

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No. 493 of 2019 (O&M)

Date of Decision: 11.01.2019

M/s NBS Gurukul Institute of Competitions Pvt. Ltd.

.....Appellant

versus

State of Punjab and others

.....Respondents

**CORAM: HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE
 HON'BLE MR. JUSTICE ARUN PALLI, JUDGE**

Present : Mr. Aditya Dassaur, Advocate, for the appellant.

KRISHNA MURARI, CHIEF JUSTICE (oral)

By means of this petition filed under Article 226 of the Constitution of India, the petitioner has approached this Court seeking a writ of certiorari for quashing the tender summary report whereby the technical bid submitted by the petitioner along with respondent No.4 with whom he entered into a consortium agreement has been rejected on the ground of incomplete documentation. A further writ of mandamus has been claimed to command respondents No.1 and 2 to accept the technical bid of the petitioner and to permit him to participate in the financial bid.

2. The petitioner is a private limited company incorporated under the Companies Act, 1956. Respondent No.2- I.K.Gujral Punjab Technical University, Kapurthala, invited bids for providing On Screen Marking of Answer Books to manage the examination related activities in a scientific and secured manner. The duration of the contract was specified as six months which was liable to be extended up to three years.

3. Clause 1.3 of the Notice Inviting Tender contained a stipulation that the bid by consortium consisting of two parties was permitted with the following conditions:-

- i) One party shall be termed as Primary bidder and the second shall be Secondary bidder.
- ii) A consortium agreement shall be submitted along with Tender Application defining the roles of both parties along with their company registration details.
- iii) The Consortium agreement must define only one of the above two parties as Single Point of Contract who will sign the agreement with the client, receive payments and coordinate for all purposes.
- iv) The qualification criteria are to be met by the primary bidder only.

4. Similarly qualification criteria was also prescribed in clause-11 of 4.4 Instructions to Tenderers which prescribes the following minimum qualification criteria for being eligible to participate in the bid:-

Sr. No	Criteria	Particulars	Documents
1.	Legal Entity registered in India for last 3 years.	It can be registered company/partnership firm/Limited Liability Partnership Firm (LLP)/Proprietorship Firm/Trust/Society.	Certificate of incorporation.
2.	Average annual Turnover more than 2 crore in last 3 years.	Should have an average annual turnover in the last 3 Financial years (2015-2016, 2016-2017, 2017-2018).	Audited Balance sheet and Chartered Accountant Certificate.
3.	Must have experience in On screen Marking Projects.	Implemented OSM Projects in Past (at least at university level).	Certified copies of LOI/Contract/Agreements.

4.	Should have positive net worth.	Should have positive net worth as on 31.3.2018.	Audited Balance sheet, profit and loss account and Chartered Accountant Certificate.
5.	Must possess ISO 27001:2013 (Date Security) Certification for at least one year.	Should have certificate of quality management and information security management ISO 27001:2013.	Copy of the same to be attached.
6.	Should not be blacklisted by any government organization.	Should not be under a deflation of ineligibility or blacklisted in any government/Department.	Self declaration on affidavit.
7.	Must possess the ownership and complete source code of OSM software solution.	Should have ownership and complete source code of OSM software solution.	Certificate of the same must be attached.

5. As already noted above, clause 1.3(4) of the NIT clearly provided that minimum qualification criteria is to be met by the primary bidder only. From a perusal of the aforesaid facts it is clear that if a bid was to be offered by consortium of two parties then the consortium agreement was to define as to which of the two parties are primary bidder and secondary bidder. Admittedly the petitioner and respondent No.4 entered into a consortium agreement wherein the petitioner was specified as primary bidder and respondent No.4 as secondary bidder.

6. On analysis of the bid documents submitted by the petitioner and respondent No.4, the technical bid was found to be non-responsive on account of the fact that the prescribed minimum qualifications were not met by the petitioner who admittedly was a primary bidder and thus the technical bid was held to be non-responsive. This information was duly communicated to the petitioner through e-mail which reads as under:-

“Upon examining the technical bid, following deficiencies are noticed:-

1. Since NBS Gurukul Institute of Competitions (P) Ltd. is the Primary Bidder & as per

Tender Clause No. 1.3.4 at page no.6 and clause No.11.5 and 11.7 at Page No.23, “The qualification criteria are to be met by the primary bidder only.” And accordingly the “Own Source Code Certificate and ISO 27001:2013 (Data Security)” are not provided by you (NBS Gurukul Institute of Competitions (P) Ltd.)

2. Work Satisfactory reports for Maharashtra University of Health Sciences, Nashik is not provided.

You are requested to send certified scanned copies of above mentioned documents, latest by 03.01.2019 (2PM) at vaneetaptu@gmail.com

7. The e-mail was responded to by the petitioner by submitting a reply which is on record as Annexure P-5. A perusal of the same goes to show that the fact that the petitioner was a primary bidder and respondent No.4 a secondary bidder was not denied therein. Nor any explanation was submitted with respect to the objection that the petitioner being a primary bidder in accordance with the terms of the NIT was to confirm the minimum prescribed qualifications which were lacking.

