

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.18509 of 2015 (O&M)
DATE OF DECISION: 04.09.2015

M/s Ashok Kumar and Company

....Petitioners

versus

Food Corporation of India and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present: Dr. Praveen Hans, Advocate for the petitioners

Mr. J.S. Puri, Advocate for the respondents/
caveators

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE :

The petitioners have challenged the respondents' decision holding their bid to be technically unqualified.

2. The respondent by an e-tender notice dated 14.07.2015 invited online tenders for the appointment of contractors for loading/unloading/handling and transport of food grains and allied material etc. for a period of two years. The tender involved a two bid system i.e. the technical bid and the financial bid.

3(A) The "General Information to Tenderers" which formed a part of the bid document, *inter alia*, contained the following clauses:-

"GENERAL INFORMATION TO TENDERERS

....

5. Instructions for submitting Tender

The instructions to be followed for submitting the tender are set out below:

- (a) The tenderer must fill up and sign the forwarding letter in the format given in Appendix-I and also furnish full, precise and accurate details in respect of information asked for in **Appendix-II** attached to the form of tender. The filled and signed Appendices I and II are to be scanned and uploaded at the space/packet provided in the e-procurement system. Detailed instructions to bidders are available at Annex-A of MTF. Bidders are requested to read the instructions contained therein carefully & meticulously for submission of bids through e-procure Portal.
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8. **Submission of Tender**

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- (c) The envelope/packet in online containing the technical bid shall include the following:-
- (i) All the Annexures & Appendices of MTF duly signed on each page by the Tenderer should be scanned and uploaded in e-procurement portal.
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- (d) Tender which do not comply with these instructions shall be summarily rejected." (emphasis supplied)

(B) The Appendix-II referred to in Clause 5(a), quoted above, is a form to be filled in by the tenderers. This form required a tenderer to state whether the tenderer is, *inter alia*, a registered partnership firm and to furnish the names of all the partners and the business in which the tenderer is engaged. The relevant extracts read as under:-

"1.	Name, date of birth and address of the tenderer, email id & contact No.	
2.	Composition of tenderer:- (state whether the tenderer is a proprietorship concern, or registered partnership firm, or a company). The name of the proprietor, or all Partners, or, the Directors of the company, as applicable, should be given.	
....		

List of Documents Attached

1. Forwarding Letter.
2. All supporting documents except tender document have to be signed, scanned and uploaded in Technical Bid. Price Bid has to be scanned and uploaded at the requisite places in the e-Procurement system.
3. List of documents enclosed.

Document No.

- | | | |
|----|--|-------------------------|
| 1. | <u>Attested copy of Registered Deed of Partnership/Memorandum and Articles of Association/ By-laws/ Certificate of Registration etc. as applicable</u> | [√]
Yes/No" |
|----|--|-------------------------|
- (emphasis supplied)*

4. The petitioners claim to be a partnership firm registered under the Indian Partnership Act, 1932. The petitioners, admittedly, uploaded the tender ticking the word "yes" against document No.1 in the form indicating thereby that they had enclosed an attested copy of the registered deed of partnership. Admittedly, the registered deed of partnership was not enclosed with the petitioners' bid. What was enclosed was only an "Agreement modifying a partnership deed" dated 20.07.2015. The deed is precisely that viz. an agreement modifying the partnership deed and not the partnership deed itself. It refers to the partners, the business of the firm and that the partners were carrying on the business upon the terms and conditions contained in a deed of partnership dated 18.05.2015. The deed of partnership dated 18.05.2015 was, admittedly, not forwarded/enclosed by the petitioners. Clause-1 of the agreement modifying the partnership deed states that the deed is supplemental to the deed of partnership. Clause-2 thereof refers to the capital contribution of the partners and Clause-3 provides that the change would be effected by the partners bringing in additional capital or by withdrawal of capital as may be required. Clause-4 refers to the

profit sharing ratio. The fifth and final clause of the agreement modifying the partnership deed states that the terms and conditions of the deed of partnership dated 18.05.2015 shall, except in so far as the same are modified, continue in full force and effect.

5. The agreement modifying the partnership deed, therefore, reflected the modification of the capital contribution and the profit sharing ratio. It is obvious that the deed of partnership dated 18.05.2015 itself contained several other clauses. In any event, what was required by the notice inviting tender (NIT) was the partnership deed and not merely the agreement modifying the partnership deed. The agreement modifying the partnership deed would indeed also be relevant for the partnership deed would be subject to the same. However, the agreement modifying the partnership deed alone was not sufficient.

The petitioners' tender was, therefore, not in accordance with the terms and conditions of the NIT.

6. The only question then is whether the requirement of furnishing the partnership deed was a reasonable term or not and if it is whether it was an essential term of the NIT.

7. In our view, it is certainly a reasonable term. Firstly, it is for a party inviting a tender to stipulate the terms and conditions. It is not for a court to dictate the terms and conditions upon which the tender ought to be invited. A party inviting bids would obviously be interested in knowing certain crucial details such as regarding the formation of the partnership deed, the businesses of the firm and the arrangement between the partners *inter se* for managing the business of the partnership firm. It would also want to know which of the partners is a

managing partner or a sleeping partner or a profit sharing or a non-profit sharing/fixed salaried partner. Another important aspect would be whether there are any minors who are admitted to the benefit of the firm for they would not be responsible for the liabilities of the firm. The requirement, therefore, of the bidders enclosing/furnishing the partnership deed is, therefore, reasonable and, in any event, cannot be said to be arbitrary or irrational.

8. The requirement of furnishing the partnership deed was an essential term of the NIT. This is clear firstly from Clause-III of the terms and conditions quoted earlier. Clause-5 of the "General Information to Tenderers", also quoted earlier, states that the tenderers "must" furnish full, precise and accurate details in respect of information asked for in Appendix-II attached to the form of tender. The term "must" indicates the requirement of furnishing the information asked for in Appendix-II to be mandatory. There is nothing that persuades us to hold, contrary to the plain language of the terms and conditions, that the provision is merely directory.

9. The doubt in this regard is set at rest by Clause-8 of the "General Information to Tenderers". Clause 8(c) required the envelope/packet containing the technical bid to include *inter alia* all the appendices. It is axiomatic that the requirement of enclosing the annexures and appendices is to enclose duly filled in annexures and appendices. It can hardly be suggested that the inaccurate or incorrect annexures or appendices would meet the requirement of Clause 8(c). The consequence of the failure to do so is provided in sub-clause (d) of Clause-8 which provides that the tenders which do not comply with these conditions "shall be

summarily rejected". The consequence of a summary rejection of a tender, which does not comply with a particular condition, is as clear an indication as any that the term is mandatory.

10. The decision of the first respondent to reject the petitioners' bid as being non-responsive and technically unqualified cannot, therefore, be faulted.

11. The petition is, therefore, dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

04.09.2015
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(TEJINDER SINGH DHINDSA)
JUDGE