

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.07.2018

+ **W.P.(C) 9268/2016**

TAYYAB HUSSAIN

..... Petitioner

versus

STEEL AUTHORITY OF INDIA AND ORS. Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Vikas Sethi.

For the Respondents :Mr Shaiwal Srivastava and Ms Aayushi
Agarwal.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner – sole proprietor of a concern named ‘Hussain Goods Carrier’ – has filed the present petition, *inter alia*, impugning the letter dated 22.12.2014 (hereafter ‘the impugned communication’), whereby the respondent (hereafter ‘SAIL’) has cancelled the Letter of Intent (LOI) issued to the petitioner and forfeited the Earnest Money Deposit (EMD) of ₹20,00,000/- made by him.

2. SAIL has taken the aforesaid action on account of the petitioner’s failure to furnish an additional security in terms of Clause (b) of Paragraph 7.8 of the ‘Instruction to Bidders’, which formed a part of the Notice

Inviting Tender (NIT) issued by SAIL on 20.09.2014. The petitioner claims that the aforesaid action is arbitrary and unreasonable and, thus, liable to be set aside. In addition, the petitioner also claims that Paragraph 7.8 of the Instruction to Bidders forming a part of NIT, is arbitrary and irrational.

Background Facts

3. SAIL issued a NIT dated 20.09.2014 inviting bids for appointment of a Handling Contractor at SAIL Warehouse located at B4-B8, Okhla Industrial Area, Phase - 1, New Delhi.

4. On 14.10.2014, SAIL also held a pre-bid conference with prospective bidders at Tughlakabad warehouse for clarifying any issues that bidders may have with regard to the said NIT.

5. Pursuant to the aforesaid NIT, the petitioner submitted its bid on 18.10.2014. The technical bids were opened on the same date, that is, on 18.10.2014. The petitioner's bid was found technically compliant and SAIL proceeded to consider the petitioner's financial bid, which was found to be the lowest.

6. By a letter dated 14.11.2014, SAIL called upon the petitioner for a meeting to be held on 15.11.2014 to provide the cost break-up for justifying the rates quoted by the petitioner for the Handling Contract of Delhi Warehouse.

7. In compliance with the aforesaid request, the petitioner submitted break-up of the costs justifying his bid. Thereafter, on 19.11.2014, SAIL issued the Letter of Intent (LOI) informing the petitioner that his tender had been accepted by SAIL. On the following day – 20.11.2014 – SAIL issued a letter, *inter alia*, calling upon the petitioner to furnish the performance

guarantee in the sum of ₹25,00,000/- (Rupees Twenty Five Lacs) towards security deposit; bank guarantee for a sum of ₹5,00,000/- (Rupees Five Lacs) towards hiring of EOT crane; “an Additional PG Bond of ₹35,00,000/- (Rupees Thirty Five Lacs)” in terms of Paragraph 7.8 of the ‘Instruction to Bidders’. The petitioner was also put to notice that if the documents sought for were not furnished, the LOI would be cancelled and the EMD would stand forfeited.

8. In response to the above, the petitioner sent a letter dated 27.11.2014 requesting that the condition for furnishing of the additional PG Bond for a sum of ₹35,00,000/- be withdrawn. The petitioner stated that he had not taken into account furnishing of any such bond as he was not aware of estimated rates of SAIL. The petitioner also confirmed that he was willing to comply with all other conditions as required in terms of the letter dated 20.11.2014. SAIL declined the aforesaid request by a letter dated 04.12.2014, and the petitioner was further put to notice as to the consequences that would follow if he failed to submit all the requisite documents as required in terms of the letter dated 20.11.2014.

9. The petitioner sent another letter dated 18.12.2014 once again requesting SAIL to withdraw the condition of furnishing of an additional PG Bond for a sum of ₹35,00,000/-.

10. Since the petitioner had failed to comply with the requirements of the letter dated 20.11.2014, SAIL terminated the LOI by a letter dated 22.12.2014 and forfeited the EMD of ₹20,00,000/- that was furnished by the petitioner alongwith his bid.

