REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6125 OF 2016
(Arising out of SLP (C) No.19285 of 2015)

STATE OF JHARKHAND & ORS. ...Appellants

Versus

M/S CWE-SOMA CONSORTIUM ...Respondent

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. This appeal has been filed assailing the judgment dated 13.03.2015 of the High Court of Jharkhand dismissing the appellant's Letters Patent Appeal No.309 of 2014, in and by which, the Division Bench affirmed the order of Single Judge directing opening of technical and financial bid of the respondent.

3. The matter in dispute relates to construction of a dam in the State of Jharkhand. The facts leading to filing of this appeal are as follows: The proposed project, Kharkai Dam at Icha is a part

of Subernarekha Multipurpose Project, a Central Government Aided Scheme funded through the Accelerated Irrigation Benefits Programme (AIBP). Subernarekha Multipurpose Project is an Inter State project that was sanctioned in the year 1978 with the objective of providing irrigation in Jharkhand, Orissa and West Bengal. It will also provide water for drinking and industrial purpose as also for production of hydel power. The Water Resources Department, Government of Jharkhand, through its Executive Engineer issued a Notice Inviting Tender (NIT) for the construction of the Dam as per the Standard Bidding Documents (SBD) dated 28.02.2014. On 24.03.2014, a pre-bid meeting was held where ten tenderers participated and during its course, it was observed that in the clauses of the NIT, there were certain departures from the SBD. After the pre-bid meeting, in total, only three bidders namely, M/s CWE-SOMA Consortium, Hyderabad (respondent herein), M/s. IL & FS Engineering and Construction Co. Ltd., Hyderabad and M/s. Navyuga Engineering Co. Ltd., Hyderabad participated in the tender process and submitted their bids. In meetings of the Departmental Tender Committee held on 02.06.2014 and 06.06.2014, it was found that among the three tenderers, only the respondent was found responsive and other two bidders were found unresponsive. Therefore the tender committee

took a decision under clause 4.18(d) of the Central Vigilance Commission Guidelines ('CVC Guidelines') to cancel the tender and go for retender to make the tender process more competitive. The tender committee re-affirmed this decision in a meeting held on 09.07.2014 after the Chief Minister referred an application of the respondent to them. Aggrieved thereof, respondent filed a writ petition before the High Court.

4. The learned Single Judge after examining clauses 4.17 and 4.18 of the CVC Guidelines which provide for procedure in case of a single quote/single valid acceptable quote and in case of lack of competition due to restrictive specifications respectively, came to the conclusion that in the absence of the decision of the tender committee that the specifications were stringent, clause 4.18 could not have been resorted to and tender committee should have resorted to clause 4.17. The Single Judge allowed the writ petition, holding the action of the appellants as arbitrary and against public interest. The matter was then carried in appeal filed by the appellants before the Division Bench by way of Letters Patent Appeal. The Division Bench upon perusal of the rationale for the decision of the tender committee, was of the view that there indeed existed competition as three companies, including the respondent had participated and respondent turned out to be the single bidder.

Thus, the Division Bench concurred with the conclusion of the Single Judge that only clause 4.17 should have been invoked. The Division Bench also noted that the initial tender value was estimated as Rs.698 crores for the tender floated in February 2014, and when second tender was floated in July 2014 within the short span of few months, the estimated value of the project had increased to Rs.738 crores. Thus, Division Bench dismissed the appeal holding that re-tendering at later stage would further enhance the estimated value, causing excessive loss to the state exchequer which may not be in the public interest. Being aggrieved, the State of Jharkhand has preferred the present appeal.

