In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 22279 of 2019
IA No: CAN 1 of 2020

Amar Nath Sah
Vs.
Union of India, through the Secretary, Ministry of Defence and others

For the petitioner	:	Mr. Sankarsan Sarkar, Mr. Pran Gopal Das
For the Union of India	:	Mr. Madan Murari Verma, Mr. Partha Sarathi Ghosh
Hearing concluded on	:	04.01.2021
Judgment on	:	11.01.2021

Sabyasachi Bhattacharyya, J:-

1. CAN 1 of 2020 is allowed in view of the urgency involved and WPA No. 22279 of 2019 itself is taken up for hearing.

2. The petitioner is a civil contractor enlisted as Class "D" contractor since 2010 under the respondent authorities and runs a sole proprietorship business under the name and style of "Sri Amar Nath Sah". Such enlistment has been renewed from time to time, lastly up to December 31, 2020.

3. Respondent no. 6 issued a Notice Inviting Tender (NIT) in September, 2019 for repair/replacement of internal electrification and other allied works for OTM and MD ACCN at west side of Lehl Marg under GE (S) Binnaguri. The petitioner participated therein and its technical bid was accepted on October 4, 2019. The respondent authorities opened the financial bid of the petitioner on October 10, 2019.

4. The petitioner contends that, while placing its financial bid online, the petitioner inadvertently committed a mathematical error and gave credit of Rs. - 23,71,600 instead of Rs. – 4620/-, due to which the bid of the petitioner totalled Rs. -5,50,533.40 p., which was exorbitantly higher than that intended by the petitioner.

5. Immediately upon realizing its mistake, the petitioner wrote a letter on October 10, 2019 itself, asking for revocation of the petitioner's offer as per Clause 6 of the NIT conditions and Clause 3.25 of the MES Manual on Contracts and offering to deposit the earnest money as specified in the e-tender. The said letter was received by respondent no. 6 on October 11, 2021. As no action was taken on such letter, it is submitted that the petitioner reiterated the above statements by another letter dated November 5, 2019.

6. However, on November 11, 2019, the petitioner received four letters, three dated October 10, 2019 and one dated November 2, 2019, stating that respondent no. 6 had already accepted the petitioner's offer and had awarded the contract to the petitioner. Placing reliance on photocopies of the relevant envelopes annexed to the writ petition, learned counsel for the petitioner argues that all three letters dated October 10, 2019, sent by respondent no. 6, were posted through speed post only on October 21, 2019 and the one dated November 2, 2019 was posted on November 6, 2019.

7. The petitioner sent another letter dated November 18, 2019 refuting the allegations made in the letters of respondent no. 6 and reiterating that the petitioner had already revoked its offer by its letters dated October 10, 2019 and November 5, 2019.

8. Respondent no. 6 replied by a letter dated November 14, 2019, allegedly received by the petitioner on November 19, 2019, stating that the offer of the petitioner had already been accepted on October 10, 2019 and could not be revoked as per the Indian Contract Act.

9. The petitioner, by its letter dated November 21, 2019, controverted the contentions of the said letter dated November 14, 2019.

10. The present writ petition has been filed for a writ in the nature of mandamus commanding the respondents to revoke the petitioner's offer as per Clause 6 of the NIT conditions and Clause 3.25 of the MES Manual on Contracts and for cancellation of the aforementioned letters dated October 10, 2019 and November 2, 2019, sent by respondent no. 6.

11. Placing particular reliance on Clause 6 of the Instructions on filling and submission of tender accompanying the NIT-in-question, learned counsel for the petitioner argues that the said provision contemplated revocation of its offer by the lowest bidder after the closing of bid submission date and time, upon which its offer would be treated as revoked and the earnest money deposited by it forfeited. In case of MES enlisted contractors (such as the petitioner), the amount equal to the earnest money stipulated in the NIT would be notified to the bidder for depositing the amount through MRO, which offer was, in fact, made by the petitioner in its letter dated October 10, 2019.

12. It is further submitted that the letters of respondent no. 6, purportedly dated October 10, 2019, were all posted only on October 21, 2019, that is, long after revocation of the petitioner on October 10, 2019 itself, immediately upon realization of its bona fide error on the date of opening of the financial bid. Such back-dated 'acceptance' of the petitioner's contract was tailor-made to bye-pass the petitioner's revocation of its offer to suit the respondents' purpose.

13. In fact, learned counsel for the petitioner contends, the respondents were duty-bound to notify to the bidder the amount equal to the earnest money stipulated in the NIT in case of MES enlisted contractors, for the bidder to deposit such amount through MRO, in the event of revocation of offer. In the present case, despite no such notification having been issued on the part of the respondents, the petitioner offered of its own to pay such amount.

14. Learned counsel for the respondents submits that earnest money had to be paid prior to acceptance of the bid, at the time of submitting the bid; as such, the petitioner's offer to deposit such amount was meaningless.

15. The respondents argue that the petitioner's offer was already accepted on the day on which the financial bid was opened, that is, on October 10, 2019, concluding the contract between the parties before it was revoked. The alleged revocation letter was received by respondent no. 6 on the next day, that is, October 11, 2019. Hence, there was no further scope for revocation of the offer, which had by then crystallized into a concluded agreement.

