In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 11678 of 2020

SHRISTI-SPML JV
Vs.
Kolkata Municipal Corporation and others

For the petitioner	:	Mr. Jaydip Kar, Mr. Sourav Kumar Mukherjee, Mr. Saushik Chowdhury
For the Kolkata Municipal Corporation	:	Mr. Alok Kumar Ghosh, Mr. Ramajit Chatterjee
Hearing concluded on	:	08.01.2021
Judgment on	:	12.01.2021

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1 is a joint venture of two companies. It allegedly intended to participate in a tender dated August 2, 2018 for a contract to design and build sewage treatment plant and allied works in connection with the National Mission for Clean Ganga (NMCG) project. The project was conceived and is being implemented nationwide, primarily with the funding of the World Bank.

2. The tender was a two-tier process, contemplating a prior technical bid and subsequent financial bid, to happen consecutively.

3. Prior to the technical bid being opened, the petitioner wrote to the respondents on September 29, 2020 (annexed at page-137 of the writ petition) requesting an amendment of the Minimum Qualifying Criteria (MQC) of the tender so that maximum number of bidders can participate in the bidding and for healthy competition. Such proposed amendment pertained primarily to the distance which was to be covered in the previous works of the bidders for the purpose of the pre-requisite past experience regarding similar projects.

4. The petitioner made several communications to the respondents on this count, indicating on November 27, 2020 (page-142 of the writ petition) that the said NIT condition, which appeared in Addendum 2 dated December 26, 2019 and was reiterated by the authorities vide Addendum No.4 dated November 26, 2020, would allow only a single bidder to qualify on much higher prices than the estimated price, leading to loss of financial resources of the country and precluding fair competition, maximum participation and transparency in the tender process.

5. The petitioner relies on an e-mail communication from the respondents' end dated November 8, 2020 (annexed at page-145 of the writ petition), by which the respondents acknowledged the verbal requests and letters from the petitioner and assured the petitioner that the relaxations in PQ as sought by the petitioner in its letter dated September 29, 2020 might be considered during the opening of technical bid of the project. It was further indicated in the e-mail that the relaxations might be considered based on legitimate practical grounds regarding the said PQ points and for more competitive bidding.

6. However, in utter disregard of their assurance, the respondent-authorities proceeded to open the technical bid on December 10, 2020 without consideration of the petitioner's request for modification of the conditions. As such, the petitioner has preferred the present writ petition seeking cancellation of the concerned tender dated August 2, 2018 and for ancillary reliefs.

7. Learned senior counsel appearing for the petitioner submits that the petitioner had no scope of participating in the tender, since the technical pre-conditions of the NIT were never amended. It is submitted that such condition was tailor-made in favour of the respondent no.5, which was the only successful bidder in the technical bid. It is argued that such a situation was foretold by the petitioner in its previous communications, clearly indicating in its correspondence that refusal to modify the condition would tantamount to awarding the project to a single bidder, which was against all norms of inclusiveness and impartiality governing public tenders.

8. That apart, it is submitted that the respondent no.5 was blacklisted by the UP Jal Nigam Limited at Gaziabad, where respondent no.5 is based, for which the Government had registered a case under Section 304 of the Indian Penal Code and other relevant provisions of law, apart from blacklisting the respondent no.4. Learned senior counsel relies on the annexure at page-3 of the supplementary affidavit filed by the petitioner in connection with the writ petition on this score. By placing reliance on page-4 of the supplementary affidavit, it is urged that even the Bihar Urban Infrastructure Development Corporation, Patna had raised serious allegations against respondent no.5, which resulted in respondent no.5 being blacklisted by the said authority as well.

9. Learned senior counsel submits that the award of contract to respondent no.5 would entail huge loss to public money, which might jeopardize the credibility of the country in the eye of international organizations like the World Bank which are funding the parent project. Respondent no.5, it is submitted, will have the monopoly in participation in the bid in exclusion of all others by virtue of the impugned condition of the NIT and would quote exorbitant prices in the absence of any competition. Such an approach is contrary to the principle of inclusiveness by ensuring participation of maximum bidders, which ought to govern the grant of public contracts.

10. Placing reliance on the judgment of *Michigan Rubber (India) Limited vs. State of Karnataka and others*, reported at *(2012) 8 SCC 216*, learned senior counsel for the petitioner argues that a basic requirement of Article 14 of the Constitution of India is fairness in action by the State and that non-arbitrariness in essence and substance is the heartbeat of fair play. Fixation of a value of the tender, although entirely within the purview of the executive, leaving little role for courts to play in the process, such action of the executive can be struck down if proved to be arbitrary or unreasonable and not in conformity with healthy standards and norms. By placing particular reliance on paragraph 24 of the judgment, it is argued that the tender process ought to be struck down if the process is mala fide or intended to favour someone or is so arbitrary and irrational that the court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached it. Court interference may also occur where public interest is affected.