5. On behalf of the appellants, Mr. Mukul Rohatgi, the learned Attorney General submitted that the impugned judgment is contrary to clause 24 of the NIT as also the settled position of law that it is the prerogative of the government to award the tender. Placing reliance upon *Rajasthan Housing Board and Anr.* v. *G.S. Investments and Anr.* (2007) 1 SCC 477 and *Uttar Pradesh Avas Evam Vikas Parishad & Ors.* v. *Om Prakash Sharma* (2013) 5 SCC 182, it was submitted that so long as the bid has not been accepted, the highest bidder acquired no vested right to have the auction confirmed in his favour. It was further submitted that clauses 4.5 (A) (a) and 4.5 (A) (c) which were restrictive have led to

other two bidders becoming unresponsive. It was contended that these restrictions have not garnered the approval of the Cabinet which is mandatory and was consequential in reducing the number of participants from ten to three in which SOMA alone was found to be responsive and the tender committee rightly decided to cancel the tender which is in consonance with clause 4.18 (d) of CVC Guidelines. It was urged that the impugned judgment directing the appellant to open the technical as well as the price bid of the respondent is erroneous and against well settled principles laid down by this Court.

6. Per contra, Mr. P.P. Rao learned Senior Counsel for the respondent appearing along with Senior Counsel, Mr. Dushyant Dave submitted that cancellation of respondent's tender was arbitrary and against public interest. By referring to clause 4.17 of the CVC Guidelines, learned Senior Counsel submitted that in a case where a single quote or a single valid acceptable quote is received against limited tender or where a tender has resulted in a single vendor situation, it needs to be processed further. It was submitted that the learned Single Judge and the Division Bench rightly held that clause 4.17 of CVC Guidelines ought to have been resorted to and not clause 4.18(d) of CVC Guidelines. Drawing our attention to the financial implications of the project, learned Senior

Counsel submitted that by issuance of a fresh tender, the value of the project will go up by about Rs.100 crores and the same will be detrimental to the public interest causing huge loss to the public exchequer.

7. We have carefully considered the rival contentions, perused the impugned judgment and the material on record including the additional documents filed by the appellant-State.

8. Every tender above the estimated value of Rs.250/- lakhs has to be in consonance with Standard Bidding Documents (SBD) which has got its approval from the Cabinet. The entire exercise of complying with the general conditions of SBD is to ensure that the tender is not stringent and restrictive in nature so that it can enable many tenderers to participate and facilitate a wider fair play competition. Any variation from SBD needs prior approval from the department which is done after considering the viability of inserting that clause and whether or not the same is restrictive and stringent in nature.

9. During the pre-bid meeting held on 24.03.2014 that was attended by ten tenderers, there were unapproved departures in clauses 4.5 (A) (b) and 4.5 (A) (c) from the clauses of the SBD. As these departures in the clauses of the tender document had not been approved, the Chief Engineer was requested vide letter dated

26.03.2014 to issue appropriate corrigendum to the tender notice so that the tenders could be published in accordance with the SBD and reminder of the said request was sent to the Chief Engineer vide letter dated 31.03.2014. In reply to the afore-mentioned letters, the Chief Engineer responded vide letter 02.04.2014 stating that the departures were for the reason that the work was of a specific and urgent nature and the clauses were inserted to ensure smooth implementation of the work on time.

10. Even though there were ten participants in the meeting on 24.03.2014 of pre-qualification bid, in view of stringent clauses in the tender document, only three bidders namely: (i) M/s. CWE-SOMA Consortium, Hyderabad; (ii) M/s. IL & FS Engineering and Construction Co. Ltd., Hyderabad and (iii) M/s. Navyuga Engineering Co. Ltd., Hyderabad submitted their bids. Upon scrutiny of the three bids, only respondent's company bid was found responsive; the other two bids were found non-responsive in the light of provisions of clauses 4.5(A)(b) and 4.5(A)(c). The tender committee therefore decided to cancel the tender in order to make the tender more competitive and decided to re-invite tenders in the light of SBD norms on the basis of which tenders are invited by the department. The minutes of the Departmental Tender Committee held on 02.06.2014 reads as under:-

> "In light of special conditions prescribed for the invited tender for the work, only one tenderer is found responsive in *technically-cum-pre-qualification bid*.
>
> In view of the above, in order to make the tender under subject more competitive, the departmental tender committee after due consideration while cancelling the tender has decided to re-invite tenders in light of SBD norms on the basis of which tenders are invited by the department.
>
> Chief Engineer, Icha-Galudeeh Complex, Adityapur, Jamshedpur shall, accordingly, ensure action inviting tenders according to the prescribed SBD norms without any delay."

