IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP-7935-2020
Date of Decision: 17th November, 2020

M/s KP Group 9 Security and House Keeping

Petitioner

Versus

State of Haryana and others

Respondents

CORAM: JUSTICE S. MURALIDHAR
JUSTICE AVNEESH JHINGAN

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Present: Mr. Rana Gurtej Singh, Advocate for the Petitioner.

Mr. Ankur Mittal, Additional Advocate General, Haryana.

Mr. Vivek Aggarwal, Advocate and Mr. Jawahar Lal Goyal, Advocate for the Respondent No. 3.

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Avneesh Jhingan, J.

1. The Petitioner is partnership firm engaged in providing out-sourced manpower to various organizations. Petition is filed being aggrieved of rejection by Respondent No. 2, i.e. the Director, Fisheries Department, Haryana of its financial bid and consequently seeks the quashing of an e-mail and letter dated 15th May, 2020 intimating the Petitioner of the rejection of its bid and the reasons there for.

2. By a tender notice dated 6th March, 2020, the Director, Fisheries Department, Haryana invited bids for supply of manpower like Section Officer Accounts, Consultants, Field Officers, Clerks etc. The Notice

Inviting Tender ('NIT') was in two-tier system. The technical bids were to be opened on 16th March, 2020 and after evaluation of the technical bids, the financial bids were to be opened on 18th March, 2020. The Petitioner submitted its bid pursuant to the above tender notice.

3. According to the Petitioner, the technical bids were evaluated on 18th March, 2020. The financial bids were opened on 15th May, 2020. The Petitioner received an auto-generated e-mail from Respondent No. 2 on 15th May, 2020 at 2:05 P.M. stating that its bid had been admitted. Within three minutes, another e-mail was received from the Respondent No.2 stating that 'you are informed that your bid for the above tender has been rejected during financial evaluation by the fully constituted committee for the reason of financial criteria'. A memo was issued by Respondent No. 2 on 15th May, 2020 citing the reasons for rejecting the bid of the Petitioner. A letter dated 14th May, 2020 was also issued to the private Respondent (Respondent No. 3) intimating it of the acceptance of its financial bid and calling upon it to enter into a Service Agreement. It would be pertinent to mention at this stage that the rates quoted by the Petitioner and the private Respondent were the same.

4. Learned counsel for the Petitioner argued that its financial bid was wrongly rejected. He made the following submissions:-

(i) First, the financial bid is alleged to have been opened on 18th March, 2020 whereas the tender summary annexed, auto-generated e-mail and rejection of information are all dated 15th May, 2020, i.e. after a gap of two months.

(ii) Secondly, that bid of the private Respondent No. 3 was accepted even before considering the financial bid of the Petitioner.

(iii) Thirdly, for rejecting the bid of the Petitioner, the Respondent No. 2 had carved out reasons regarding violation of terms and conditions of the existing contract. However, no action was initiated for blacklisting or for forfeiting the bank guarantee as per Clause 19 (x) of the existing contract.

(iv) Lastly, when the rates quoted by both the Petitioner and Respondent No. 2 were the same, the Petitioner ought to have been called for negotiations.

5. Learned counsel for Respondents No.1 and 2 reiterated the pleadings in the reply to defend the rejection of the bid. According to Respondent No. 2, the technical bid was opened on 16th March, 2020 at 10:30 a.m. and the financial bid on 18th March, 2020 at 10:30 a.m. He submitted that in para 4 of the reply, the time gap has duly been explained. Para 4 of the reply is reproduced below:-

> "4. It is submitted that the financial bid was opened on 18.03.2020 at 10.30 a.m. It is pertinent to mention here that there were holidays in the State offices from 21.03.2020 to 23.03.2020 and due to lock down in the nation w.e.f. 24.03.2020 the proceeding of the financial bid could not be updated on the website of NIC and the summary of the financial bid opening was updated on 15.05.2020 at 2.05 p.m.. It is further submitted that a letter dated 14.05.2020 was issued informing the private respondent about the acceptance of his financial bid and called upon him to enter into Service Agreement."

6. The contention raised is that the detailed reasons were communicated to Petitioner and apart from the said reasons, there were other instances of violation of the terms and conditions of the existing contract. The

Petitioner had not paid wages of May, 2020 and was demanding an advance payment from the Department.

7. Before proceeding to discuss the above contentions, the reasons mentioned in the impugned letter dated 15th May, 2020 may be noticed. They read as under:-

> "(i) The Agency was required to make payment of one month salary in advance to outsourcing employees as per existing service agreement but it did not make payment in advance for the month of March and April 2020 in spite of telephonic messages. Resultantly this Department has to make payment in advance to your agency and after that your agency made the payment to outsourcing employees. This is a very serious matter violating the terms and conditions of existing tender.
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> (ii) Apart from above it has also been observed that there are many missing credits of EPF/ESI of number of employees for several months for which your agency was asked to explain the reason and to deposit these missing credit amount in the account of respective employees. Even then these deposits have not been updated whereas your Agency has already received these amounts from this Department completely online in its bank account.
>
> (iii) The proof of deposits of EPF/ESI contribution for the month January, 2020 to March, 2020 has not been submitted to this office which is serious issue.
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> Keeping in view the facts stated above it has been decided to reject your tender opened on 16.03.2020 and service agreement with your Agency will be terminated after 15.06.2020."