11. Aggrieved by the same, the petitioner had filed the present petition.

Submissions

12. Mr Sethi, the learned counsel appearing for the petitioner contended that the provisions of Paragraph 7.8 of the 'Instruction to Bidders' was arbitrary and unreasonable, as SAIL had not disclosed its estimated rates and, therefore, the bidders were not aware whether they would be required to furnish any additional security or not. He further submitted that the provision to provide an additional bank guarantee based on the unilateral decision of SAIL is *ex facie* unreasonable and arbitrary.

13. Next, Mr Sethi contended that the petitioner had provided full justification for the rates quoted by it and SAIL had issued the LOI thereafter. He submitted that this clearly indicated that SAIL was satisfied with the justification provided by the petitioner and, thus, there was no question of demanding any additional security thereafter. Further, he stated that SAIL had not disclosed any reason for demanding any additional security of ₹35,00,000/- or as to how that amount had been determined. He relied on the decision of the Jharkhand High Court in ***R.B. Trading Agency v. Steel Authority of India Ltd.: W.P.(C) 4985/2014 decided on 11.11.2014***, and on the strength of the said decision contended that the procedure adopted by SAIL was arbitrary and against the principles of natural justice. He emphasized that the said decision was also rendered in the context of Paragraph 7.8 of the Instruction to Bidders and the Court had directed refund of the EMD forfeited by SAIL. He submitted that the aforesaid decision in the ***R.B. Trading Agency v. Steel Authority of India Ltd*** (*supra*) was upheld by the Division Bench of the Jharkhand High Court and the SLP against the same had been dismissed.

14. Mr Srivastava, the learned counsel appearing for SAIL countered the submissions advanced on behalf of the petitioner. He also sought to distinguish the decision in the case of *R.B. Trading Agency v. Steel Authority of India Ltd* (*supra*) on the ground that in that case, the Jharkhand High Court had observed that there was no condition in the contract which would preclude the tenderer from withdrawing its offer before tender was awarded. He submitted that in the present case, there is an express provision in the NIT that the bids furnished by the bidders would remain valid for the specified period and withdrawal of the same would result in forfeiture of the EMD. He also referred to the order passed by the Supreme Court in the SLP preferred by SAIL against an order dated 13.01.2015 passed by the Division Bench of the Jharkhand High Court affirming the decision of the Single Judge in *R.B. Trading Agency v. Steel Authority of India Ltd* (*supra*). He pointed out that in its order, the Supreme Court had clarified that the said decision would not be treated as a precedent.

Reasoning and Conclusion

15. Before proceeding further, it would be relevant to refer to Paragraph 7.8 of the 'Instructions to Bidders', which is set out below:-

“7.8 Negotiation/Justification of rates quoted

- (a) Order in Contract will be placed on the basis of L-1 quotation. If required, negotiations will be held with L-1 bidder only. If a bidder quotes un-workable rates, i.e. if the quoted price is less than the lower limit of the estimated rate (as determined by the Company), the bidder will be asked to justify the rates quoted.

- (b) On non-acceptance of justification/refusal of the same, the bidder will be asked to furnish Additional PG Bond equal to the amount which will be the difference between lower limit of the estimated rate and the quoted rate of the bidder. The amount of PG Bond to be furnished will be calculated by multiplying such differential rate with the estimated quantity for first year of operation. The bidders, who refuse to comply with this, their EMD shall be forfeited and they will not be considered for participating in the retendering process if the contract is not finalized from the present tender.”

16. A plain reading of Clause (a) of Paragraph 7.8 of the Instruction to Bidders clearly indicates that SAIL was obliged to place the order on the bidder who had furnished the lowest quotation (L-1). It was also expressly provided that negotiations, if any, would also be held only with the L-1 bidder. Thus, once the petitioner's offer was found technically compliant and his rates were the lowest, SAIL was obliged to enter into the contract with the petitioner. This is notwithstanding that the rates quoted by the petitioner were lower than the rates estimated by SAIL. Thus, even if a bidder quoted rates, which according to the SAIL were unworkable, SAIL did not have the option to reject the bid and was required to proceed to enter into the contract with the lowest bidder. In such case, Clause (b) of Paragraph 7.8 of the Instruction to Bidders expressly entitled SAIL to call for an additional PG Bond equal to the amount of difference between the annual contract value determined on the basis of lower limit of the rates estimated by SAIL and the rates quoted by the L-1 bidder.

