

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 2012/2008 & CM 3798, 5639/2008**

Reserved on : 16th May, 2008

t Date of decision: 26th May, 2008

M/S GANPATI-RV-TALLERES ALEGRIA TRACK PVT. LTD.

..... Petitioner

Through Mr.Neeraj Kishan Kaul, Sr.Adv. with
Ms.Rajeshwari Shukla and Mr.Zamil Abidin,
Advocates.

Versus

UNION OF INDIA & ANR.

..... Respondent

Through Mr.Rajiv Dutta, Sr.Adv. with
Mr.Ashwani Bhardwaj, Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE V.K.SHALI

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

J U D G M E N T

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V.K.SHALI, J

1. The present writ petition filed by the petitioner is challenging the issuance of order dated 7th March, 2008 by the respondents wherein the respondents had communicated to the petitioner that it is not meeting the eligible criteria of the tender floated by the respondents and, therefore, their commercial bid will not be considered.

2. Briefly stated the facts leading to the filing of the present writ petition are that the respondents floated a tender on 7th November, W.P.(C) NO.2012/2008

2007 for the purpose of supply of Thick Web Switches (60 Kg.). In pursuance to the aforesaid tender, the petitioner a Joint Venture company was one of the bidders. The relevant tender conditions are as under:

“2.8 – The tender will be in two packet systems i.e.

(i) Technical Bid

(ii) Commercial Bid.

The technical bid and the commercial bid should be in separate packet/cover duly sealed and supercribed on the packet/ cover clearly as “Technical Bid” and “Commercial Bid”. Both the bids, each in a separate packet/cover should be put inside one main cover and sealed.

The commercial bid will be opened subsequently only for those tenderers who have been found successful in the technical bid as per clause 4.0. In the technical bid no commercial offer shall be made nor an indication be given about the pricing etc. If the same is done offer shall be rejected.”

3. Clause 4.1.1 and 4.1.2 read as under:

“4.1.1 The **tenderer** must be ISO 9001 certified, RDSO approved, for 1 in 12 curved switch manufacturers on the date of opening of tender.

4.1.2 Qualifying requirements of tenderers quoting for Item no.1 of Schedule of Quantities i.e. supply of 1500 sets of TWS with own end forged asymmetrical rails:-

a) Approved (4.1.1 Para) Indian **firms can participate in the bid for supply with tenderer’s own end forged asymmetrical rails** by entering in collaboration/Joint Venture (JV) with any foreign firm who has an experience of end forging of asymmetrical rails for thick web switches. In this case, the tenderer should submit certificate of collaboration/JV with the firm

already doing end forging. The collaborator should also be ISO 9001 certified.

b) The tenderer will submit the document of firm proposal/firm commitment (preferably partnership deed/joint venture agreement) from the supplier of end forged asymmetrical rails from whom these rails are to be imported; OR the tenderer should submit a notarized commitment letter from an existing reputed firm having end forging capability for assuring supply of end forged thick web rails to the tenderer in the event of tender being awarded.

c) The collaborator/supplier of end forged asymmetrical rails should have forged and supplied **500** Nos. end forged asymmetrical rails of section 60kg or equivalent, or manufactured thick web switches by end forging **500** Nos. of asymmetrical rails, of section 60 kg or equivalent, themselves or their wholly owned sister concern to Railway systems in **last 2 years**. If the end forging is done through sister concern, the sister concern should also be ISO 9001 certified. The tenderer shall submit a certificate from the Railway networks to which these thick web switches have been provided.

d) Tenderer, quoting for item No. 1 of schedule of supply, will submit the details of the manufacturer of asymmetrical rails Zu-1-60/60E1A1 section, from whom they would procure the asymmetrical rail/end forged rail, along with compliance of the relevant provisions of IRS-T-12/96(up to 4th amendment dated 31.05.07) and as per Annexure IX. The tenderer shall also furnish the relevant values/results obtained/obtainable for all the qualifying criteria tests mentioned in clause 13 of IRS-T-12-96.

e) Tenderer will submit the details of manufacturer/supplier of end forged rails for this work along with confirmation regarding full compliance of the provisions of forging of rail-ends in accordance with the clause 2.0 of the Annexure-VII of the tender document in proforma as per Annexure IX.

4. Clauses 4.2 and 4.3 laid down as under:-

“4.2 Documents to be submitted by the Tenderers: the documents required under the tender conditions for submission along with the tender are listed below. The tenderers are advised to examine various conditions and submit necessary documents accordingly.

