

Core Projects and Technologies. Vs. State of Bihar, and ors.

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SooperKanoon Citation : sooperkanoon.com/915994

Court : Patna

Decided On : Aug-18-2010

Judge : Shiva Kirti Singh. J.

Acts : Companies Act - Sections 4, 212

Appeal No. : LETTERS PATENT APPEAL No.937 OF 2010

Appellant : Core Projects and Technologies.

Respondent : State of Bihar, and ors.

Advocate for Def. : Mr. Jaideep Gupta; Mr. Y.V. Giri; Mr. Rakesh Ojha; Ms. Soni Srivastava; Mr. Inder Raj Gill; Mr. P.K. Shahi; Mr. Shiva Jee Pandey; Mr. Vikash Kumar, Advs.

Advocate for Pet/Ap. : Mr. U.U. Lalit; Mr. Arunabh Chaudhary; Mr. Anupam Lal Das; Mr. Rajesh Ranjan; Mr. Raktim Gogoi; Mr. Sanjeev Kumar, Advs.

Judgement :

1. This Letters Patent Appeal is directed against order dated 03.05.2010 whereby learned Single Judge dismissed the writ application bearing CWJC No. 5669 of 2010 preferred by the appellant/writ petitioner on the ground that the official respondents were not obliged either under law or under the terms of E-tender notice inviting request for proposal (RFP for brevity) to consider the experience of a Subsidiary Company of the appellant for the purpose of eligibility so as to open and consider the technical and commercial bid of the appellant for supply,

installation, maintenance of IT infrastructure (Establishment of Computer Lab, Hardware, Networking Software, Uninterrupted Power Supply etc.) and Computer Education Services (Faculty, Curriculum, Courseware, Testing and Certification, Teachers Training etc.) in 600 schools in the Rural and Urban areas of the State of Bihar on Build Own Operate and Transfer (BOOT) basis.

2. In substance, the writ Court found no good ground to interfere with the impugned decision of Respondent No.4, the Bihar State Electronic Development Corporation Limited (Beltron) dated 18.03.2010 contained in Annexure-11 to the writ petition disclosing the reasons for disqualification of the appellant's bid at the preliminary stage itself.

3. The facts relevant for the purpose of present appeal are in brief mentioned hereinafter. On 19.02.2010 respondent no.4 issued E- tender notice inviting request for proposal for supply and installations of hardware, software etc. and for the Computer Education Services noticed above.

4. The said E-tender was subsequently revised on 22.02.2010. The said E-tender notice for RFP is Annexure-1 to the memo of appeal. As per E-tender notice the submissions of proposals/bids was to be accompanied by earnest money deposit (EMD) in form of a demand draft/bank guarantee of Rs.1 Crore issued by a Nationalized Bank with validity for a period of six months.

5. A pre-bid conference was to be held on 04.03.2010 of the prospective bidders to consider requests for clarifications. The bid was required to be in three parts; (i) "pre qualification documents" containing earnest money deposit and all the pre qualification documents; (ii) "Technical Proposal" complete with all technical details and (iii) "Commercial Proposal" containing price schedule. The last date for submission of bids/proposals through E-tendering as per the Tender notice was 12:00 Noon of 8th March, 2010.

6. On 04.03.2010 the appellant submitted certain queries for clarification and on the same day the Pre Bid Conference was held as per schedule with the prospective bidders which included the appellant and three others including the successful bidder, EDUCOMP (respondent no.5 herein). On 06.03.2010 certain

amendments were made to the RFP document. The amendments are Annexure-3 to the memo of appeal. By another corrigendum dated 06.03.2010, respondent no.4 extended the last date for submission of bids till 12:00 Noon of 10.03.2010. On 09.03.2010 the appellant, through a letter requested respondent no.4 for extension of the last date by further seven days on the ground that adequate space in the server of the respondent no.4 was not allotted for uploading the required documents and that arranging the EMD of Rs.1 Crore from a Nationalized Bank would require some time. The appellant received no response to its request for extension of time and therefore submitted its E- bid on 10.03.2010 within time. Only one other bidder namely, NIIT submitted its E-bid within time i.e., by 12:00 Noon on 10.03.2010. On 10th March, 2010 at 3:00 P.M. respondent no.4 extended the date of submission of the E-tender by one week. This was protested by the appellant. The extension notice providing fresh tender schedule is Annexure-9 to the memo of appeal. It contains a notice and clarifications to the effect that those bidders who have submitted their bids may re- submit it by the appropriate time and only those bidders who had purchased the tender document as on 4th March, 2010 were only eligible to request for E-forms. Respondent no.5, the Successful Bidder submitted its bid/proposal on 16.03.2010. The pre-qualification bids were opened as per schedule on 16.03.2010 at 3:00 P.M. and its results were announced on 18.03.2010. Then the appellant came to know from the impugned decision in Annexure-11 that its pre-qualification bid was rejected for the reason mentioned in the following words:-

"The Committee has received Profit Loss Account of Core Projects and Technologies Limited and Experience Certificate of Core Education and Consulting Solutions Inc. Hence, disqualified".