16. By the letter dated November 14, 2019, respondent no. 6 intimated the petitioner further that the date of commencement of work was October 21, 2019 as per Work Order No. 01 dated October 10, 2019, also requesting the petitioner to commence the work at the earliest.

17. Learned counsel for the respondents contends that the writ petition should, thus, be dismissed.

18. At the outset, it must be noted that the petitioners are, admittedly, contractors enlisted with MES. Clause 6 of the Instruction on Filing and Submission of Tender, published with the relevant NIT, provides for the revocation of offers after opening of financial bids, by the latest bidder. Clause 6 is set out below:

"6. <u>Revokation/Revision of offer upward/offering voluntary reduction, after opening of financial bids by lowest bidder</u>

In the event of lowest tenderer/bidder revoking his offer or revising his rates upward/offering voluntary reduction, after the closing of bid submission date & time, his offer will be treated as revoked and the Earnest Money deposited by him shall be forfeited. In case of MES enlisted Contractors, the amount equal to the Earnest Money stipulated in the notice of tender, shall be notified to the tenderer/bidder for depositing the amount through MRO. Bids of such Contractors/bidder shall not be opened till the aforesaid amount equal to the earnest money is deposited by him in Govt. Treasury. In addition bids of such tenderer/bidder and his related firm shall not be opened in second call or subsequent calls. Reduction offered by the tenderer/bidder on the freak high rates referred by the review shall not be treated as voluntary reduction.”

19. It is evident from a plain reading of the said clause that the question of revocation by the latest bidder arises only after the closing of bid submission. In case of MES enlisted contractors, the amount equal to the earnest money stipulated in the notice of tender shall be notified to the tenderer/bidder for depositing the amount through MRO. Bids of such contractors/bidders could not even be opened, let alone accepted, till the aforesaid amount equal to the earnest money is deposited by him in the Government Treasury.

20. Another relevant clause in the context is Clause 5 of the NIT itself, which stipulates that unlisted contractors are required to submit the requisite documents along with earnest money deposit (EMD) and tender fee. By specific exclusion, listed contractors have been excluded from the purview of the clause.

21. Clause 7, on the other hand, provides that enlisted contractors of MES shall submit the requisite documents without, however, requiring the deposit of earnest money along with the documents.

22. Hence, the respondents' argument, that the deposit of earnest money has to be simultaneous with the submission of the bid/documents, is not applicable to MES enlisted contractors, as borne out by the clauses of the NIT itself.

23. Clause 6 specifically provides that the MES enlisted contractors do have a window of revoking their offer subsequent to closure of bid submission date and time. In the present case, the financial bid was opened on October 10, 2019. On the same date, the petitioners intimated the respondents about their error in submitting the bid and sought to revoke the offer. In addition, the petitioners offered to deposit the amount equal to earnest money even before the respondents notified such amount in terms of Clause 6.

24. Although the said offer of the petitioners was received by the respondents on October 11, 2019, the communication by the respondents regarding alleged acceptance of the petitioners' offer came much later. Such communication was posted through speed post only on October 21, 2019, alleging a retrospective acceptance of the offer with effect from October 10, 2019. Such hurried response of the respondents was an obvious attempt to negate the revocation of offer by the petitioners, since, as per Clause 6, the bid of the petitioners could not have been opened till the amount equal to the earnest money was deposited by the petitioners in the Government Treasury. In the present case, admittedly, the petitioners had not deposited such amount at any point of time, thereby obviating any scope of the respondents opening the bid. Moreover, there was no notice to the bidder by the respondents for depositing the amount equal to earnest money through MRO, which was a pre-requisite for the deposit of such amount by the bidder, as per Clause 6.

25. The subsequent attempt on the part of the respondents, to give out that the petitioners' offer had been accepted, is vitiated by patent contravention of the NIT conditions.

26. The chronology of events makes it clear that the respondents acted without jurisdiction in retrospectively opening the bid of the petitioners and accepting the same before the amount equivalent to earnest money was even notified, let alone deposited. Since the petitioners revoked their offer on October 10, 2019 itself, further intending to deposit the amount equivalent to earnest money, the contract between the parties was never concluded. As such, no work order could be issued on the basis of such purported contract, which never saw the light of day.

27. In such view of the matter, the respondents acted illegally in proceeding to issue the three letters dated October 10, 2019 and the subsequent communication dated November 2, 2019 and in issuing the letter dated November 14, 2019, to the petitioners. In such circumstances, WPA No. 22279 of 2019 is allowed on contest, thereby directing the respondents to revoke the offer of the petitioners with immediate effect. The letters dated October 10, 2019, November 2, 2019 and November 14, 2019, sent by the petitioners to the respondents stand hereby rescinded. The consequential work order and all action taken on the basis of such illegal acceptance of the petitioners' offer also stand cancelled.

28. There will be no order as to costs.

29. Urgent certified website copies of the order shall be provided to the parties upon due compliance of all the requisite formalities.

(Sabyasachi Bhattacharyya, J.)