- i)
- ii)
- iii).....
- iv)
- v)
- vi) Copy of latest ISO 9001 certificate as stipulated in para 4.1.1 of ITT.
- vii)
- viii)
- ix)
- x)
- xi)
- xii)

4.3 Tenderer not submitting the requisite information and not conforming to performance standards specified should note that his offer is liable to be rejected.”

5. That in terms of the aforesaid eligibility conditions, the petitioner, a joint venture company submitted its bid. It is stated by the learned counsel for the petitioner that there were 16 bids, which were received, out of which 13 including the petitioner were found not to be meeting the technical requirement. Three bidders found not to

be meeting the requirement were informed vide letter dated 13th February, 2008 that their bids were not in order. On 7th February, 2008, the petitioner received a letter from respondent no.2 that the commercial bid of the petitioner will be opened on 22nd February, 2008 at 15:00 hours in Rail Bhawan, Room No.138 Raisina Road, New Delhi-01 and accordingly requested the petitioner to depute an authorized representative to witness the opening of the Commercial Bids. On 20th February, 2008, itself the petitioner received another letter intimating that the opening of the Commercial Bid by the respondents has been postponed to 3rd March, 2008 due to administrative reasons. Yet another letter was received by the petitioner on 28th February, 2008 intimating the petitioner that the opening of the Commercial Bid has been postponed till further notice issued due to administrative reasons. In the meantime, the petitioner was not only surprised but shocked to receive the impugned letter dated 7th March, 2008 from the respondents to the effect that the bid of the petitioner was not found to be technically eligible. This has necessitated the filing of the present writ petition by the petitioner wherein the petitioner has contended that the decision of the respondents that the bid of the petitioner was not meeting the technical eligibility condition is not only arbitrary and unreasonable but is also unfair, irrational in as much as the respondents themselves had intimated the petitioner on two occasions that their bid was meeting the technical requirement and the presence of their authorized

representative was sought for the purpose of opening of the Commercial Bid. It was alleged that this disapproval of the bid of the petitioner was actuated by malice, unfairness and foul play and, therefore, the action of the respondents was violative of Article 14 of the Constitution of India and the judgments of the Hon'ble Supreme Court in Tata Cellular Vs. Union of India (1994) 6 SCC 651 and Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries 1993 (1) SCC 71, wherein it was held that even in the contractual sphere of the actions of the State and all its instrumentalities must confirm to Article 14 of the Constitution of India and should not be arbitrary.

6. The respondents filed their counter affidavit to the writ petition and refuted the averments made in the petition that the petitioner was the eligible bidder. On the contrary, it was stated that the tender evaluation Committee had minutely evaluated the bid of the petitioner company, it was found that the bid of the petitioner was not meeting the eligibility requirement. It was stated by the learned counsel for the respondents that a perusal of Clause 4.1.1 of the eligibility condition clearly envisaged two requirements namely that the tenderer must have an ISO certificate 9001 while as the petitioner company did not file this certificate along with bid and further non-filing of the said certificate entailed the consequences in terms of Clauses 4.2 read with 4.3 which clearly laid down that non-submission of a requisite information would make the offer/bid of a bidder liable to be rejected.

Therefore, the bid of the petitioner was not meeting the tender eligibility condition.

7. The second submission of the learned counsel for the respondents was to the effect that the petitioner ought to be RDSO approved for 1 in 12 curved switch manufacturers from the date of opening of the tender. While as the petitioner was not approved for manufacturing of 1 in 12 curved switches on the date of opening of the tender. It was stated that the petitioner has placed reliance on the letter dated 15th February, 2007 purported to have been issued for Rail Vikas Nigam Ltd., wherein the bid of the petitioner for supply of Thick Web Grade RDSO Switches and other Switches numbering 707 was accepted, the value of which was to the tune of Rs.39,91,46,748/-. It was also stated that another inspection certificate dated 3rd March, 2008 has been issued by RDSO, Ministry of Railways, which will indicate that the petitioner had supplied Thick Web Grade-880, Class –A Tongue Rails to the Ministry of Railways which clearly show that it was at best that an inspection of the petitioner's supply and could not be construed as meeting the second requirement.

8. The learned counsel for the respondent contended that these two documents only showed that the inspection was done by RDSO, Lucknow Branch for the purpose of making and supply RVNL and the second document i.e. letter dated 15th February, 2007 would only show that an order was placed with the petitioner company. By no stretch of imagination, these two documents could be construed to be

a certificate in the nature of an approval leading to a RDSO certificate having been granted to the petitioner company as envisaged under clause 4.1.1 of the tender conditions.

