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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 30th January, 2019*

\+ W.P.(C) 841/2019

M/S A S SALES CORPORATION ..... Petitioner

Through Mr. Jitender Mehta, Advocate.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr. Nikhil Majithia, Advocate for R-2

**CORAM:**

**HON'BLE MR. JUSTICE G.S. SISTANI**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J.** ***(ORAL)***

**CM APPL 3803-04/2019 (Exemptions)**

1. Exemptions are allowed, subject to all just exceptions.

2. The applications stand disposed of.

**W.P.(C) 841/2019**

3. This petition has been filed by the petitioner under Article 226 of the Constitution of India seeking following prayers:

> "(a) To issue a writ of certiorari or any other writ or direction calling for the records and proceedings of TENDER NO.2018/ IRCTC/CATG./PROC/12141-42,
>
> (b)To issue any appropriate writ or direction to the respondents to cancel the award letter dated 16.01.2019 of TENDER NO.2018/IRCTC/Catg./PROC/12141-42 and start the process of E-TENDER NO.2018/IRCTC/Catg./PR0C/ 12141-42denovo"

4. The necessary facts required to be noticed for disposal of the present petition are that the petitioner is operating a catering business in various areas.

5. Respondent no.2/Indian Railway Catering & Tourism Corporation Ltd. (IRCTC) issued a notice inviting E Tender on 31.08.2018 for the provision of Onboard Catering Services in Mail or Express or Superfast trains having pantry car or mini pantry in partial or complete unbundling model for a period of one year. The estimated cost of the tender was Rs.49,02,000/- (Rupees forty nine lakhs and two thousand only). Some of the conditions were changed and corrigenda were issued on 13.09.2018, 18.09.2018, 20.09.2018, 01.10.2018, 10.10.2018, 15.10.2018 and 17.10.2018. The petitioner had also applied and was informed by the tendering authority of the IRCTC on 24.10.2018 about techno commercial opening of tender and his successfully submitted electronic bid. The corrigendum issued thereafter was also brought to the notice of the petitioner by emails dated 12.12.2018 and 13.12.2018 at 11.44 AM. Another two emails dated 13.12.2018 were issued at 1:39 PM and 3:21 PM. The highest bidder was M/s Express Food Services with a bid amount of Rs.2,22,65,807/ (Rupees two crores twenty two lakhs sixty five thousand eight hundred seven only). The petitioner, on the same day, after enquiring from the IRCTC officials learnt that the highest tenderer (M/s Express Food) has withdrawn his bid on the opening date of the financial bid i.e. 13.12.2018.

6. The first submission of the learned counsel for the petitioner is that withdrawal of the bid by the highest bidder is in violation of clause 3,

sub-clause 3.5 of the tender document. It is submitted before us that as per sub clause 3.5, the bid can be withdrawn at least one day in advance, excluding the date of receipt of bid. However, the bid was withdrawn on the same day. It is the grievance of the petitioner that post withdrawal of the bid by the highest bidder, an offer was made to the second highest bidder i.e. M/s Singh Caterers, who agreed to match the offer of the highest bidder and the tender was awarded to him. The second grievance of the petitioner is that the tender document does not provide for such a procedure to be followed and in fact according to counsel for the petitioner, the tender, should have been withdrawn and a fresh tender should be invited. He places reliance on the Central Vigilance Commission's (CVC) guidelines dated 24.08.2000, copy whereof has been handed over in Court. Reliance is placed on para 3, which is reproduced below :

> "3. Some of the organisations have sought clarification as to whether they can consider the L-2 offer or negotiate with that firm if L-1 withdraws his offer before the work order is placed, or before the supply or execution of work order takes place. In this regard, it is clarified that such a situation may be avoided if a two-bid system is followed (techno commercial) so that proper assessment of the offers is made before the award of work order., Therefore, if L-1 party backs out, there should be retendering in a transparent and fair manner. The authority may in such a situation call for limited or short notice tender if so justified in the interest of work and take a decision on the basis of lowest tender."

7. Thirdly, counsel for the petitioner submits that the petitioner is the existing licensee and in case, the second highest tenderer also withdraws his bid, petitioner apprehends that in the absence of any

firm policy, he would not be offered the same incentives, which was provided to the second highest tenderer.

8. Mr. Nikhil Majithia, learned counsel, who enters appearance on behalf of respondent no.2, on an advance copy, submits that the present writ petition is misconceived and should be dismissed. Counsel submits that reading of clause 3, sub-clause 3.5 of the tender document would show that the withdrawal of the bid is to be received by the IRCTC at least one day in advance excluding the date of receipt of the bid. Reading of this sub-clause would also show that in fact an outer limit has been fixed for withdrawal but there is no bar in withdrawing the bid so made on the same day. Counsel has also drawn attention of the Court to clause 6.4 of the tender document to highlight the implication of a tenderer withdrawing the tender. Para 6.4 reads as under :

> "6.4 The Earnest Money deposited is liable to be forfeited if the tender withdraws or amends, impairs or derogates from the E-Tender in any respect within the period of validity of his offer."