17. It is not difficult to understand the rationale for the aforesaid provision. Plainly, if an employer finds that the rates quoted by the contractor are unworkable, he would have two ready options. One would be to reject the bid and the second would be to secure himself for non-performance by the contractor. In the present case, SAIL has decided to adopt the second option by making a provision to apply for an additional security for the due performance of the contract. This Court finds no infirmity with this approach.

18. SAIL had clearly indicated in the Instruction to Bidders that if the rates quoted by the L-1 bidder, were less than the lower limit of the estimated rates as determined by SAIL, the bidder would be called upon to justify the rates quoted by him. In conformity with the said term – Paragraph 7.8(a) of the Instruction to Bidders – SAIL had called upon the petitioner to justify the rates quoted by it. The petitioner had furnished his justification for the rates quoted by him. However, SAIL did not find the same to be convincing and, therefore, in terms of Clause (b) of Paragraph 7.8 of the Instruction to Bidders, SAIL had called upon the petitioner to furnish an additional PG Bond.

19. The petitioner's contention that he was not aware of the rates estimated by SAIL and, therefore, could not have factored the cost of additional PG Bond, is understandable. Clause (b) of Paragraph 7.8 of the Instruction to Bidders, in effect introduces an element of stealth cost inasmuch as the bidders can never be certain as to whether they would be called upon to furnish additional security and, if so, to what extent. However, there is no denying the fact that the petitioner as well as other bidders were fully aware that they may be called upon to furnish an additional security, if SAIL found the rates quoted by them to be

unworkable and lower than the lowest rates estimated by it. The petitioner had participated in the bidding process being fully aware of the aforesaid possibility and, therefore, it is not open for the petitioner to now challenge the said clause as arbitrary or unreasonable.

20. It is also relevant to note that the Jharkhand High Court in ***R.B. Trading Agency v. Steel Authority of India*** (*supra*) had also rejected the contention that Paragraph 7.8 of the Instruction to Bidders was arbitrary or unreasonable. Both the parties carried the said decision in appeal before the Division Bench of the Jharkhand High Court (being LPA Nos. 527/2014 and 521/2014). The said appeals were disposed of by a common order dated 13.01.2015, wherein the Court had observed as under:-

“9. We find sufficient justification in the stand of SAIL that if the lowest bidder has quoted unworkable rates i.e. price which is less than lower limit of the estimated rate (as determined by the company) and the bidder fails to justify the rates quoted, SAIL may ask for furnishing Additional P.G. Bond as per the formula stipulated in the said Clause 7.8. It is not in dispute that the petitioner along with other tenderers had participated in the tender process with full open eye and were aware of the terms and conditions stipulated in the instructions to bidders which also contains clause 7.8(b). Given the magnitude of the operation and the exigency with which work is to be executed by a successful bidder, SAIL can be said to have sufficient reason to satisfy itself that a tenderer who has quoted lowest bid which is less than lower limit of the estimated rate as determined by the company is required to justify it in the first place and on failure to do so is required to furnish additional performance guarantee bond..”

21. The petitioner has made a grievance of the fact that he was not aware of the rates determined by SAIL. However, it is relevant to note that Mr

Sethi did not challenge the determination of the amount of additional PG Bond. In terms of Clause (b) of Paragraph 7.8 of the Instruction to Bidders, the amount of Additional PG Bond was required to be calculated by multiplying the difference between “*the lower limit of the estimated rate and the quoted rate of the bidder*” by the estimated quantity for the first year of operation. Apparently, SAIL has estimated the said amount to be ₹35,00,000/-. The petitioner neither challenged this computation nor the manner in which the aforesaid amount had been computed.

22. In its counter affidavit filed on behalf of SAIL, it has been affirmed that SAIL had prepared the estimated rates on the basis of back-up documents and the calculation was not whimsical or arbitrary. It is also affirmed on behalf of SAIL that during the meeting held on 15.11.2014, the petitioner was duly informed that the justification of the rates quoted by him was not acceptable and the rates quoted were found to be unworkable. It is also relevant to note that SAIL in its letter dated 04.12.2014 – which was sent in response to the petitioner’s representation dated 27.11.2014 – had also stated that the petitioner was informed on 15.11.2014 that the rates submitted by him were found to be unworkable. Paragraph 4 of the said letter is set out below for ready reference:-

- “4. Further more on 15/11/2014 when you were requested for giving your justification of quote rates, it was categorically and clearly informed to you that your justification given vide your letter Ref. No. NIL dated 15.11.2014, was not acceptable due to it being unworkable and an additional PG Bond of Rs.35,00,000/- (Rs: Thirty Five Lakhs) approx. would be required as per Clause 7.8 (b) of the tender. You had also conveyed your verbal consent for submitting the same. We have issued LOC on date 20/11/2014. The LOC was also received by you, personally, without any

objection or protest. It is surprising that after 8 days of LOC received by you, issue of Additional PG Bond is raised at this later stage.”

