In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 20340 of 2019
With
IA No: CAN 1 of 2020 (Old No.182 of 2020)
With
CAN 2 of 2020

Shiba Prasad Banerjee
Vs.
The State of West Bengal and others

For the petitioners	:	Mr. Saptangsu Basu, Mr. Swarup Paul, Mr. Surya Maity, Ms. Amrita Maji, Ms. Mrinalini Majumder
For the State	:	Mr. Samrat Sen, Mr. Amitava Mitra, Ms. Amrita Panja
Hearing concluded on	:	12.03.2021
Judgment on	:	07.04.2021

Sabyasachi Bhattacharyya, J:-

1. The petitioner participated in a tender dated September 6, 2019 floated by the respondent authorities for cleaning and housekeeping services in respect of two hospitals at Kalna and Katwa and succeeded, along with respondent nos. 9 and 10, in the technical stage. Thereafter there was a tie between the petitioner, respondent nos. 9 and 10 and others at the financial bid stage, for which the fate of the bidders was decided by lots.

The petitioner participated and lost in respect of both the hospitals and three others, including respondent nos. 9 and 10, were chosen as successful bidders for each hospital and work orders issued to them. On October 25, 2019, the petitioner gave a representation to the tender issuing authorities indicating his grievances at the selection of respondent nos. 9 and 10 even at the technical stage. The present writ petition has been filed challenging the tender process and consequential work orders and for a direction on the respondent authorities to consider the petitioner's aforementioned representation.

2. The petitioner assails the selection of respondent no. 9 on two grounds.

3. First, that the petitioner had submitted the PAN Card of Jayanti Saha while all other documents were in the name of M/s Command Security Services, which is respondent no. 9. Secondly, scanned copies of documents, which were required by Clause 10.5.2 of Section VI of the Notice Inviting Tender (NIT) to be uploaded in black and white, were submitted in colour.

4. The selection of respondent no. 10, namely M/s Noble Security Services, is challenged on several grounds.

5. First, no GST Certificate, but only a provisional certificate was submitted by the said respondent.

6. Secondly, the Professional Tax Enrolment of respondent no. 10 had expired on July 31, 2018, that is, before the tender.

7. Thirdly, instead of submitting a Performance Statement as required under Section IX of the NIT, the said respondent had submitted only an affidavit declaring that performance statement has been submitted. Such affidavit was notarized on April 19, 2018 while the tender was invited on September 6, 2019.

8. The fourth objection, common with respondent no. 9, was that colour scan of documents were uploaded, contrary to the black and white required under Clause 10.5.2.

9. Learned senior counsel appearing for the petitioner relied on Clause 10.5.2 of the NIT, one of the requirements stipulated wherein is that scans of the technical documents had to be uploaded in black and white.

10. Clause 10.5.3 enumerates the documents to be contained in the non statutory cover, which included Certificates pertaining to Income Tax PAN, Professional Tax Registration and GST Registration.

11. Clause 18.6, it is contended, specifies that if any document required to be submitted for tender by the bidder in his technical proposal is not submitted or is found to be deficient in any manner at any stage after opening of bid,, the bid may be summarily rejected.

12. Apart from the grounds pleaded in the writ petition, learned senior counsel for the petitioner contends that the time-limit stipulated for furnishing performance security was relaxed in the case of respondent no. 10 after it became successful in the tender.

13. Section IX of the NIT provides a proforma performance statement, credentials of which are also one of the requirements, along with documentary evidence, as per Clause 10.5.3 of the NIT.

14. Learned senior counsel argues that respondent nos. 7 and 8, who were responsible for conducting the present impugned tender, were also instrumental in floating a previous tender, where the petitioner, on his bid being rejected, submitted a representation on October 10, 2017. A co-ordinate Bench, by an order dated November 3, 2017, the tender issuing authority to dispose of such representation in accordance with law. The present respondent no. 7 himself had communicated such order dated November 14, 2017, issued by the Director of Health Services, West Bengal, where it was observed that the selected bidder had not fulfilled the terms and conditions of the tender bid documents and the tender had been cancelled and a fresh tender directed to be invited.

15. Upon a subsequent writ petition being filed by the present petitioner alleging that the persons responsible for the lapses in the previous tender were again given charge of the fresh tender, the learned Single Judge directed an enquiry to fix responsibility. The present respondent no. 7 was found in the resultant enquiry to be partially responsible for such lapses, since he should have checked the documents before issuing award of contract.

16. By relying upon such developments in a previous tender, the petitioner alleges that the respondent nos. 7 and 8 are wreaking vengeance on the petitioner in the present tender as well.

17. In reply, learned senior counsel appearing for the respondent authorities submits that, as far as respondent no. 9 is concerned, PAN Card of the sole proprietress of the concern had been filed. The objection as to colour scan being filed instead of black and white, it is contended is technical in nature and best left to the discretion of the tender issuing authorities.

18. Regarding respondent no.10, it is argued that it had submitted Provisional GST Certificate, a GST payment receipt dated August 21, 2019 (which was contemporaneous with the tender) and an enrolment application for GST registration. These were considered sufficient by the tendering authorities on the score of GST.

19. As far as Professional Tax is concerned, learned senior counsel for the tendering authorities argues that respondent no. 10 had submitted up-to-date professional tax payment receipt for the relevant period (April 1, 2019 to March 31, 2020). The tendering authorities had considered such document sufficient compliance with the NIT clauses.