11. The relevant portion of the said judgment is quoted below:

"Paragraph 23. *From the above decisions, the following principles emerge:*

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

***24**. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

12. In the present case, the impugned tender condition, it is submitted, was suited to serve respondent no.5 and indicates clear favouritism on the part of the respondent-authorities.

13. That apart, the authorities failed to act on the specific assurance given by them regarding consideration of the petitioner's proposed modifications of the tender condition even at the time of opening the technical bid.

14. Learned counsel for the respondent-authorities, on the other hand, argues that the petitioner, admittedly, did not participate in a pre-bid meeting held by the authorities with regard to the tender. Paragraph no.14 at page 13 of the writ petition discloses so. Having not participated in either the pre-bid meeting or the tender process, the petitioner has no *locus standi* to prefer the instant writ petition. The averments in the writ petition, it is submitted, indicate that the petitioner seeks to espouse the cause of L & T, another major operator in the field, and has been set up by the latter to challenge the tender process, although the petitioner itself did not participate at any stage.

15. Furthermore, the tender process was initiated in August, 2018 whereas the petitioner sought for modification only in September, 2020, after sitting tight for two years. This delay exhibits that the petitioner played an opportunistic game and had no intention to participate in the tender process at all.

16. By placing reliance on Memorandum No.6989-F(Y) dated November 19, 2018, issued by the Government of West Bengal, Finance Department, Audit Branch, a copy of which is handed up in court, learned counsel for the respondent-authorities submits that such revised norms for acceptance of tenders with less than three qualified bids on second or subsequent calls contemplates participation of a single bidder as well. Since the present tender process has been alive for a substantially long period, the same comes within the purview of “subsequent calls” as contemplated in the Memorandum. Para II C stipulates that beyond the limit specified thereinabove, that is, beyond Rs. 20 crores, the files should be referred to the Finance Department for acceptance along with specific recommendations of the F A and HoD. Thus, it is argued that the present project of around Rs. 550 crore is also covered by the Memorandum, sanctioning participation even by a single bidder.

17. The respondent-authorities contend that, as per Clause 1.2.6 of the NIT, the bidder has to be sanctioned by the Bank in accordance with the ITB 6.8 and in accordance with the Bank's Guidelines on Preventing and Combating Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (Anti-Corruption Guidelines), only to be ineligible to be pre-qualified for or to bid for or award a contract during such period of time as the Bank shall have determined. The present tender is a sub-project under the National Project of Cleaning of the Ganga River and is funded primarily by the World Bank. Several international and national operators, including the National Ganga River Basin Authority (NGRBA), acting through the National Mission for Clean Ganga (NMCG), constituted under the Environment (Protection) Act, 1986, and the concerned State Governments monitor the project and fix the eligibility criteria. The KMC, in floating the tender, is only implementing such project, the yardsticks for which have already been laid down by the national and international operators governing such project. As such, the KMC is acting under the aegis of the said monitoring authorities and, as a mere implementing authority, does not have any authority to alter the NIT conditions.

18. In such view of the matter, the respondent-authorities seek dismissal of the writ petition.

19. At the outset, it is observed that the petitioner has been requesting modification of the tender conditions to facilitate impartiality and public participation for quite some time, which was not heeded by the KMC. In the absence of any modification of the relevant conditions, the petitioner and/or bidders other than respondent no.5 could not have participated in the tender process in any event, even if they were willing to do so. The willingness of the petitioner to participate in the tender has been pleaded in several places of the writ petition, including but not restricted to paragraph no. 20 of the writ petition.

20. Moreover, the petitioner has, in effect, relied on the doctrines of Promissory Estoppel and Legitimate Expectation, on the basis of the assurance given by the KMC vide e-mail dated November 8, 2020 (annexed at page 145 of the writ petition) disclosing that the petitioner's request of modification might be considered during the opening of technical bid, based on legitimate practical grounds and more competitive bidding. Thus, it cannot be said that the petitioner does not have *locus standi* to challenge the tender process.

21. Mere reference to another major operator in the field, particularly the L & T, does not necessarily imply that the petitioner is espousing the cause of someone else. Such reference might very well be construed as an illustration of exclusion of other major bidders from the process.

22. The non-participation of the petitioner in the pre-bid meeting and/or the tender process, being inevitable in view of the KMC refusing to consider its several requests for modification, does not disqualify the petitioner from moving the present writ petition.

23. The argument as to non-impleadment of the national operators which conceived and monitor the parent project does not hold good since the respondent nos.3 and 4, who are monitoring the project, have been impleaded in the writ petition.