7. The two issues raised before the writ Court as well as in this appeal for challenging the impugned decision of respondent no.4 are as follows:-

"(i) Whether the rejection of the Bid submitted by the Appellant/Petitioner on grounds mentioned in the rejection order is sustainable in view of the terms and conditions of the tender? (ii) Whether the extension of the date for submission of the bids after the time for receipt of the bids on 10.03.2010 was already over is

permissible and sustainable in law?"

8. In context of issue no.1 the submission on behalf of the appellant is that the appellant-company is entitled to rely upon the requisite qualification and experience of another company which is its Subsidiary company because the provisions of the Company Law and the law declared by Courts on this subject permit such a course of action and the tender notice also contains several materials in support of a Subsidiary Company being treated as part and parcel of its Holding company such as the appellant. According to learned senior counsel for the appellant, the respondent no.4 erred in law in treating Core Education and Consulting Solution Incorporate to be a different entity in the context of required experience and that such decision was so arbitrary which could not have been taken by a prudent businessman.

9. In order to appreciate the submissions in respect of issue no.1 it would be convenient to extract the eligibility criteria contained in Clause 17 of the notice:-

17. Eligibility Criteria The bidder shall meet the following criteria for eligibility:

(a) The bid shall be submitted by an individual organization only. Consortium is not allowed. For supply of Hardware, peripherals and other equipments/materials the education service provider may have a back end tie-up with the manufacturer/supplier, however for the bidder will be responsible in totality.

(b) The bidder should be an Information Technology & Communication Company & specializing in IT learning services with adequate experience of executing similar projects for at least 300 schools. School should be acknowledged by Government as of 31st Dec 2009.

(c) The bidder should have an average annual sales turnover of INR 100 Crores and above in the last three financial years.

(d) The Net Worth of the bidder should be positive. The bidder is required to submit its audited balance sheet or copy of the annual report duly signed in original by the authorized signatory.

(e) The bidder must have experience of completed/executing dually supported by Acceptance Test document at least any one of the following:

1. Project of comprising of hardware, system software, trainer and learning services of Rs. 20 Crores.

2. 2 Projects of comprising of hardware, system software, trainer and learning services of Rs. 10 Crores.

3. 3 Projects of comprising of hardware, system software, trainer and learning services of Rs.7 Crores.

(f) References (contact details, customer completion certificate, customer satisfaction certificate etc.) for these projects shall be provided. Projects executed for bidder's own, bidder's group of companies or bidder's JV companies shall not be considered. (g) Qualification of Hardware (Server/Desktop) supplier Should have ISO 9001 certification, as OEM with experience of supply & multilocational installation at minimum of 400 different sites in the State of Bihar.

(h) The bidder must have had at least 100 employees on roll over each of the last three years (As on December 31, 2009, 2008 & 2007).

(i) The bidder shall have Quality certification from an accredited and internationally reputed/renowned firm (viz. ISO 9001 and ISO 14000).

(j) The bidder should have office in Bihar. In case bidder has no presence in Bihar, bidder shall furnish an undertaking that an office shall be opened in Bihar, with sufficient personnel and inventory of spares within a month of selection as Successful Bidder.

(k) The bidder shall have bank's certificate of solvency.

(l) The bidder must have company registration certificate, registration under Labour Laws Contract Act, valid sales tax registration certificate and valid service tax registration certificate.

10. On behalf of the appellant emphasis was laid on definition of the term Affiliate in the definition Clause i.e. Clause-2 of the notice. It defines Affiliate as under:

"Affiliate" shall mean any holding company or subsidiary company of a party to the Agreement or any company, which is subsidiary of such a holding company. The expressions "holding company" and "subsidiary company" shall have the meaning specified in section 4 of the Companies Act 1956 (as amended from time to time).

