IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.573 of 2015 (O&M)
RESERVED ON: 14.01.2015
DATE OF DECISION: 23.01.2015

Delta Guards Pvt. Ltd.

…..Petitioner

Versus

Sarva Haryana Gramin Bank and others

.....Respondents

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

HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Kunal Dawar, Advocate for the petitioner

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

The petitioner has challenged the tender process on the ground that the respondents had not fixed a viability range for the minimum service charge.

2. On 7.11.2014, respondent No.1 issued a notice inviting tenders for providing security guards at nine of its regional offices. The bids were to be submitted in the two envelope system, namely, technical bid and financial bid. It is necessary to note, at the outset, that the petitioner submitted its tender and participated in the entire tender process without demur. The petitioner did not, at the material time, raise any objections either to the terms and conditions of the tender or to the tender process. The petitioner's bid was not the most competitive. It was,

therefore, not awarded the contract. The contract was awarded to respondents No.2 and 3.

3. The tender process has been challenged before us on the ground that the viability range was not fixed prior to the notice inviting tenders. Firstly, it is not open to the petitioner to raise this contention. As we noted earlier, the petitioner submitted its bid and participated in the tender process without ever raising any objection in this regard. The petitioner has raised this contention only because its bid was not accepted. Considering the nature of the tender and in view of these circumstances, we are not inclined to exercise our extra-ordinary jurisdiction under Article 226 of the Constitution of India in favour of the petitioner.

4. The contention that every tender must necessarily contain a viability range is, in any event, not well founded. A viability range is indeed stipulated in certain tenders to eliminate bids that are not genuine for a variety of reasons. It is, however, for the party issuing the tender to decide whether or not to stipulate a viability range. There is nothing unusual about a party not stipulating a viability range. It is for the party inviting tenders then to determine the merits and demerits of the bids received by it. It may well not be concerned with whether a bidder makes a profit or not or even as to the extent of profit that the bidder may make. The party

inviting the tender may not be concerned with and is not bound to be concerned by the commercial viability of a bid.

5. Take for instance cases, where a party invites tenders for the sale of material. It would not be unusual for it not to be concerned with the commercial viability of the bids submitted. It would be content to receive the maximum amount remaining unconcerned with the commercial wisdom of the bidder.

6. It was submitted that if the bid is unreasonably low, the bidder would find it impossible to complete the contract and would, in all probability, abandon the same finding it commercially unviable.

7. The argument is not well founded. A bidder may even submit a very low bid in the hope that it's executing the work would stand it in good stead in future or enable it to develop a reputation in the market. There may be a prestigious contract where the award of the contract itself would earn the bidder goodwill which may, in cases, be far more valuable than the profit earned from the contract. This is a commercial decision taken by the bidder with which the party inviting the tenders may well not be concerned. The contention that a party inviting tenders must in all cases mandatorily stipulate a viability range is, therefore, rejected.

8. The judgment of the Supreme Court in **Dutta Associates Pvt. Ltd. vs. Indo Merchatiles Pvt. Ltd., 1997(1)**

SCC 53 far from supporting this contention militates against it. In that case, the notice inviting tenders did not contain a viability range. The respondent did not award the contract to the lowest tenderer. The respondents determined what they called a viability range. It was not contended that it was necessary that the notice inviting tenders must stipulate the viability range. The respondents, after fixing the viability range, after the bids had been received, proceeded to negotiate with one of the parties who fell within the viability range. The Supreme Court held that the entire process leading to the acceptance of the appellants' tender was vitiated *inter alia*, on the ground that the tender notice did not specify the viability range and did not stipulate that only the tenders coming within the viability range would be considered. The Supreme Court also observed that the tender notice did not even say that after receiving the tenders, the respondents would first determine the viability range and would then call upon the lowest eligible tenderer to make a counter offer. It was further held that exercise of determining the viability range and calling upon the appellants to make a counter offer on the ground that it was the lowest tenderer among the eligible tenderers was outside the tender notice and that fairness demanded that the authorities should have notified in the tender notice itself the process which they proposed to adopt while accepting the tender.

Even in the case before us, the notice inviting the tenders did not specify the viability range. Nor did the notice inviting tenders stipulate that only the tenders coming within the viability range would be considered. Further, the notice inviting tenders also did not state that upon receipt of the tenders, the respondents would determine the viability range and then call upon the lowest eligible tenderer to make a counter offer. The judgment of the Supreme Court, therefore, only indicates that the award of a tender based on a viability range can only be in cases where the notice inviting tenders stipulates the viability range or at least puts the parties to notice that a viability range may be determined. The tender process was not struck down by the Supreme Court on the ground that the notice inviting tenders did not stipulate the viability range.

9. In the circumstances, the writ petition is dismissed. There shall, however, be no order as to costs.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

23.01.2015 **(AUGUSTINE GEORGE MASIH)**
parkash* **JUDGE**

√ **Whether reportable: YES/~~NO~~**