20. Since respondent no. 10 had submitted performance statement of January 18, 2019, which was for a period before the impugned tender, which was issued on September 6, 2019, the authorities accepted it as due compliance with the relevant NIT clause.

21. Regarding filing of colour scan, the contention of the tendering authorities is similar to that of respondent no. 9.

22. In support of such contentions, learned senior counsel for the respondent authorities files a detailed written instruction in support of his contentions, apart from relying on the annexures to the writ petition itself.

23. By placing particular reliance on Clause 19.3 of the NIT, learned counsel points out that prior to the detailed evaluation of price bids, the purchaser will determine the substantial responsiveness of each bid. A substantially responsive bid is defined in the clause as one, which conforms to all the terms and conditions of the TE documents without material deviations. 'Material deviations' is defined as deviations from, or objections or reservations to, critical provisions. Examples thereof, as given in the clause, are those concerning Performance Security, terms and mode of payment, force majeure and applicable law.

24. Since, in the present case, there was substantial compliance without material deviations from critical provisions, as illustrated in Clause 19.3, it was fully within the power of the tendering authorities to accept such bids.

25. Moreover, learned senior counsel appearing for the tender issuing authorities argues, the petitioner himself participated up to the lottery stage of financial bids and waived his right to turn back and challenge the process after knowing the final result, in which he lost out.

26. Learned counsel for the respondent places reliance on *Poddar Steel Corporation v. Ganesh Engineering Works and others*, reported at *(1991) 3 SCC 273* in support of his contention that deviation from non-essential or ancillary/subsidiary requirements and minor technical irregularities on the part of the bidder can be waived.

27. Upon considering the materials on record and submissions of learned senior counsel for the parties, it is evident that the petitioner had actually taken a chance by participating in the entire tender process and had not raised any objection regarding the technical bid before he participated and lost only on lots at the financial bid stage. Such conduct indicates opportunism on the part of the petitioner, if not outright waiver.

28. Secondly, the summary rejection of any document submitted in the technical bid is a discretion vested in the tender issuing authority and is not mandatory, as clearly indicated in the expression “may be” preceding such rejection, appearing in Clause 18.6. Such clause cannot be construed as mandatory.

29. That apart, Clause 18.6 of the NIT, which contemplates such direction, is to be read in conjunction with Clause 19.3, which stipulates that substantial responsiveness of a bid will be one which conforms to the terms and conditions without “material deviations”. The said term has been further qualified by the expression “deviations from, or objections or reservations to critical provisions”. Illustrations of such deviations have also been given, which hit at the root of the NIT. The deviations and irregularities alleged by the petitioner are not “material deviations” from “critical provisions” at all. It was the sole discretion of the tender issuing authority to consider the technical bids of respondent nos. 9 and 10 as substantial compliance.

30. The allegations of mala fides on the part of respondent no. 7 and 8, merely on the basis of one of them (respondent no. 7) having been held partially responsible for lapses in a different tender, since he ought to checked to documents, cannot *ipso facto* give rise to the presumption of mala fides. The person held primarily responsible in that case is not pleaded or proved to be involved in the present tender process at all.

31. The allegations of non-compliance on the part of respondent nos. 9 and 10 of the NIT provisions, as discussed above, are flimsy at best, and do not fall within the category of "material deviations" from "critical" provisions of the NIT. The ratio laid down by the Supreme Court in *Poddar Steel Corporation (supra)* is, thus, squarely attracted in the present case.

32. The colour scan allegation is *ex facie* frivolous in case of both respondent nos. 9 and 10, since the requirement of black and white was not of an absolute mandatory nature; on the contrary, a colour scan could be over-compliance rather than under, since it would provide the exact replica of the documents.

33. As far as respondent no. 9 is concerned, submission of the PAN Card of the sole proprietress of the bidder concern was sufficient, since a sole proprietorship is not a separate juristic entity, distinct from the proprietor, in law.

34. The allegation of performance security relaxation for respondent no. 10 is absent from the pleadings in the writ petition. Moreover, such challenge was *post facto*, after the petitioner took a chance till the financial bid stage and lost in the drawing of lots upon there being a tie.

35. The GST and Professional Tax clauses of the NIT were also substantially complied by respondent no. 10. It is well settled by a plethora of judgments, which need not be multiplied here, which lay down that satisfaction on compliance of the tender terms and the choice of competence for the proposed work lie within the domain of the employer, that is, the tender issuing authority. Such discretion ought not to be interfered with by courts. In the present case, no patent mala fide and/or favouritism or arbitrariness in the conduct of the impugned tender has been demonstrated at all by the petitioner.

36. Thus, the impugned tender is held to have been valid on all scores on the materials on record, rendering the challenge thereto and consequential direction on the authorities to consider the petitioner's representation meaningless.

37. In view of the above observations, the writ petition fails.

38. Accordingly, WPA No. 20340 of 2019 is dismissed on contest. The connected applications, bearing CAN Nos. 1 and 2 of 2020, are disposed of consequently.

39. There will be no order as to costs.

40. Urgent certified copies, if applied for, be furnished to the parties upon due compliance of requisite formalities.

(Sabyasachi Bhattacharyya, J.)