IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 26290 OF 2019

M/s.Colorplast Systems Pvt. Ltd.	}	Petitioner
versus		
UTI Infrastructure Technology	}	
and Services Ltd.	}	Respondent

Mr.Kunal Kanungo with Ms.Rohini Menon and Ms.Rhea Garg i/b. Mr.S.Venkateshwar for the petitioner.

Mr.Vipul Shukla with Mr.Parag S. Gosar i/b. Mr.Jayesh R. Vyas for the respondent.

CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.

DATED :- SEPTEMBER 30, 2019

P.C. :-

1. The petitioner before us had circulated this matter stating that there is grave urgency and if it is not taken out of turn, the petitioner may lose opportunity to obtain a contract from the respondent. We, therefore, heard this matter and posted it today only to give an opportunity to the petitioner to consider whether a writ petition under Article 226 of the

Constitution of India can ever be a remedy in the facts and circumstances brought before this court in this writ petition.

2. The petitioner claims that it is engaged in the business of manufacturing and supply of smart plastic cards for more than 19 years. The petitioner has several clients including Government departments and public sector corporations. The Delhi Metro Rail Corporation, the Bangalore Metro Rail Corporation and the Kolkata Metro Rail Corporation are all said to be among the petitioner's clients.

3. The respondent before this court is a Government-owned company that provides technology and outsourcing services to the financial and Government of India sectors. Though it is registered as a Government Company under section 2(45) of the Companies Act, 2013, it has all the traits and characteristics of a State within the meaning of Article 12 of the Constitution of India. Therefore, a writ petition under Article 226 of the Constitution of India is maintainable against it. In any event, this respondent is performing a public duty and therefore, in the instant case, there is a public law element involved.

4. On 29th July, 2019, the respondent issued a tender for the supply of plastic cards. The petitioner's technical bid has been rejected by the impugned communication. The apprehension is that its financial bid will not be opened. It is only the financial bids of those bidders whose technical bids have been found to be satisfactory which would be considered. The petitioner would stand excluded. The petitioner says that it has satisfied all terms and conditions and hence, this disqualification or rejection of its technical bid is arbitrary and illegal.

5. The petitioner has been informed on 6th September, 2019 by the respondent as under:-

UTI Infrastructure Technology And Services Limited

UTIITSL/PAN-GSD/2019-20/48414 06th September, 2019

M/s Colorplast Systems Private Limited
24, Prakriti Marg,
Sultanpur,
Delhi-110030

Dear Sir,

Sub : Tender for <u>"Bid for Printing of Plastic Cards"</u>

Reference : Your letter dated 02.09.2019

With reference to your letter dated 02.09.2019 wherein you had requested to reconsider our stance of disqualifying your technical bid, we wish to inform you that as per the online tender submitted by you for "Bid for Printing of Plastic Cards" floated by UTIITSL on 29.07.2019

1. On the opening of Technical Bid on 06.08.2019, our Technical committee vide their evaluation dated 08.08.2019 observed that following documents submitted by you are either not available/incomplete with reference to the Tender Document. Accordingly, the same was intimated to you vide our letter dated 09.08.2019 bearing reference number UTIITSL/PAN-GSD/Plastic Card Tender/48086 and vide e-mail dated 09.08.2019. The details of not available/incomplete information is mentioned below:

Sr. No.	Particulars	Remarks	Tender Document Reference Clause
1	Chartered Accountant/ Company Secretary certificate certifying that the Agency/ Vendor has an average annual turnover of the value quoted by him and is profit making organization during the last two financial years. (Please do not attach the entire profit and loss statement).	Original Not submitted	Part II A-2(c)
2	Reference certificate in original from a Bank or a PSU or a Government Department/ Institution on their Letter Head as per the following format.	Not Submitted	Part II A-2(q-ii)

2. It is brought to your notice that as per the Tender Document floated on 29.07.2019-

a. Clause Part II A-2(q-ii) states that : Reference certificate in original from a Bank or a PSU or a Government Department/Institution on their Letter Head as per the specified format is one of the eligibility criteria as a proof for consideration for empanelment of the intending agency establishing that the

Agency/Vendor has a prior experience of not less than 5 years in Printing of Plastic Cards.

b. Clause 21 (f) Part I-General Conditions- Bid opening process states that :

> "No further communication shall be held with the vendors for technical documents and the Technical qualification shall be based only on the documents presented during the bid process and the same shall be considered as final."

