bid was the lowest when compared to their bids, but the petitioners submit that the third respondent is not eligible to be considered for the award of the work for the following reasons: according to the petitioner, the tender submitted by the contract cannot be considered, unless his bid is 'responsive' as per the terms and the conditions of the tender documents referred to earlier. The petitioners further submit that as per the terms and conditions of the tender document, a contractor bidding for a particular work, must have necessarily executed a work in the preceding five years for a total value of which should at least be 50% of the work for which a contractor is tendering. The petitioners state that according to the

information they have, the third respondent herein executed the works, the value of which is only Rs.60 lakhs, in the preceding five financial years. Hence, they submit, that the third respondent herein is not entitled to obtain a contract under the tender notification in question of worth about Rs.120 crores, as the third respondent, on the strength of the same experience of having executed work in the preceding five financial years, had already obtained another contract from the second respondent in response to another tender notification, and, therefore, the third respondent cannot utilise the said qualification for the purpose of securing any contract under the tender notification in question.

4. The petitioners, at the time of hearing, furnished additional set of material papers which are the internal departmental proceedings, wherein the Superintending Engineer concerned opined that the third respondent already obtained another work to the tune of Rs. 120 lakhs on the strength of his past experience of executing similar works of the value of Rs.64 lakhs. (Xerox copies of the documents are produced before me.). It appears from the said documents that the said note of the Superintending Engineer was approved by the Engineer-in-Chief on 31-3-1998 and consequently a further note was made to the effect that other lowest tenderers may be called for negotiations. It may be mentioned herethat the said document is part of the internal departmental proceedings. The petitioners have not disclosed the information as to how they obtained such document. Initially when the matter came up for hearing, the respondents raised objection that since the source of document have not been disclosed, the Court may not look into the document. The first respondent also filed an additional affidavit stating that an enquiry was ordered into the matter as to how such internal correspondence had made its way to the hands of the one of the tenderers. This issue will be dealt with separately in the judgment later.

5. The respondents 1 and 2 filed their counter. The learned Government Pleader appearing for respondents submits that tenders were invited under the World Bank Tender system in 2 covers. The pleading in this respect is as follows:

'.. .. Tenders were invited under World Bank tender system in 2 covers i.e., post qualification bid (2) Financial Bid. The first cover should contain the certificates in

support of physical experience, financial turnover T & P possessed, works on hand, works tendered, ITCC bid security. The responsiveness of the tender will be first decided considering the physical experience and financial turnover against the post qualification criteria fixed and the financial bid of the responsive tenders will only be evaluated. Negotiations are allowed for obtaining additional information.....'

Further it is averred in the counter-affidavit that:

'.... In reply to Para-3 of the affidavit it is submitted that as per the World Bank Tender procedure being followed, the tender submitted by a contractor have to be considered only after furnishing the required documentary evidence satisfying the post qualification criteria stipulated with bid documents against clause 3.5, illustrated hereunder.

1. 3.5(a+b) The Tenderer in the same name and style should have successfully completed 50% of quantity of works in any of the preceding five years.
2. 3.5.(c) The yearly financial turnover in the same name and style during last 5 years should not be less than 60% value of work for which tendered.

Failure to do so by any tenderer will cause for rejection of his tender. It is true that the third respondent had submitted a turnover certificate of Rs.64.83 lacs based on which Rs.120.58 lakhs worth of works was awarded earlier. It is also true that the third respondent had enclosed the same certificate for the subject packages but there is no bar under the procedure, but as per point 3.5(e) the employer has got the power to consider his existing commitments and performance before awarding the contract but the allegation of the petitioners that the 2nd respondent in bitter violation of the procedure had agreed the financial bid of the third respondent is incorrect since the bid requirements are met with by the third respondent...'

From the above pleadings of the respondents 1 and 2, it can be seen that the third respondent obtained another contract for the executing of work to the tune of Rs. 120 lakhs.