9. Learned counsel for the respondent has placed reliance on clause 4.4 of the tender document to submit that it was open for respondent no.3 to ascertain the highest acceptable second E-Tender and accordingly an offer was made to the second highest bidder to match the offer of the highest tenderer, which he accepted and the tender was awarded to him. Clause 4.4 reads as under :

> "4.4 The E-Tenders received will be evaluated by the Purchaser to ascertain the highest acceptable E-Tender on licensee fee quoted."

10. As far as the submission made by counsel for the petitioner that there is no uniform policy in place is concerned, counsel for the

respondent has handed over the guidelines of the Railway Board dated 17.11.2017. The relevant portion is reproduced below :

> "**1. Discharge of tenders in the event of lowest (L1) bidder withdrawing from the procurement process**
>
> (a) There are several instances where tenders have to be discharged and fresh tenders invited because of L-1 bidder's withdrawal. Finalization of tenders get delayed. As per the instruction from CVC vide letter No. 98/ORD/1 dated 24.08.2000 the current practice being followed on IR is "if L-1 Party backs out, there should be re-tendering in a transparent and fair manner. The authority may in such a situation call for limited or short notice tender, is so justified in the interest of work and take a decision on the basis of lowest tender".
>
> (b) However, as per para 7.5.11 (i) f of the Manual for Procurement of Goods 2017 Ministry of Finance, Department of Expenditure Chapter — 7, following procedure is to be adopted for dealing with cases where L-1 bidder withdraws:
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>> *"If the bidder, whose bid has been found to be the lowest evaluated bid withdraws or whose bid has been accepted, fails to sign the procurement contract as may be required, or fails to provide the security as may be required for the performance of the contract or otherwise withdraws from the procurement process, the Procuring Entity shall cancel the procurement process. Provided that the Procuring Entity, on being satisfied that it is not a case of cartelization and the integrity of the procurement process has been maintained, may, for cogent reasons to be recorded in writing, offer the next successful bidder an opportunity to match the financial bid of the first successful bidder, and if the offer is accepted, award the contract to the next successful bidder at the price bid of the first successful bidder."*

It has been decided to follow the latest guidelines of MOF mentioned above in cases of Stores and Services (other than Consultancy) Tenders.

**3. Variation in Contracts**

In quite a number of cases while the contract is in operation, variations are resorted to in accordance with the terms and conditions of the contract. Field officers are generally afraid of taking risk despite the variation being a reasonable option in the given situation.

Regarding Variations as defined in Para 1265 of Engineering Code following clarification is issued:

*"Contracts are a means of execution of works and as an executive; our primary role is to achieve the desired performance. It is seen that the executives are becoming more and more risk averse in taking decisions, citing various apprehensions regarding variations which are governed by para 1265 of the Engineering Code. As* a *matter of fact, variations in conditions, rates, quantities and items are permitted as per Engineering Code. It should however be governed by the basic principle that the variation should be limited so as not to completely change the scope, character and purpose of the original contract. The CVOs may also take an active part in such education. The executive taking decision with regards to variations may inter alia keep in mind the opportunity cost of not taking a decision, delaying it and the importance of a project which may even impact the image of the Railways."*

11. It is thus contended that it is wrong to state that the respondents are not following any specific guidelines.

12. We have heard learned counsel for the parties and have carefully considered the submissions so made. At the outset, we had asked the learned counsel for the petitioner as to what prejudice has been caused to him in awarding the tender to the second highest bidder, no satisfactory answer, in fact, no answer has been received except this that the respondents are not following a uniform procedure. Having regard to the guidelines of the Railway Board, which has been handed over in Court, the submission of learned counsel for the petitioner is without any force. We also find that the highest tenderer has offered Rs.2.22 crores, second highest tenderer has offered Rs.2.19 crores and the only licensee, who is the third highest bidder has offered Rs.1.95 crores. The respondent by making an offer to the second bidder has assured that the price offered by the highest bidder is secured and an offer was made to the second highest bidder to match the offer, which he did. Thus, in our view, no prejudice is caused to the rights of the petitioner and simultaneously the interest of the railway is also protected as the second highest bidder has made an offer, which was made by the highest bidder. The reliance placed on paras 5.2, 3.5 and the guidelines of the CVC in our view are misplaced to state that the notice inviting tender should be withdrawn a day in advance can be read that the tender cannot be withdrawn prior to one day specially when clause 6.4 provides for forfeiture of the earnest money in case of withdrawal, which the respondents have followed as informed by counsel for the respondent. For the reasons stated above and in the absence of the petitioner, not having been shown any prejudice having been caused.

13. We find no infirmity to the procedure followed based on the guidelines of the Railway Board. Right of the railway is protected. This petition lacks merit. The same is accordingly dismissed.

**CM.APPL 3802/2019 (stay)**

14. The application also stands dismissed in view of the orders passed in the present petition.

**G.S.SISTANI, J.**

**JYOTI SINGH, J**

**JANUARY 30, 2019**
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