

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 155 of 2020

**M/s B.S. Medical International
Vs.
Metro Railway, Kolkata and others**

For the petitioner	:	Mr. Debasish Banerjee, Mr. Jayanta Narayan Chatterjee, Mr. Supreem Naskar
For Metro Railway, Kolkata	:	Mr. Satyandar Agarwal, Mr. Bijoy Bag
Hearing concluded on	:	18.12.2020
Judgment on	:	23.12.2020

The Court:

1. The Petitioner participated in a tender floated by the respondent no.3 vide Tender Notice No. MRTS/Med/1/CMGPS/19-20/TSMH for the purpose of installation of Central Medical Gas Pipeline System (CMGPS), the closing date of which was November 28, 2019. The private respondent also participated in the tender process and was selected as the L-1 bidder, while the petitioner's bid was rejected. Challenging such rejection and the acceptance of the bid of respondent no.4, the petitioner has preferred the instant writ petition.

- 2.** Learned counsel for the petitioner argues that the petitioner has twelve years' past experience in jobs similar to that contemplated under the tender, whereas respondent no.4 has only done such work during the period 2015-2016. Moreover, it is submitted that respondent no.4 does not have its own already-established service facilities in the State of West Bengal to provide necessary service support 24/7, as required by Clause 2 of Annexure-B (terms and conditions) of the Notice Inviting Tender (NIT).
- 3.** On the score of experience, the petitioner, it is submitted, is far ahead of respondent no.4.
- 4.** That apart, only the petitioner, among all participants in the tender, offered CAMC for five years post warranty, furnishing certificates for each component of such units covered by the proposed annual maintenance. Respondent no.4 and the other bidders did not offer any such service, in contravention of Clause 6 of Annexure-B to the NIT.
- 5.** Moreover, for the specific purpose of the tender-in-question, there cannot be any general quotation. It is only the petitioner, among the bidders, who quoted CMGPS pertaining to each component unit of coverage. The respondent no.4 and the other bidders were deficient on such score as well.
- 6.** Adverting to the bunch of papers handed over by learned counsel for the respondent, learned counsel for the petitioner argues that it is evident therefrom that respondent no.4 had paid zero income tax, as evident

from the IT Returns of the respondent no.4, for three consecutive financial years, annexed to the said bunch. The said fact, it is submitted, hits at the very root of the financial credibility of respondent no.4.

- 7.** It is argued that Clauses 2, 3 and 6, which was satisfied by the petitioner and not by respondent no.4, are captioned as 'Essential' in the terms and conditions to the NIT, whereas past experience of supply and installation of similar projects in Government Hospitals as a prime contractor, as provided in Clause 4, falls under the category 'Desirable'. Hence, the allegation that the petitioner did not have past experience with the railways, as required by the said Clause 4, could not vitiate the qualification of the petitioner as a contender for the L-1 slot.
- 8.** Learned counsel for the respondent-authorities submits that the scope of providing CAMC, stipulated in Clause 6 of the terms and conditions of the NIT, will only arise post warranty and can be worked out with the successful bidder even after commencement of the work. Thus, detailed quotation on such aspect cannot be deemed to be an essential pre-requisite of award of contract.
- 9.** Relying upon several documents submitted by respondent no. 4 on its work experience, which are part of the bunch of papers handed up by the respondent authorities, learned counsel submits that the work experience of respondent no. 4, the L-1 bidder dates back at least to the year 2007, satisfying Clause 4 under the second category of terms and conditions, which exceeds the experience of the petitioner. Initially

respondent no. 4 was a proprietorship and subsequently got incorporated as a private limited company, although essentially the control of respondent no. 4 remained in same hands. It is submitted that the petitioner, on the other hand, failed to provide sufficient documents of completion of work, similar to the work for which the present tender was floated, for the railways or government hospitals, as required under Clause 4. On the contrary, respondent no. 4 furnished ample documents in support of completion of work relating installation of Central Medical Gas Pipeline System (CMGPS) for several railway hospitals. Thus, the successful bidder scored much ahead of the petitioner on past experience and expertise for work similar to that contemplated under the present tender.

- 10.** It is further submitted by learned counsel for the respondent authorities that the credentials harped on by the petitioner were not essential for the work-in-question but pertained to additional qualifications, as opposed to those conditions which were satisfied by respondent no. 4, which were an integral part of the job. Hence, it is argued, respondent no. 4 came far ahead of the petitioner on all the essentials credentials, which qualified respondent no. 4, and not the petitioner, as the L-1 bidder.
- 11.** In any event, the respondent-authorities argue, the tenderer has the right to award contract to a bidder who is better suited for the work at hand, in its perspective and the eligibility criteria provide only a guideline in that regard. The ultimate choice of candidate rests in the hands of the

employer and ought not to be interfered with by the court, unless there is gross arbitrariness or patent mala fides involved in the selection process.

- 12.** Considering the nature of the terms and conditions as provided in Annexure B to the NIT, it is clear that two different sets of qualifications were stipulated by the respondent-authorities, the first captioned as 'Essential' and the second 'Desirable'. In spite of the nomenclature, the terms and conditions also provide that the 'Essential' qualifications were "some important tender requirements" whereas the 'Desirable' ones contained a rider "The company should have following supporting documents to qualify for the tender". As such, whatever might have been the captions under which the respective two sets of terms and conditions were clubbed, the language immediately preceding such sets elaborate quite clearly that the qualifications of which the petitioner boasts were only "important" tender requirements while the ones where the petitioner was deficient but respondent no. 4 earns brownie points were those for which the bidders "should have supporting documents to qualify for the tender".
- 13.** The deficiencies of respondent no. 4 alleged by the petitioner are frivolous on all counts, be it past experience with similar employers in the same field or other criteria, as evidenced by the bunch of documents produced by the respondent-authorities, which were furnished online by the successful bidder with its bid. As far as post warranty CAMC is concerned, the same was merely to be quoted in the offer but would

come into force “post warranty”, that is, much after the commencement of work, by its very definition. Hence, the successful bidder was fully eligible for award of contract under the impugned tender.

14. That apart, it is for the employer floating the tender to select the best candidate according to the nature and peculiarities of the proposed work. It is not for the court, let alone other participants in the tender, to dictate such choice. The employer has to have a free hand in matters of award of contract, unfettered by substitution of the logic of someone else, be it the court or other bidders.
15. In the present case, the L-1 bidder qualified on all the necessary pre-requisite criteria for getting the contract, whereas the petitioner lacked the requisite past experience, for which documents had to be mandatorily uploaded to qualify for the tender. No mala fides, arbitrariness or bias on the part of the respondent-authorities has been established by the petitioner at all, as far as conduct of the tender and selection of respondent no. 4 as the L-1 bidder is concerned.
16. Thus, there is no occasion to interfere with such selection. The challenge mounted by the petitioner should necessarily fail.
17. Accordingly, WPO No. 155 of 2020 is dismissed without, however, any order as to costs.
18. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)