However, UTIITSL have given chance and requested to submit the not available /incomplete documents to you and also additional time was given,

3. Further as per the tender clause 19 in Part I

> "*UTI ITSL* reserve the right to call for any clarification / papers required for scrutiny from anyone including the Bidder. *UTI ITSL* is free to take any clarification or document or certificate from the associated banks and other agencies for scrutiny purpose or for deciding on the bid"

and clause 57 in Part I :

> "*UTI ITSL* reserves the right to call for further information/documents/break-up of rates, taxes, etc. to decide on the tenders"

We once again state that UTIITSL had called for the above documents vide our letter dated 09.08.2019 bearing reference number UTIITSL/PAN-GSD/Plastic Card Tender/48086 to submit the same till 13.08.2019 by 02.00 pm.

4. In response to our letter, we received your mail dated 09.08.2019 wherein consequent upon your request the date of submission of the documents was extended till 14.08.2019 by 02.00 p.m.

5. Based on the documents submitted by you vide your mail/letter dated 12.08.2019 the clause Part II A-2(c) of the Tender was fulfilled, however the Reference certificate in original was not as per clause part II A-2 (q-ii)

6. It is pertinent to mention that as per

a. Clause 21 (g) Part I -General Conditions – Bid opening process :

> *"The decision regarding qualification/ disqualification of the Bidders shall lie with UTI ITSL and shall be final and binding on all the bidders."*

b. Sub Clause 2 – Eligibility Criteria of Clause A of Part II – Special Conditions of the Tender it is mentioned that :

> "**In the** Technical Bid **authorization certificates / documents are required. If, the bidder fails to provide any of the relevant document/certificate they would be technically disqualified"**

7. We are sorry to state that inspite of providing an opportunity, you did not provide the requisite documents and hence as per the clauses mentioned in the Tender document, the Bid submitted by you was Technically disqualified.

8. Since the Tender Clause Part II A-2(q-ii) has not been fulfilled, we regret that we shall not be able to reconsider the disqualification of your Bid.

Thanking you,

Yours faithfully,

Sd/-

6/9/19

Anand Kadlak
Sr.Manager"

6. A perusal of this communication reveals that the technical committee evaluated the bids on 8th August, 2019 after the said bids were opened on 6th August, 2019. The documents submitted by the petitioner were either not available or were incomplete. The petitioner was informed of this fact on 9th August, 2019 and the details of the 'not available/incomplete' information was set out in the particulars. The petitioner says that this communication is not in conformity with the terms and conditions of the tender. In any event, all tender conditions have been complied with.

7. The learned counsel appearing for the petitioner invited our attention to the memo of the writ petition and all annexures thereto. Our attention has been invited to Part II A-2(c) and Part II A-2(q-ii) of the tender document. It is stated that clause (c) requires the agency/ vendor to have an average annual turnover of the value quoted, and the agency/ vendor should be profit-making during the last two financial years. A certificate of the Chartered Accountant/ Company Secretary should be attached in support of the same. The other condition requires that a bank or a PSU or a Government Department/ institution, on its letterhead, must say that the petitioner has been 'empanelled with it for supplying/printing of plastic cards' for the number of years mentioned therein, and that its services have been found to be satisfactory. The counsel would submit that the requirement of producing a certificate from the Chartered Accountant is fulfilled in this case and the petitioner indeed is a profit-making organisation. The original certificate from the Chartered Accountant would evidence this fact. Our attention has been invited to the certificates of the Chartered Accountant from Exhibits 'F', 'G', 'H' and 'I' collectively.

8. As far as the second part is concerned, the argument is that the condition is capable of substantial compliance and does not require strict compliance. Being a regular vendor to various Metro Rail Corporations and having supplied similar cards to them, the condition should be 'understood' or 'read' as having been complied with when the document forwarded fully evidences this fact. It is submitted that therefore, the exclusion from the tender process is *ex-facie* illegal and arbitrary. Throughout, the emphasis is that there is sufficient compliance of the conditions prescribed in the notice inviting tender/ tender document. Thus, the argument is that the technical bid is in order. There could have been no ground for any disqualification from the process and the mandate of Articles 14 and 19(1)(g) of the Constitution of India has been violated.

9. What we have noticed from the documents on record is that although the petitioner feels that the certificate is claimed to be compliant, it is in fact not so. An opportunity was given to rectify the contents, but that right has not been availed of. The petitioner says that it did produce a certificate meeting the tender conditions. Our attention is invited to page 62 of the paper book. In that regard, we have perused the certificates from the PSUs. The certificate of the Delhi Metro Rail Corporation is dated 25th November, 2014. Page 68 of the paper book contains a copy of this certificate and it says that the petitioner supplied a certain quantity of smart cards against the purchase order and that was placed on a consortium of the petitioner and M/s.Shanghai Hauyuan Smart Information. Page 69 of the paper book is a certificate which evidences payments made to the petitioner for supply of smart cards. That would reveal that the transaction is with a consortium in the year 2014. The transactions of the petitioner are of the years 2015, 2016 and 2017. Certain quantities are said to have been supplied. The petitioner says that this certificate and the other certificates from Bangalore Metro Rail Corporation establish that the petitioner is a regular supplier of plastic cards from June, 2016 to November, 2017.

