IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5607 of 2020

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M/S OMEGA ELEVATORS having its local office at House No. 5, Road No. 25, Sri Krishna Nagar, Patna 800001 and having its registered office at 11, Sanjeev Baug Society, New Sharda Mandir Road, Paldi, Ahmedabad, Gujarat - 380007, through its sole proprietor, Mr. Kumar Manharlal Desai, aged about 67 years, Gender - Male, resident of A/4, Jam Appartment, Near Dada Saheb Derasan, Navarangpura, Ahmedabad, 380009.

... ... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Railways, Government of India, New Delhi.
2. The Chairman, Railways Board, Ministry of Railways, Government of India, New Delhi.
3. The General Manager, East Central Railway, having its office at Mahendru Ghat, 1st Floor, Patna - 800004.
4. The Senior Divisional Electrical Engineer/ G (DEE/G), East Central Railway, Sonpur, Bihar.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Bhargav Hasurkar, Advocate
		Mr. Nikhil Kumar Agrawal, Advocate
		Ms. Aditi Hansaria, Advocate
For the Respondent/s	:	Mr. S.D. Sanjay, ASG
		Mr. Ramadhar Shekhar, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT
Date : 04-05-2020

Heard Mr. Bhargav Hasurkar and Mr. Nikhil Kumar Agrawal, learned Advocates for the petitioner and Mr. S.D. Sanjay, learned Additional Solicitor General assisted by Mr. Ramadhar Shekhar, Advocate, for the respondents.

2. This writ petition has been filed against the decision of the respondents for setting aside the E-Tender Notice/Detailed Notice inviting tender (hereinafter referred to as 'DNIT') L-Open-

19-20-33 dated 05.03.2020 issued under the signature of respondent no. 4 on the ground that the same has been issued illegally by cancelling the previous tender for the same work in which the petitioner/company was declared to be the lowest tenderer. It may be noted that the petitioner is a manufacturer and supplier of lifts/escalators and had approached this Court earlier vide CWJC No. 25129 of 2019 seeking a direction to the respondents, especially respondent no. 4, to allow the petitioner to participate in the tender as in that tender document, there was a restrictive clause which permitted only the named companies manufacturing lifts, to participate.

3. Pursuant to an order passed in the aforesaid petition on 19.12.2019, the petitioner was permitted to participate in the tender proceedings and was declared L-1.

4. It has been submitted that the documents furnished by the petitioner were complete in all respects including the requirement of submitting the document indicating its registration with the Employees Provident Fund Organization and the PF Code provided by the EPFO as well as the Udyog Aadhar Number.

5. It has been urged that the petitioner participated in the tender process in which it was declared to be the lowest bidder (L-1) by way of Tabulation Statement of Financial bids which was

published online on 26.12.2019. Thereafter, when no communication was made by the respondents, the authorized representative of the petitioner contacted the respondent no. 4 with a request to execute a letter of award and enter into an agreement so that the work could begin. It was only telephonically informed to the representative of the petitioner on 08.04.2020 by respondent no. 4 that the tender in question (Tender Notice No. L-Open-19-20-24 dated 22.11.2019) has been cancelled and a fresh tender for the same work has been issued on 05.03.2020.

6. The petitioner has challenged the aforesaid decision viz. of cancellation of the earlier tender and issuance of a fresh tender for the same work on the ground that no reason has been assigned for the same and that such decision is palpably arbitrary, illegal, perverse and therefore unsustainable in the eyes of law.

7. As opposed to the aforesaid contentions, Mr. S.D. Sanjay, learned ASG has submitted that the petitioner, though, is registered with Employees Provident Fund Organization and had also submitted the PF Code along with the tender documents but it did not submit the Universal Account Number (UAN) of the workers along with its offer, which was a mandatory requirement.

8. Mr. Sanjay has referred to the item break-up of the eligibility conditions in the Special Financial Criteria which is being extracted here for ready reference:

Special Financial Criteria

S. No.	Description	Confirmation Required	Remarks Allowed	Documents Uploading
1	Contractor should have to be registered with Employee Provident Fund Organization (EPFO). It is mandatory for contractor to submit PF code provided by EPFO with their tender offer. <u>Also each contractor has to submit "UAN" of their worker with their offer and have to mention in tender document. It is mandatory. Otherwise offer will not be considered for further action and your offer will be summarily rejected.</u>	No	No	Allowed (Mandatory)

(emphasis provided)

9. It has been pointed that only two bidders submitted their E-Tender and the tender committee, on evaluation of the tenders and verification of the documents, found that neither of the tenderers had complied with the mandatory condition of the submission of UAN of their employees along with their tender papers. Both the tenders were therefore rejected. Per force, fresh tender was floated.

10. In support of his argument, Mr. S.D. Sanjay has submitted that the tender in question followed a Single Packet System and in the event of a mandatory requirement not having been complied with, the tender of the petitioner and the other in the fray were rejected. Even though, under the Single Packet System, the rates offered by the tenderers was opened, it would not make the decision of cancelling the tender bad as in a Single

Packet System, a tenderer runs the risk of his financial offer being opened/exposed even though his tender is not accepted on other technical reasons.

11. Apart from this, it has further been urged that since no contract has been entered into between the respondents and the petitioner, no right has till date accrued to the petitioner to maintain any cause of action.