9. Per contra, learned counsel for the petitioner contended that so far as ISO certificate 9001 of the petitioner is concerned, the said certificate was in existence even prior to the date of tender which was floated by the respondents and on account of inadvertent mistakes like the said certificate was not filed. The petitioner in order to show its bonafide had filed three ISO certificates of all the three joint venture partners were submitted along with the bid. It was further urged by the learned counsel for the petitioner in any case the letter dated 7th March, 2008 sent to the petitioner does not make a mention that their bid has not been found to be technically compliant on account of non-submission of ISO certificate. Therefore, non-submission of ISO certificate by the petitioner could not be held against him so as to invoke the clause 4.3 of the tender condition to reject his bid summarily.

10. So far as RDSO approval of the tenderer is concerned, it was urged by the learned counsel for the petitioner that the said approval certificate was not required to be submitted along with tendered bid. Moreover, it was stated that according to the eligibility condition clause 4.1.1, it was laid down that the tenderer ought to have RDSO approved for 1 in 12 curve switches manufactures on the date of opening of the tender and further in terms of Clause 4.1.1 (g), it was

envisaged that all successful bidders will have to install CNC milling machine in their premises within the currency of the contract and machine at least 75 sets of Thick Web Switches by their installed CNC, in case they have submitted MOU/agreement for using CNC milling machine of other party. This will be mandatory to get them enlisted in the approved list of suppliers for Thick Web Switches for future tenders.

11. Developing this argument further, it was stated by the learned counsel for the petitioner that since there was no RDSO certificate with regard to Thick Web Switches, therefore, the approval ought to be only for 1 in 12 curved switches manufacturing and further the bidders had 9 months period at his disposal to put place. This facility for the purpose of manufacturing of Thick Web Switches which capacity or facility could be inspected by the respondents and in case of the petitioner it was stated that he already has in existence the said facility and, therefore, the petitioner was eligible. It was also stated that one of the joint partners of the petitioner had the said requisite certificate issued by RDSO for the purpose of manufacturing of Thick Web Switches. It was contended that the existence of the said RDSO certificate in favour of one of the Joint venture partner was sufficient compliance of Clause 4.1.1 of the tender condition. Accordingly, it was stated that the action of the respondents in issuing the letter dated 7th March, 2008 indicating that the bid of the petitioner was to technically not compliant was not only arbitrary and irrational but it

suffers from the Wednesbury principles and, therefore, was liable to be struck down and further its award the contract to the petitioner subject to opening of their commercial bid was sought.

12. We have thoughtfully considered the contentions advanced before us by the respective sides. We have also gone through the records. The controversy between the parties is very narrow one and so is the scope of judicial review in tender matters. So far as the scope of judicial review is concerned, it is well settled that the tenderer is free to set down its own conditions which meets its requirement and the Courts can only strike down such conditions only if they are unreasonable, malafide or arbitrary. Reliance in this regard is placed on Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors. (2004) 4 SCC 19. In the instant case, there is no challenge to the tender conditions. There is only challenge to the process of decision and the interpretation of the condition No.4.1.1. In the back drop of the aforesaid legal position, we proceed ahead to examine the contentions of the petitioner. Clause 4.1.1 clearly envisaged that tenderer must have an ISO certificate. The tenderer in the instant case is a joint venture company. No doubt, the tenderer is an ISO certified company having the certificate dated 2nd November, 2007 but the eligibility conditions under Clause 4.2.4 clearly laid down that the copy of latest ISO certificate as stipulated in para 4.1.1 had to be submitted by the tenderer. Sanction for non compliance of this condition to this is provided in clause 4.3 which laid down that

non-submission of the requisite information or a document would make the offer/bid liable to be rejected. Admittedly, in the instant case the petitioner joint venture company did not submit the said ISO certificate along with the bid. Therefore, strictly speaking they did not meet the requirement of 4.2 read with 4.3 of the tender conditions. No doubt, the petitioner had received two letters indicting the petitioner that bid was found to be technically compliant and that they must depute their authorized representative but such letters ipso facto did not mean that if on the review of the entire matter, the Tender Evaluation Committee found that actually the petitioner's bid was not technically compliant, it was precluded from retracing its steps. It is for these reasons that when the Tender Evaluation Committee found that actually the tenderer had given a bid, which was not technically compliant and meeting the eligibility condition, it necessitated issuance of letter dated 7th March, 2008 stating therein that the petitioner was not found to be technically eligible. It was not necessary for the respondents to have mentioned the reasons as to why the petitioner was not found to be eligible technically because it was evident to the petitioner themselves that they ought to have known what are the documents which are required to be submitted and which having not been submitted by them entailed rejection in terms of Clause 4.3. Therefore, no fault can be found in the decision making process of the respondent much less in issuance of the letter dated 7th March, 2008 to the petitioner.