10. To our mind, the certificates or communications are not in order, that is to say, they are not compliant with the stipulated conditions of tender. The tender condition has been quoted in the petition itself. The petitioner has rightly understood it to mean that the petitioner must produce a certificate evidencing empanelment of the petitioner with the Government department/ institution, bank or a PSU. The petitioner does not produce any proof of such empanelment. The petitioner has also to produce evidence that the services rendered by the petitioner to these organisations have been found by that organisation to be of satisfactory nature. If we peruse the documents, copies of which are placed on record and to which we have made a reference in the foregoing paragraphs, we find that they do not evidence any empanelment. They do not say in terms that the services rendered by the petitioner are found to be satisfactory. They also do not say, barring page 71 of the paper book, itself in vague terms, that the services were indeed of such nature as would label them as satisfactory. The petitioner's performance is stated to be satisfactory by Bangalore Metro Rail Corporation. However, this does not say that the petitioner is empanelled with it. To our mind, therefore, there is no question of any substantial compliance.

11. The petitioner would have been invited for a pre-bid meeting like other bidders or persons interested. At any such pre-bid meeting, as is usual and common, any doubts or clarifications would have been addressed and made known to all, either by way of an amendment or a clarification. The petitioner could not have been unaware of the work it had done for the other metro rail corporations, or the terms of those tenders, or the nature of the certificate it could obtain from those other metro rail corporations. It was for the petitioner to have sought the clarification in advance. Had it done so, and had this clarification been issued, then the rejection could not be sustained. Had the clarification been sought and refused, then the rejection is good and cannot be interfered with. But if the clarification was never sought at a pre-bid meeting or in pre-bid correspondence, the petitioner cannot now be heard to say that the tender condition should be deemed to have been fulfilled in some relaxed or 'substantial' manner.

12. There is also an inherent danger to accepting any such submission, because it means that virtually any condition, and particularly a qualification condition, can be literally dispensed with by reading into it some non-specific, amorphous and entirely undefined 'substantial' compliance.

13. It is not possible, therefore, to hold that there is an arbitrariness or any action violative of Article 14 of the Constitution of India.

14. From the record, it is clear that there was indeed correspondence with the petitioner. The petitioner is aware that the certificate provided is not as per the prescribed format. The petitioner received the e-mail of 9th August, 2019. The petitioner was given a chance and requested to submit the not available/ incomplete documents and additional time was given. The petitioner was issued a reminder that the clarification should reach the respondent by 13th August, 2019. The petitioner forwarded an e-mail on

9th August, 2019 and the time was, therefore, extended up to 14th August, 2019 by 2.00 p.m. The reasons assigned in the communication which is challenged in the writ petition are that the documents submitted by the petitioner vide e-mail/ letter dated 12th August, 2019 were scrutinised and the condition vide Part II A-2 (c) of the tender was fulfilled. However, the reference certificate in original in terms of Part II A-2(q-ii) was not as per that requirement of the clause. It is in these circumstances that the petitioner has been informed that despite providing opportunity, the requisite documents were not forwarded. That is why the technical bid was rejected. The specific reason is that Part II A-2(q-ii) requires this certificate evidencing empanelment and satisfactorily rendering of services. Both these elements are absent in the certificates provided by the petitioner.

15. Contrary to what the petitioner asserts, this is not a matter of a minor linguistic difference, nor of an unthinking or mindless insistence on form over substance. To our mind, this is a clear case of an interpretation placed on the terms and conditions of the contract. The terms and conditions of the contract have been interpreted by the respondent consistent with their phraseology and wording. The intent and purpose is not to allow anybody and everybody to participate, but an experienced and qualified bidder alone should enter the fray. If that object and purpose is sought to be achieved by the terms and conditions mentioned above, then, in our writ jurisdiction, we cannot hold that this interpretation of the tender conditions is impossible, improbable or implausible. The interpretation being found to be consistent with the purpose sought to be achieved, this is not a fit case for interference in writ jurisdiction.

16. As regards the claim under Article 19(1)(g), the sole petitioner being a company and there being no individual joined as a co-petitioner, this fundamental right cannot be invoked. Even otherwise, there is no fundamental right to be considered as a bidder, to have one's financial bid opened, or to have a technical bid accepted. A rejection of a technical bid as being non-compliant with a tender condition is not per se a violation of a fundamental right under Article 19(1)(g), even assuming that a body corporate (not being a 'citizen' within the meaning of Part II of the Constitution of India) can ever invoke it.

17. The writ petition is devoid of merits and it is dismissed.

18. There will be no order as to costs.

(S.C.DHARMADHIKARI, J.)

(G.S.PATEL, J.)