8. Learned counsel for the petitioner vehemently contended that since the consortium of petitioner and respondent No.4 jointly met all the eligibility criteria, hence the technical bid has wrongly been held to be non-responsive. It is next contended that the e-mail submitted by the petitioner has been rejected on vague grounds without specifying any reasons and is bad in law.

9. We have considered the arguments advanced by learned counsel for the petitioner.

10. As already stated hereinabove, the NIT clearly required the primary bidder to confirm the prescribed necessary qualifications and thus even if the consortium of petitioner and respondent No.4 jointly met all the

eligibility criteria, the bid offered cannot be said to be in accordance with the terms of the NIT and thus the argument has no legs to stand. In so far as the second argument is concerned that no reasons have been assigned for rejecting the technical bid, the same stands belied from the record itself. The copy of the e-mail quoted hereinabove sent to the petitioner filed as Annexure P-4 clearly specify the reasons for holding the technical bid to be non-responsive.

11. It was next contended that condition was only ancillary and not essential and thus any deviation there from was not so fatal so as to hold the bid non-responsive.

12. There can be no two opinions that tender conditions are binding upon both the agency which invites bids as well as the tenderer/bidder. Yet the courts have had occasion to consider the issue whether all the conditions specified in the NIT are to be strictly complied or some of the conditions specified are only ancillary and not so essential, the non-compliance whereof can be said to be so fatal to the bid/tender so as to warrant its rejection on that score. While considering this issue, Hon'ble Apex Court in ***Poddar Steel Corporation v. Ganesh Engineering Works and others (1991) 3 SCC 273***, has observed as under:-

“As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be

required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.”

13. The same view was reiterated in ***Indian Railway Catering and Tourism Corporation Ltd. v. Doshian Veolia Water Solutions (P) Ltd. (2010) 13 SCC 364***. It was a case where there was an omission to mention the figure of excise duty in the bid by the bidder. The Court held it to be not in respect of essential conditions so as to warrant rejection of the tender.

14. Thus the requirement in a tender notice can be classified into two categories one which lay down the essential conditions of eligibility and the others which are mere ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender is required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

15. One of the tests to determine whether the condition is one that is essential and to be followed rigidly or is just ancillary can be whether the shortcoming or the condition which is lacking can be cured without bringing any substantial change in bid documents by supplying the actual or correct information which was found to be lacking.

16. In ***State of Kerala v. Zoom Developers Private Ltd. and others (2009) 4 SCC 563***, where the bid of a party was treated as non responsive because there was a change in the consortium membership and failure to incorporate joint and several liability clause for the consortium clause in the consortium agreement. According to the respondents the party had used

words “Joint and several responsibility” instead of the words “joint and several liability”. The Supreme Court observed that though the word “responsibility” is different from the word “liability” and the term “joint and several liability” was required to be incorporated in the consortium agreement, there was no merit in the contention that only the word “liability” ought to have been used since it constituted an objective criterion. The Court observed that it was a curable defect.

17. However, the violation of a condition in the NIT prescribing the essential qualifications cannot be held to be a condition which is only ancillary and not essential. It may be relevant to refer to the judgment of the Hon’ble Apex Court in case ***Ramana Dayaram Shetty v. International Airport Authority of India and others*** 1979(3) ***Supreme Court Cases*** 489, wherein a condition of having minimum five years experience of running a registered second class hotel/restaurant was held to be one of the essential condition and awarding the contract to someone who did not fulfill the condition was held to be discriminatory since it excluded other persons similarly situate from tendering for the contract. It may be relevant to extract paragraph-34 of the aforesaid judgment which reads as under:-

“**34.** It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, Respondent 1 was not entitled to act arbitrarily in accepting the tender of Respondents 4, but was bound to conform to the standard or norm laid down in para 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by Respondent 1 was discriminatory having no just or

reasonable relation to the object of inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd Class restaurant at the airport. Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, Respondent 1 was not entitled to depart from it and to award the contract to Respondents 4 who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, Respondent 1 could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of Respondents 4. When Respondent 1 entertained the tender of Respondents 4 even though they did not have 5 years' experience of running a IInd Class restaurant or hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with Respondents 4 for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of Respondent 1 in accepting the tender of Respondents 4, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of Respondents 4 was, in the circumstances, invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action.”

18. There can be no manner of doubt that minimum qualification criteria prescribed in the NIT would fall under the category of essential conditions of eligibility which is to be strictly followed and violation of the same would not tantamount to just a technical irregularity having little or no significance which could be waived. Any waiver of an essential condition would not only be arbitrary but also discriminatory to many identically situated which may not have submitted the bid having thought that they are precluded from doing so for want of minimum prescribed qualification criteria.

19. In view of the factual legal position discussed hereinabove since the bid submitted by the petitioner was in violation of the conditions specified in the NIT which was falling within the ambit of essential conditions, violation whereof would essentially result in rejection of the bid. Thus no fault can be found with the decision of the respondents' authorities in holding the technical bid, for the said reason, as non-responsive and the same does not require any interference.

20. The writ petition is devoid of merits and accordingly stands dismissed.

(KRISHNA MURARI)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

11.01.2019
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Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No