8. Clauses 6 and 7 of the NIT, which are relevant for the issue at hand, read as under:-

> "6. The Director, Fisheries Department reserves the right to accept or reject the tender or any part of the bid without assigning any reason thereof.
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> 7. In case two or more bidders quote same rates, the work shall be awarded to a bidder on the basis of merits."

9. The issue raised by the Petitioner of the time gap in the opening of the financial bid and the intimation thereof, has duly been explained by Respondent No. 2. After evaluating the technical bid, the financial bid was opened on 18th March, 2020. The reason for delay in uploading the status was that there were holidays from 21st March, 2020 to 23rd March, 2020. Thereafter there was a nationwide lockdown from 24th March, 2020. From the tender summary, it is forthcoming that the date of the updating of the status is mentioned as 15th May, 2020, whereas the date of opening of the financial bids was 18th March, 2020.

10. The grievance of the Petitioner that the acceptance of the financial bid of Respondent No. 3 was intimated to it by Respondent No. 2 even before considering the financial bid of the Petitioner, is not well-founded. It has been clarified that financial bids were in fact opened on 18th March, 2020 itself. It was due to the unprecedented prevailing pandemic situation, resulting in a nationwide lockdown, that the status update and the consequent intimation were delayed. Since the Committee had considered the financial bids on 18th March, 2020 itself, sending of information in that regard to Respondent No. 3 on 14th March, 2020 will not prove fatal to the allotment of tender.

11. Non-initiation of action in terms of Clause-19 (x) of the existing contract, enables the Fisheries Department to initiate action to blacklist the service provider and forfeit its Bank guarantee in case of delay in payment by one month or more, is of no help to Petitioner. The rejection of the bid was on the basis of comparative merits of the Petitioner and Respondent

No. 3. The violation of the terms and conditions of the existing contract formed the basis whereby Respondent No. 3 was found better suited, or in other words, more meritorious. The mere fact that action has not yet been initiated under the Clause 19 (x) of the existing contract does not debar Respondent No. 2 from taking note of the violation of the terms and conditions of the existing contract by running/existing contractor.

12. As per Clause-7 of the NIT, in case two bidders have quoted the same rates, the work had to be allotted on the basis of merits. There was no occasion for Respondent No. 2 to invite the Petitioner for negotiations. The determination of merit of Respondent No. 3 cannot be faulted for following reasons. The violation of the terms and conditions of the existing contract by the Petitioner was occasional by the failure to pay the staff advance salary. In fact the Petitioner sought advance from Respondent No. 2 for making payment of wages; there were missing credit entries of EPF/ESI of number of employees for several months; the proof of deposit of EPF/ESI contribution for January, 2020 to March, 2020 were not submitted. Apart from this, the Respondent No. 3 was found to have deployed more persons in various departments as compared to the Petitioner. As per reply filed, the Petitioner had shown to engage major number of its persons in Kalpana Chawla Government Medical College, Karnal, where the agreement was terminated due to violation of terms and conditions of tender, labour law and Wages Act.

13. There is another aspect of the matter that apart from the technical pleas being raised by the Petitioner in the writ petition, there is no challenge to

the merits of the reasons given for rejecting the bid. There is no denial to the fact that the Petitioner had not made payment to the staff deployed before submitting the bills to the Respondent No. 2. Resultantly, the Petitioner failed to make payment of one month's advance salary to the employees as per existing contract. The Petitioner, in spite of being provided opportunity, failed to explain the missing credits of EPF/ESI of staff and to adduce proof of EPF/ESI contribution from January, 2020 to March, 2020.

14. The Supreme Court in ***Air India Ltd. v. Cochin International Airport Ltd., 2000 (2) SCC 617*** held:

> "7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decisions of this Court in ***R.D. Shetty v. International Airport Authority, (1979) 3 SCC 489, Fertilizer Corporation Kamgar Union v. Union of India, (1981) 1 SCC 568, Asstt. Collector, Central Excise v. Dunlop India Ltd., (1985) 1 SCC 260, Tata Cellular v. Union of India, (1994) 3 SCC 651, Ramniklal N. Bhutta v. State of Maharashtra, (1997) 1 SCC 134 and Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999)1 SCC 492.*** The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned.

> Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

15. Having considered the facts and the law laid down by the Apex Court, no case is made out to establish that the decision of rejection of financial bid was vitiated due to *mala fide* or arbitrariness. No case is made out before this Court to interfere under Article 226 of the Constitution of India in furtherance of public interest, more so, when the rates quoted by the Petitioner and the private Respondent were the same.

16. The writ petition is dismissed.

[AVNEESH JHINGAN]
JUDGE

[S. MURALIDHAR]
JUDGE

17th November, 2020
pankaj baweja

Whether speaking / reasoned: Yes
Whether Reportable: Yes