6. The learned Counsel for the third respondent submitted that, there is no bar in the terms and conditions stipulated in the bid documents, by which the contractors obtaining other contracts by utilising his past experience is prohibited from participating in the tender proceedings in question. Such a condition is sought to be read into the terms of the tender by the petitioner in view of the minutes of the meeting recorded by the respondents 1 and 2 in Pre-bid conference held on 23-I-1997. The learned Counsel further submitted that respondents have no legal authority to make such stipulation as the same was not found in the two original documents. Further the learned Counsel submitted that for the sake of argument without conceding the factual correctness of the submission that the Superintending Engineer opined that the third respondent is not qualified for awarding the works of the contract in question, the Engineer-in-Chief who happens to be the competent authority and superior to the Superintending Engineer is entitled to take a different view of the matter having regard to the relevant provisions of law and conditions of the tender notification. It is further submitted that the terms and conditions of the tender notification and the above-mentioned documents only bind the parties but not the opinion of the individual officers or the tenderers in this regard. The learned Counsel submitted that it is the only fairness of the process of awarding of the contracts that is amenable to the jurisdiction of the Court in exercise of its power under Article 226 of the Constitution but not the actual decision taken in this regard. In other words, if the procedure adopted is found to be fair and just, the Court would not sit as an appellate authority to decide whether the competent authority reached the conclusion correctly or not.

7. The Book-lets accompanying tender documents, titled as 'Forms of Bids for LCB Works' referred to earlier contained the procedure of awarding of the contracts. Section 'O' of Clause 5 of Volume-I provides that a Pre-bid conference open to all prospective bidders will be held, whereunder it appears that opportunity to all the bidders will be provided for obtaining clarification regarding the tender works and the tender conditions. Section 1 of the Volume deals with the instructions of the bidders, in which, Para 3.5 deals with the minimum criteria for post qualification, which is relevant for deciding the issue involved in the present Writ Petition-reads as follows:

'3.5. Minimum Criteria for Post Qualification:

- (a) The tenderer in the same name and style should be in Civil Engineering business for a period not less than two years.
- (b) The tenderer in the same name and style should have successfully completed the construction of similar works tendered for during last five years and he should have executed the following quantities of work in any one of the years,
- (c) The yearly financial turn over in the same name and style in any one of the year during last five years should not less than Rs.
- (d) The Contractor should own or have necessary plant and equipment. The Contractor should also possess qualified personnel to execute the work.
- (e) The tenderer's existing commitments and performance will also be considered by the employer before deciding the award.

As can be seen from the above extract, the relevant factors which qualify a 'person' are:

- (1) that the person must have been in that business for not less than two years;
- (2) the person must have successfully completed works in the preceding five years; and
- (3) must also have a specially financial turn-over in any one of such preceding five years.

Understandably, as this Book-let covers not only the case of the tender proceedings in issue, but also is meant to cover all similar transactions; the 'financial turn-over' expected for the bidder is not stipulated in the Book-let but left blank. The same would have to be decided from case to case. In my view, a Pre-bid conference contemplated under Clause 5 of Section 'O' referred to earlier is meant only to decide such matters depending on the nature and value of the work and such other conditions relevant to the issue. Apparently in fulfilment of the said requirement, the pre-bid conference was held on 23-1-1998 whereunder it was

decided as follows : and the same is extracted insofar as it is relevant for the present case:

'2. Eligibility and Experience Criteria:

The attention of bidders is drawn to Section I of Volume I of bid documents with particular preference to Section 1-3.

Minimum criteria for post qualification:

(A) Physical :--Must have successfully executed similar type of work during any one year of the last five years. 20% of minimum length.

For Example :--The bidder is bidding for sewer line of length 1000mts. should have successfully executed as a single work of sewer line 200 mts.

(B) Financial :--Must have successfully executed during any one year or last five years minimum 50% of the value.

For Example :--The bidder is bidding for one sewer line costing Rs. 10.00 lakhs should have successfully executed work costing not less than 5.00 lakhs in one year. The same analogy applies for all other works also.