23. The petitioner sent a letter dated 18.12.2014, responding to above letter dated 04.12.2014. However, SAIL’s assertion that the petitioner was informed that SAIL had not accepted his justification for the rates quoted by him and that an additional PG Bond of ₹35,00,000/- approximately would be required, was not controverted.

24. In view of the above, the petitioner’s contention that he was not informed that his justification for the rates quoted by him were not found acceptable cannot be accepted.

25. Further, the petitioner, in his letter dated 18.12.2014, did not raise any dispute with regard to the quantification of the sum of Additional PG Bond; he merely stated that the rates estimated by SAIL had not been informed to him. It was open for the petitioner to not only seek reasons for rejection of his justification of the rates quoted by him but also verify whether the amount of Additional P.G Bond was correctly calculated. But, the petitioner neither sought any such information nor raised any such dispute.

26. Plainly, if the petitioner had demanded the reasons for rejection of the justification provided by him, SAIL would be bound to provide the same. This is so because furnishing of the additional P.G Bond would entail additional costs, which could not be factored in by the bidder. And, if the petitioner to be visited with such consequences, the minimum that is required is that he should have full opportunity to ensure that such determination is not whimsical or arbitrary.

27. In view of the above, this Court is unable to accept that the demand of additional PG Bond of ₹35,00,000/- raised by SAIL is illegal or contrary to the terms of NIT.

28. In ***R.B. Trading Agency v. Steel Authority of India Ltd.*** (*supra*) the Court had accepted the petitioner's plea that the procedure adopted by SAIL was arbitrary and against the principles of natural justice. In that case, the Court had found that the petitioner had requested SAIL to disclose the reasons for demanding additional performance guarantee bond, but SAIL had failed to disclose any such reasons. In the present case, the petitioner has not demanded any explanation or reasons for demanding the Additional PG Bond. Further, in that case, the Court had also reasoned that had the estimated cost been disclosed to the petitioner, he could have taken the decision whether to continue with the bid or not. The Court also observed: *"There is no condition in the contract that before the tender is awarded, the tenderer cannot withdraw"*.

29. However, in the present case, Clause 9.4(a) of the Instruction to Bidders expressly provides for forfeiture, if the bidder withdraws the tender during the validity period. The said clause is set out below:-

“9.4 The Earnest Money Deposit (EMD) shall be forfeited:-

- a) If the bidder withdraws the tender during the validity period of the tender and / or modifies any of the Terms & Conditions contained in the tender during the validity period of the said tender or;”

30. In view of the above, withdrawal of the tender by the petitioner would result in forfeiture of the EMD. The contention that SAIL was required to disclose the estimated rates at the time of floating the tender is unmerited. Plainly, if the estimated rates were disclosed, all bidders would

have submitted their bid, taking the same into account. Further, the petitioner did not raise any such objections at the material time. Having participated in the bidding process without raising any objection to the non-disclosure of estimated rates, it is not open for the petitioner to now challenge the same.

31. This is also the view expressed by the Division Bench of the Jharkhand High Court in the case relied upon by the petitioner. The Division Bench had disposed of the appeals (LPA Nos. 527/2014 and 521/2014) against the decision of the Single Judge in ***R.B. Trading Agency v Steel Authority of India Ltd.*** (*supra*) by a common order dated 13.01.2015. In the said order, the Division Bench had also observed that “*for reasons of maintaining the sanctity of the tender process, SAIL may have good reason not to disclose the lower limit of the estimated rate as determined by the company as in case if re-tender is undertaken the prospecting tenderer may have prior knowledge of estimated rates and may take undue benefit out of it.*”

32. In view of the above, this Court finds no merit in the present petition. The same is, accordingly, dismissed.

VIBHU BAKHRU, J

JULY 23, 2018
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