It was later realised that the typographical error had been made in the above minutes and therefore '*technically-cum-pre-qualification bid'* was later modified to "*pre-qualification bid"* in the meeting held on 06.06.2014.

11. Against the decision of tender committee cancelling the tender, SOMA Consortium filed a complaint before the Chief Minister of Jharkhand and in furtherance of order of the Chief Minister, the Departmental Tender Committee held meeting on 09.07.2014. In the said meeting, tender committee decided that the decision taken by the committee in its meetings dated 02.06.2014 and 06.06.2014 was correct and the same was affirmed in the light of clause 4.18(d) of CVC Guidelines, clause 32 of ITB, clause 24 of IFB and the letter of CVC dated 07.05.2004. Tender committee reiterated its earlier decision to invite fresh tenders to make the tender under subject more competitive. Pursuant to the decision taken on 09.07.2014, appellant proceeded

for fresh tender and NIT was published in the newspapers as per the norms on 13.07.2014.

12. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide *Laxmikant and Ors. v. Satyawan and Ors.* (1996) 4 SCC 208; *Rajasthan Housing Board and Anr. v. G.S. Investments and Anr.* (2007) 1 SCC 477 and *Uttar Pradesh Avas Evam Vikash Parishad and Ors.* v. *Om Prakash Sharma* (2013) 5 SCC 182).

13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-

> "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof."
>
> Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at

> any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action."

In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.

14. 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 person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

15. The appellant claims that the decision of re-tendering was in the light of the restrictive nature of the conditions introduced in the NIT in departure from the SBD and was in consonance with clause 4.18(d) of CVC Guidelines. Clause 4.18 of CVC Guidelines reads as under:-

> "**4.18**. Re-tendering- Retendering may be considered by the TPC/CFA with utmost caution, under the following circumstances:
> (a) Offer do not confirm to essential specification
> (b) Wherever there are major changes in specification and quantity, which may have considerable impact on the price.
> (c) Prices quoted are unreasonably high with reference to assessed price or there is evidence of a sudden slump in prices.
> (d) There may be cases when the lack of competition is due to restrictive specification, which do not permit many vendors to participate. The CFA must consider if there are reasons for review of specification of the item to facilitate wider competition. Re-tendering will be done only after approval of IFA and CFA in all cases."

Respondent, on the other hand, submits that the present case is not guided by clause 4.18(d) of CVC Guidelines rather it is guided by clause 4.17 and therefore cancellation of tender invoking clause 4.18(d) is arbitrary and erroneous. Clause 4.17 of the CVC Guidelines reads as under:-

> "**4.17**. There are cases when only a single quote or a single valid acceptable quote is received even against LTE or OTE, this results in a single vendor situation indicating lack of competition. These cases will not be treated as procurement against Single Tender Enquiry and shall be progressed as an LTE or OTE case as applicable."

16. In order to consider the question whether the respondent's case is to be appreciated under clause 4.17 or

clause 4.18 of the CVC Guidelines, in the impugned judgment, the Division Bench examined the clauses that have been inserted in the NIT in departure from SBD i.e. clause 4.5(A) (a) and clause 4.5 (A)(c). The said clauses read as under:-

> "**4.5 (A)** To qualify for award of the contract, each bidder in its name should have in the last five years as referred to in Appendix.
> (a) Achieved a minimum annual turnover (in all classes of civil engineering construction works only) amount indicated in Appendix in any one year, (usually not less than one & half times the estimated cost of the project may be kept. However, for Turn-key & other projects where completion period is two years or more, the annual turnover may be kept as per the requirement upto 1.50 x Estimated cost/years of completion of project).
> (b .....
> (c) Executed in any one year, the minimum quantities of the following items of work as indicated Appendix.
> – cement concrete (including RCC and PSC).....cum
> -earthwork in both excavation and embankment(combined quantities) .....cum
> - ....cum
> - ....cum
> (usually 50% of estimated quantity. However, for Turn-key & other projects where completion period is two years or more as per the requirement may be kept as estimated quantity/years of completion of project.)"