12. The learned counsel for the petitioner, in response to the aforesaid stand of the respondents has submitted that the requirement under Special Financial Criteria was rather vague and capable of being interpreted as Universal Aadhar Number of the company. The petitioner had in its possession the Universal Account Number of its workers and had the petitioner known that the UAN number referred to the Universal Account Number of the labourers and not Universal Aadhar Number, the same would have been furnished along with the tender papers. The petitioner would not have derived any undue advantage by withholding the Universal Account Number of its workers which it had in its possession; rather it has only served as a detriment and which has resulted in the rejection of its tender.

13. As a legal proposition, it has been submitted that when tenders are invited, the terms and conditions ought to

indicate the norms and benchmarks with certainty and if there is any vagueness in anyone of the terms employed in the tender, the principle of *contra proferentem* as contained in maxim *verba chartarum forties accipiuntur contra proferentem* had to be applied. In other words, if a term used in a contract paper is ambiguous and capable of being interpreted in two different ways, the interpretation given by the author or the writer of the contract is not to be insisted upon to the disadvantage of the other party.

14. The petitioner urges that in ***Industrial Promotion and Investment Corporation of Orissa Ltd. v. New India Assurance Company Ltd. : (2016) 15 SCC 315***, the Supreme Court has opined that in the event of ambiguity in the wordings of a policy, it is to be resolved against the party which prepared it. It has further been submitted that in the absence of any communication from respondent no. 4 to the petitioner and not seeking any clarification from the petitioner, makes the decision of cancelling the tender and floating a fresh tender for the same work absolutely suspect and unacceptable.

15. After having heard the counsel for the parties, this Court finds that one of the eligibility conditions for the tender was submission of UAN number of the workers of the tenderer along with the original offer, which requirement has been made

mandatory in clear and unambiguous terms. The requirement further specifies that in the absence of such UAN number of the workers being furnished, the offer will not be accepted and shall be summarily rejected. The UAN number is referable to the workers of the tenderer and, therefore, there cannot be any ambiguity with respect to its meaning.

16. In ***Industrial Promotion and Investment Corporation of Orissa Ltd.*** (supra), the Supreme Court has clearly stated that the *contra proferentem* rule of construction can be used only when there is an ambiguity before a court and because of which it is unable to decide by resorting to ordinary principles of interpretation as to which of the two meanings of a word employed is the correct one. The rule cannot be used to create ambiguity.

17. It further appears from the documents supplied and arguments advanced that no contract had been entered into between the petitioner and respondent no. 4. In ***Rishi Kiran Logistics Pvt. Ltd vs. Board of Trustees of Kandla Port Trust & Ors. : (2015) 13 SCC 233***, it has been held that the bidders participating in a tender notice have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from

hidden agenda. The terms and conditions of the tender cannot be challenged and no bidder will have the authority to insist for any further negotiations unless the terms and conditions of the notice so provides. In the absence of any concluded contract, it would not be prudent for a Court to go into such contractual issues as to whether a condition in a tender is necessary or it serves any special purpose so as to justify such a stipulation. Under such circumstances, if any petition under Article 226 of the Constitution of India is at all entertained, it has only to be seen through a limited aperture.

18. In ***State of Jharkhand and Ors. vs. M/S CWE-SOMA Consortium (2016) 14 SCC 172***, the Supreme Court has again reiterated that in case of a tender, there is no obligation to accept any one of the tenders, even the lowest tender. The decision to enter into any contract with the lowest tenderer is solely with the authority issuing the tender. It is also well settled that so long as the bid has not been accepted, the highest or the lowest bidder acquires no vested right to have the contract concluded in his favour. The authority is well within its rights to reject a bid without assigning any reason thereof.

19. The terms in the present tender paper clearly stipulate that the railways reserves the right to either cancel the

tender or reject any or all of the tenders without assigning any reason thereof.

20. I have also assessed the respective contentions of the parties for satisfying myself whether the decision of the respondent in cancelling the earlier tender is discriminatory against anyone. It is relevant to mention here that the other party in the fray has not challenged the decision. On finding that the requirement of furnishing UAN number of the workers of the tenderer was mandatory and there being no ambiguity in interpreting the meaning of UAN and the petitioner and another not having complied with the same, no fault could be found with the decision of the authority (respondent no. 4) in cancelling the tender.

21. It further appears that the petitioner has not been proscribed from participating in the fresh tender.

22. For the reasons aforestated, this writ petition fails and is dismissed.

23. Mr. S.D. Sanjay, learned ASG has informed this Court that the date for opening the tender has been extended to 20th of May, 2020 in view of the lock-down because of the pandemic. The petitioner shall be well advised to participate in the tender by uploading the tender documents, in case it is so desired. The

physical furnishing of certain documents, this Court has been informed by Mr. S.D. Sanjay, would though be insisted upon but the date of opening the tender shall be extended till the time it becomes possible to furnish the documents physically by the tenderers. On that account also, the petitioner ought not to entertain any doubts.

24. A request, in the last, has been made by the learned counsel for the petitioner that in the earlier tender, the petitioner had deposited an amount of Rs. 2,42,000/- as earnest money which is required to be refunded as in the fresh tender also, the earnest money has been deposited by the petitioner.

25. Mr. S.D. Sanjay, learned ASG submits that the earnest money deposited in the last tender shall be refunded to the petitioner, preferably within a period of four weeks from the date of passing of this order.

26. With the aforesaid direction/observation, the writ petition is disposed of.

(Ashutosh Kumar, J)

Krishna/-
Praveen

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	