3. XX XX XX XX XX XX

Special Conditions:

A) The works should be completed within agreement period.

B) The experience certificate shown for one package is not eligible for another package. However the balance experience if any available after showing the same for 1 st work will be taken for another package.

XX XX XX XX XX XX XX

XX XX XX XX XX XX XX '.

Therefore in the pre-bid conference, it was decided that the 'financial turn-over' expected of the bidder is 50% of the value of the work for which the bidder is competing. In the background of the provisions of the bid-documents and the minutes of Pre-bid conference, it is clear that for the purpose of the Award of contract, the 'financial experience' of the bidder in the preceding five years is one of the crucial factor to be considered and unless that condition is satisfied, the financial bid could not be opened. However, the question whether utilisation of such 'financial experience' for obtaining another contract not covered by the tender notification in issue, would operate as bar on the bidder to obtain present contract is a matter to be decided.

8. In clauses 'b' and 'c' of Para 3.5 of Volume-I do not give any positive suggestion as to whether any such bar exists. Even Sub-condition 'B' of Special Conditions of the tender notification (recorded in the minutes of the meeting of Pre-bid conference) indicates that the certificate shown for one 'package' is not eligible for another 'Package'. What exactly is the meaning of the work 'Package' is not explained in the minutes of 'Pre-bid conference' nor is the term defined in the tender documents. In the absence of such definition or explanation to the expression 'package' the meaning of the word 'Package' requires examination.

9. It is admitted on all hands that the logic behind the stipulation of the previous experience on the part of the bidder is to ensure that the bidder has necessary capacity and competence to successfully complete the contract, if awarded to him.

10. To make an assessment whether a bidder can successfully complete the contract if awarded, two factors are relevant and are to be taken into consideration : the first factor is that the bidder had in the past successfully executed works of the nature which are similar to the works in question, as it would be logical to think that a person who achieved a particular result in the past, would normally be capable of achieving the same thing if he were asked to do again. The second factor is that, having regard to the resources of the bidder, though he has the capacity to successfully complete the work if awarded, if the resources are already committed to some other work similar to the work in issue elsewhere, both the past experience and the existence of resources would be of no use for the purpose

of securing the execution of the work in issue.

11. Visualising the problem, the State inserted Clause 3.5 (e) which stipulates that the 'tenderers existing commitments and performance will also be considered' by the employer before deciding the award of contract. Obviously, the condition under 'c' seeks to take care of the situation where notwithstanding the fact that the tenderer has sufficient experience of having executed similar work during the past five years, if the tenderer has other similar works on hand, under another contract, where all his abilities and financial resources are likely to be exhausted or locked up during the 'relevant period'. Therefore, the employer is entitled to make an assessment of the situation before taking a decision about the award of the contract. An argument was advanced that such an assessment about the existing commitments is permissible only at the stage of the award of the contract, but not at the stage of the 'post qualification' assessment. In my view such an assessment is permissible and essential both at the stage of deciding the eligibility of the bidder and also at the stage of award of contract (as such 'existing commitments' may arise at either stage) and in view of the logic behind the requirement to make such an assessment as explained earlier.

12. For the purpose of making such an assessment, the bidder is required to furnish the information as per Schedule III (A) of Volume III in the Forms supplied alongwith tender documents. The said Schedule requires the tenderer to indicate the works to be completed as on the date of submission of the application. If such is the purpose sought to be achieved by sub-clause 'e' of Para 3.5 whether the expression 'package' employed in sub-condition 'B' of Special Conditions refers to other works covered under the tender notification in issue or other work on hand of the contractor, in my view, becomes an irrelevant factor. If the original bid document stipulates that the 'bidders existing commitment and the performance will also be considered', obviously the expression must be referring to a commitment not covered by the transaction in question. The said clause in my view creates on me part of the respondents 1 and 2 - State an obligation to make such an assessment, as they are ultimately dealing with public money, and not merely an enabling provision.