17. Clauses 4.5(A)(a) and 4.5(A)(c) have been found stringent resulting in request to the Chief Engineer for issuing corrigendum as the above clauses added an additional qualification of showing of quantity of work done in one project. The Division Bench thereafter examined clauses 4.17 and 4.18 of CVC Guidelines and came to the conclusion as under:-

> "...there was certainly a competition within three companies including SOMA in which SOMA turned out to be a single vendor and therefore it cannot be said to be a case for retendering on account of lack of competition due to restrictive specification. Lack

> of competition has to be construed in that manner only. In this eventuality, it is only clause 4.17 of CVC guidelines which ought to have been invoked and not clause 4.18 of CVC guidelines as rightly held by learned Single Judge."

18. Admittedly, in the pre-bid meeting held on 24.03.2014, ten tenderers have participated. After conclusion of the pre-bid meeting on 24.03.2014, as a result of stringent conditions prescribed in clause 4.5(A)(a) and 4.5(A)(c), only three tenderers could participate in the bidding process and submit their bids. As noticed earlier, upon scrutiny two were found non-responsive. In our considered view, High Court erred in presuming that there was adequate competition. In order to make the tender more competitive, tender committee in its collective wisdom has taken the decision to cancel and re-invite tenders in the light of SBD norms. As noticed earlier, the same was reiterated in a subsequent meeting held on 09.07.2014. While so, the High Court was not justified to sit in judgment over the decision of tender Committee and substitute its opinion on the cancellation of tender. Decision of the state issuing tender notice to cancel the tender and invite fresh tenders could not have been interfered with by the High Court unless found to be *mala fide* or arbitrary. When the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh

tenders, it cannot be said that there is any *mala fide* or want of *bona fide* in such decision. While exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by *mala fide,* unreasonableness or arbitrariness.

19. Observing that while exercising power of judicial review, court does not sit as appellate court over the decision of the government but merely reviews the manner in which the decision was made, in *Tata Cellular* v. *Union of India* (1994) 6 SCC 651, in para (70) it was held as under:-

> "**70**. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism, However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State*. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

20. The government must have freedom of contract. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and Anr.* (2005) 6 SCC 138, in para (12) this Court held as under:-

> "**12.** After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)"

The court does not have the expertise to correct the administrative decision as held in *Laxmikant and Ors. v. Satyawan and Ors.* (1996) 4 SCC 208, the government must have freedom of contract.

21. The right to refuse the lowest or any other tender is always available to the government. In the case in hand, the respondent has neither pleaded nor established *mala fide* exercise of power by the appellant. While so, the decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.

22. Having addressed the correctness of reasonings recorded by the High Court, it is important to note one further aspect. When the SLP came up for hearing, by an order dated 10.08.2015, while granting interim stay on the operation of the impugned judgment, this Court directed that the appellants shall be free to invite fresh tenders and process the same, but no allotment shall be made without permission of this Court. The appellant-state has filed an additional document stating that about 20,421.43 acre of land is to be acquired under the "Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013" which came into force on 01.01.2014. Section 41 of the said Act states that no acquisition of land as far as possible could be made in the Scheduled Area. If it is necessary, it should be done only as per last resort. It also states that land in Scheduled Areas can only be acquired with the prior consent of Gram Sabha or Panchayats or the autonomous District Councils. The learned Attorney General submitted that the entire sub-mergence area of the proposed Icha Dam is in the scheduled area and the remaining land for Icha Dam can be acquired only with the prior consent of the Gram Sabha of the affected villages. It is further stated that the issue was discussed in the meeting of Tribal Advisory Council held on

27.09.2014 and that Tribal Advisory Council and the sub-committee opined that the construction of Icha-Kharkai Dam may be cancelled. Learned Attorney General therefore submitted that there are some issues which need to be resolved before floating a fresh tender of Icha dam. The impugned judgment of the High Court is liable to be set aside.

23. In the result, the impugned judgment of the High Court of Jharkhand is set aside and this appeal is allowed. No costs.

.....CJI.
(T.S. THAKUR)

.....J.
(R. BANUMATHI)

New Delhi;
July 12, 2016