11. Reliance was also placed upon Section 212 of the Indian Companies Act to highlight that the Balance Sheet of holding company is required to include particulars relating to its subsidiaries including a copy of Balance Sheet of the subsidiary, a copy of its profit and loss account and several other particulars. Reliance was also placed upon the judgments of the Supreme Court in the case of (1) State of U.P. & Ors v. Renusagar Power Company & Ors, (1988) 4 SCC 59, (2) New Horizons Limited and Another v. Union of India & Ors, (1995) 1 SCC 478 and some other cases noticed by the learned writ Court in paragraphs-9 and 10 of the impugned judgment. Those judgments clearly lay down the law that the corporate veil can be lifted or pierced when the Courts find that the Corporate personality is opposed to justice, convenience or interest of revenue. The case of Renusagar Power Company (supra) was related to payment of electricity duty involving interest of revenue. The case of New Horizons Limited related to Government contracts and thus involved interest of revenue as well as issue of justice. The present case also relates to award of contract and therefore in view of law laid down by the Apex Court in New Horizons Limited (Supra) respondent no.4 could have the option of looking into the experience of a subsidiary company which was wholly owned by the appellant-company provided the tender notice contained provisions permitting such a course of action either by the express words or by necessary implications.

12. It was rightly submitted on behalf of the respondents that in the case of New Horizons Limited (supra) a joint venture was permitted and the Apex Court in paragraph-26 came to a clear conclusion that New Horizons Limited is a joint venture as claimed by it in the tender and therefore the experience of its various constituents had to be taken into consideration by the standard of a prudent

businessman.

13. In the present case, as per definition, the word "affiliate" refers to the subsidiary company of a holding company but there is no provision in the tender notice which may lead to the conclusion, explicitly or impliedly, that for the project at hand the experience of the subsidiary company may be taken into account as experience of the holding company. As a fact Clause 17 (a) highlights that the bid is required to be by an individual organization only and consortium is not allowed. In view of such specific prohibition in the tender notice, the view and course of action adopted by the respondent no.4 in not accepting the experience of the subsidiary company as that of the appellant company cannot be treated to be whimsical or arbitrary so as to permit interference in exercise of writ jurisdiction. Even if two views could be possible in interpreting the relevant eligibility clauses, since the view taken by respondent no.4 is also a probable and possible view, the writ Court was right in not interfering in the matter.

14. Clause 17 (b) stipulates that the bidder should be an Information Technology and Communication Company and specializing in IT learning services with adequate experience of executing similar projects for at least 300 schools.

15. It was rightly submitted on behalf of the respondents that the term "Bidder" has been defined in Clause-5 as well as Clause 19 of the Definition Clause in the notice inviting RFP and at both the places it is an exclusive definition which does not include any subsidiary company or "affiliate" of the firm offering the bid for solution, services and or materials required in the RFP. It was further highlighted that the requirement of submitting a profile of the bidder as per Appendix-2 along with pre qualification bid no doubt requires disclosure as to whether the bidder is a Government or Public Sector undertaking or partnership firm or a Limited Company or member of a group of Companies or subsidiary of a large corporation but that does not take away from the requirement of experience in respect of the bidder that it should be an IT and Communication company specializing in IT learning Services nor it seeks to enlarge the definition of term "Bidder".

16. On behalf of the respondents reliance was placed upon a judgment of the Supreme Court in the case of Air India Limited v. Cochin International Airport Ltd &

Ors, (2000) 2 SCC 617 to highlight the law laid down in paragraph-7 to the effect that in the matter of award of contract by the State or its instrumentalities the decision is not amenable to judicial review but the Court can examine the decision making process and it may interfere if the decision making process is found to be vitiated by mala fides, unreasonableness and arbitrariness. It was further observed thus:

" Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene".

17. In view of discussions made earlier the issue no.1 is decided in favour of respondent no.4 because its decision making process is found to suffer neither from mala fides nor arbitrariness. So far as issue no.2 is concerned, the facts disclose that the request for extension of last date for submission of bids was made by the appellant-company itself. A legal point is sought to be made out only because the authorities took time in acting upon the request and the extension was granted perhaps three hours after the expiry of the time. We find this part of the decision making process also to be without any mala fides or arbitrariness.

18. Materials have come on record that the project at hand was already delayed by cancellation of earlier notice inviting tenders and now after the award of the work to respondent no.5 substantial work has already been done towards providing the schools with IT infrastructure. Hence, overwhelming public interest also does not require interference in the matter.

19. Several case-laws were cited on behalf of respondents to support the proposition of law that lifting or piercing the corporate veil can be resorted to only in special circumstances and that too only by the Courts. This issue need not be gone into in view of findings on the two main issues already given in favour of the respondents. In fact, this issue is not relevant because the real issue in this case is

dependent upon terms and conditions mentioned in the notice inviting tender/offer which have been already considered.

20. For the reasons indicated earlier, the appeal fails and is dismissed accordingly. There shall be no order as to costs.

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