24. As regards the blacklisting of respondent no.4, however, it is clear that the disqualification of bidders for participation in the bid is circumscribed by the standards set by the World Bank and other international and national stakeholders monitoring the project. Clauses 1 to 4 of the invitation of bids dated December 26, 2019 (appearing at page 32 of the writ petition) indicates that the parent project is World Bank-funded and the bid follows the General Procurement Notice for the project that appeared in UNDB online. The NGRBA, Ministry of Jal Shakti, Government of India received financing of US $ 600 million from the World Bank towards the cost of the National Ganga River Basin project. The NMCG and concerned State Governments and the ULB, it is indicated in the said invitation, have entered into a Memorandum of Understanding towards the implementation of the project forming a part of the NGRBA programme. The Kolkata Municipal Corporation (KMC) is obviously implementing a sub-section of the project under the aforesaid

Guidelines and cannot have any independent say in the matter of modification of the tender conditions. Clause 1.2.6 (appearing at page 41 of the writ petition) stipulates that, for being eligible to bid in the tender, the bidder has to be sanctioned by the Bank (meaning the World Bank) in accordance with its relevant Guidelines. Hence, it was beyond the authority of the KMC, the implementer of only a secondary wing of the project, to alter the NIT conditions.

25. As far as the "assurance" by KMC to the petitioner dated November 8, 2020 is concerned, the same merely comprised of a possibility that the petitioner's request "may" be considered on certain grounds and does not give rise to a binding liability on the part of the authorities to mandatorily consider such alteration. Such assurance, in any event, being *de hors* the Guidelines and eligibility criteria stipulated in the parent Memorandum of Understanding, does not form a part of the essential pre-conditions of the tender process. *Michigan Rubber_(supra)* categorically lays down that Governmental actions are amenable to judicial review only to the extent of ascertaining whether the authorities acted validly for a discernible reason and not whimsically for an ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. Fixation of a value of the tender, it was held, is entirely within the purview of the executive and the courts hardly have any role to play in the process except for striking down arbitrary or unreasonable action. If the

Government acts in conformity with healthy standards and norms, such as awarding of contracts by inviting tenders, interference by courts is very limited. Greater latitude is required to be conceded to the said authorities in the matter of formulating conditions of a tender document and awarding a contract, unless such action is found to be malicious and amounts to misuse of its statutory powers. Pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and resources to successfully execute the work. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, interference by court is very restrictive since no person, it was held in *Michigan Rubber (supra)*, can claim a fundamental right to carry on business with the government.

26. In the present case, the tests for interference laid down in *Michigan Rubber (supra)* are not satisfied. The petitioner has failed to establish patent mala fides, favouritism, arbitrariness or irrationality on the part of the respondents sufficient to conclude that no responsible authority acting reasonably and in accordance with relevant law could have reached such decision. There is nothing on record to show that the tender conditions affect public interest. The mere collateral effect of some operators in the field being excluded automatically by dint of the tender conditions is not sufficient justification to interfere with the discretion of the respondents to stipulate tender conditions which falls within the domain of the tendering authority. In the present case, the authority inviting tender acted fully within its powers to enumerate the specific past experience required by it to get the project-at-hand executed. The KMC did so within the bounds of the guidelines set out by the monitoring authorities and the funding Bank. Such condition is not arbitrary, unreasonable or partial from any perspective. The failure of the petitioner or some other operators to meet the stipulated benchmark is not, *ipso facto*, a valid ground for interference by the writ court. The discretion to set the standards come within the exclusive domain of the authorities inviting tender, who are the best judges of the requirements for their project, thus, leaving no scope of interference by the court.

27. The permissibility of a single bidder to participate is borne out clearly by the Memorandum dated November 19, 2018 issued by the Additional Chief Secretary to the Government of West Bengal under the Government of West Bengal, Finance Department, Audit Branch. Such memorandum provides, contrary to the argument of the petitioner (by placing reliance on Para II B thereof) that the upper limit of applicability thereof is Rs.20 crores. Para II C of the Memorandum specifically provides the modality in cases where the tender exceeds Rs. 20 crore (which includes the present project of Rs.550 crore) thus, negating scope of interference on the ground of single bidder participation. Since the present tender is pending from 2018, the bidding process comes within the purview of "subsequent calls", thus, attracting the aforesaid Memorandum and legitimizing single bidder participation.

28. As discussed above, the blacklisting alleged by the petitioner does not cut ice and is irrelevant for the present project, since such blacklisting by certain local authorities does not disqualify respondent no.5 from participation in the impugned tender process, keeping in view the eligibility criteria stipulated in the NIT, in consonance with the national and international agencies monitoring and funding the parent project.

29. In view of the above discussions, the present challenge to the impugned tender must fail.

30. Hence, WPA No.11678 of 2020 is dismissed. Connected application(s), if any, also stand(s) disposed of accordingly.

31. There will be no order as to costs.

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

(Sabyasachi Bhattacharyya, J.)