13. The second submission made by the learned counsel to the effect that the petitioner a Joint Venture company was an RDSO approved 1 in 12 curved switch manufacturers is also bereft of any merit in as much as two certificates which are sought to be relied upon by the petitioner cannot be said to be the certificates granting RDSO approval to the petitioner for manufacturing of 1 in 12 curved switches. The first letter /certificate which has been relied upon by the petitioner is dated 15th February, 2007 which is a letter purported to have been issued by General Manager, Rail Vikas Bhawan to the petitioner with reference to manufacture and supply of curved switches of Thick Web issued in connection with the bid and the technical proposal opened by the Rail Vikas Nigam on 31st May, 2006. The number and details of switches including the Thick Web Grade 880 switches were mentioned along with total costs of the material in the second letter. This only shows that the Rail Vikas Nigam Ltd., had sent a letter to the petitioner for the purpose of supply of Thick Web Switches. This in our respectful view could not be treated as an RSDO approval. Similarly, letter dated 3rd March, 2008 is only an inspection certificate done by RDSO, Ministry of Railways in connection with the contract awarded by the Rail Vikas Nigam Ltd. On 23rd July, 2007. Therefore, this could also not be said to be a certificate purported to have been issued by RDSO. This was at best only a satisfactory inspection report which was done by RDSO for the purpose of supply period or supply to be made by

the petitioner to the Rail Vikas Nigam Ltd. and by stretch of imagination, it could not be said to be an approval in general granted to the petitioner which would entitle or enable the petitioner to bid for other tenders like one which was floated by the respondents. It has been pointed out by the learned counsel for the respondents that RDSO certificate is issued in the nature of a certificate in favour of a party which is a joint venture of the petitioner and one of the said certificate has been relied upon by the petitioner himself. The said certificate in the name of one of the joint venture partners issued on 17th June, 2005 which shows that it is valid till 30th April, 2008 w.e.f. 23rd April, 2005. A certificate was issued in favour of M/s RV Industries on 30.4.2005 which was valid for a period of three years was the type of certificate which ought to have been in the name of tenderer namely joint venture company so as to enable the joint venture company to have a successful and eligible bidder in terms of clause 4.1. In the absence of such a certificate, it could not be said that either on the basis of individual certificate of one of Joint Venture partners or two letters purported to have been issued letters/certificates in favour of the petitioner on 15.2.2007 and 03.3.2008 the petitioner was meeting the said requirement, so as to make it eligible. Therefore, we have absolutely no hesitation in holding that the petitioner was not eligible and the respondents were well within their right to have issued a letter dated 7th March, 2008 to the petitioner indicating them that their earlier letter dated 7th

February, 2008 asking to depute their authorized representative for the purpose of opening of commercial bid was cancelled on account of the fact that were not meeting the eligibility conditions.

14. So far as the reference to Clause 4.1.4 at point (g) by the learned counsel for the petitioner with regard to a period of 9 months given for the purpose of setting up said facility is concerned, in our view it has no bearing on the question of eligibility especially in the light of the fact that the petitioner is himself claiming that he has already set up such facility as on date. This is a condition which will come into play only after the initial eligibility was met.

15. Lastly, the learned counsel for the petitioner has drawn our attention to the averments made in the application to the effect that one of the bidders JV Company, Meerut had submitted their technical bid, which was totally unsigned and the bank guarantee which was enclosed by them for an amount of Rs.1 crore by way of an EMD ought to have been valid for a period of 400 days as against 365 days, which was submitted by them and yet their bid was considered to be technically compliant. This has been refuted by Mr. Dutta, learned senior counsel at the bar. After perusal the record pertaining to the tender in question the learned counsel has made a statement that only the covering letter of the said bidder did bear the signature of the bidder, while as the rest of the bid was bearing the signatures and was otherwise also meeting the eligibility conditions.

16. We are of the view that since these averments are not made in the main petition, therefore, they do not constitute a part of the pleadings and no cognizance and the same can be taken at this stage and in any case as the learned counsel for the respondent has made a statement that all the papers of the bids except the covering letter were signed.

17. In the light of the aforesaid discussion, we are of the considered view that the petitioner is not technically eligible and therefore the respondents were well within their rights to have issued a letter dated 7th March, 2008 cancelling their letter dated 7th February, 2008 directing the petitioner to depute a person for the purpose of opening of their commercial bid.

18. There is nothing arbitrary, unreasonable and malafide in the action of the respondents in declaring the bid of the petitioner as no compliant to the requirement envisaged in Clause 4.1.1.

19. Accordingly, the writ petition is dismissed. No order as to costs.

V.K.SHALI, J

MUKUL MUDGAL, J

**MAY 26th, 2008
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