13. Therefore the respondents are right in submitting that there is no prohibition under the tender conditions that a bidder who had utilised his past experience of having executed the similar work for procuring another work. However, it is for the respondents 1 and 2 to apply their minds while making assessment having regard to the existing commitment of tenderers, whether the bidders will be in a position to complete or execute the work covered by the present notification within the stipulated time and in accordance with the conditions of the contract. Whether such an assessment is made or not in the present case with reference to the third respondent, does not appear either from the pleadings of the respondents or from the records produced before me by the Government Pleader.

14. On the other hand the learned Counsel for the third respondent made a submission notwithstanding the fact that the third respondent obtained contract for the execution of similar work worth of Rs.120 lakhs for construction of filtration plant at Srikalahasthi. His resources were not in fact utilised there, as the award of such contract at Srikalahasthi in favour of the third respondent was questioned by another competitor in Writ Petition No.1203 of 1998 and during the pendency of the Writ Petition, in view of the litigation, the State had given an undertaking before this Court that the said contract would not be given effect to. In view of such undertaking, third respondent could not carry out such work and, therefore, question of his exhausting his resources for execution of the said work does not arise. It appears that the writ petition was finally dismissed by this Court by an order dated 17-4-1998. Nothing is placed before this Court either by the third respondent or other parties to the writ petition as to the present state of affairs with reference to the said contract obtained by the third respondent at Srikalahasthi.

15. In the circumstances, I am of the opinion that respondents 1 and 2 while finalising and awarding the contract to the third respondent, have not applied their minds with due regard to the relevant factors that ought to have been considered as contemplated in the bid documents. Therefore, the award of the contract in favour of the third respondent is illegal.

16. The respondents 1 and 2 simply proceeded to consider the case of the third respondent on the ground that he is the lowest tenderer. If the respondents 1 and 2 came to the conclusion, notwithstanding the other commitments, third respondent is still able to execute the contract in question, after a proper assessment of the situation in accordance with law as explained above, there would have been nothing wrong with such a decision. But in the absence of any such assessment as indicated above, merely because third respondent happens to be the lowest tenderer, the respondents 1 and 2, in my view are not justified in awarding the contract to the third respondent and the same is hereby set aside.

17. The writ petition is accordingly allowed, but in the circumstances, there shall be no costs.

18. Before parting with this case, I would like to place on record one more aspect of the matter : the internal notings and correspondence of the officers at various level in the Government are generally confidential opinions. In the context of law of contempt, such notings fell for consideration of the Supreme Court in State of Bihar v. Kripalu Shanker, : 1987 CriLJ1860 , wherein Their Lordships observed (at para 13):

'..... ..

It would be dangerous to found an action for contempt for the views expressed in the notes filed, on the discovery of unpleasant or unsavoury notes, on a perusal of the notes filed by the Court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the Court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt, in our view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over sensitive, when we come across, objectionable notings made by officers, sometimes out of inexperience, sometimes out of over zealotry.

and sometimes out of ignorance of the nuances of the question of law involved.'

the same logic, applies even in the context of maintaining the confidentiality of the notes, especially in the context of awarding of Government contracts of high-stakes, where day-in and day-out, we find in the newspapers that attempts are made to prevent competing contractors from participating in the tenders by use of force and complaints of threats to the officers in-charge of such process. Unless, the confidentiality is strictly maintained, the officers would not be in a position to take decisions fearlessly and independently. Invariably in a number of cases before this Court, such internal correspondence is relied upon without disclosing the source of information, by some parry or other; the State on the other hand, raises a routine objection that such material could not be relied upon, in the absence of any explanation as to the source of information, but hardly do we hear that, in any case the State took the follow-up action in the sense, that it tried to identify the person who is responsible for the leakage of such information and dealt with him appropriately in accordance with law. In the circumstances, I am of the view, having regard to the stand taken by the State that it had already initiated an enquiry into the matter of leakage of certain internal correspondence pertaining to this case, though the writ petition is disposed of, the respondents 1 and 2 are directed to complete the enquiry within a period of 30 days from to-day and report to this Court the result of such an enquiry.