IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 7162 of 2022

Sumantra Guha & Ors.

Vs.

West Bengal State Electricity Distribution Company Limited & Ors.

For the petitioners	:	Mr. Srijib Chakraborty, Adv. Mr. Suryaneel Das, Adv. Mr. Jibantaraj Das Roy, Adv. Mr. Chiranjit Pal, Adv. Mr. Deeptangshu Kar, Adv.
For the WBSEDCL	:	Mr. S.S. Koley, Adv.
For the Proforma respondent no. 2	:	Mr. Anish Kumar Mukherjee, Adv.
Last Heard on	:	14.12.2022
Delivered on	:	21.12.2022.

Moushumi Bhattacharya, J.

1. The petitioners are 12 partners of different Chartered Accountant (CA) Firms who are aggrieved by a letter issued by the West Bengal State Electricity Distribution Company Limited (WBSEDCL) on 11.3.2022 by which the petitioners were requested to accept the lowest rate of professional fees for key personnel of the CA Firm as provided in the impugned letter. The petitioners seek quashing and cancellation of this letter.

2. The cause for the petitioners' grievance with regard to the impugned letter will appear from the following briefly stated facts.

3. WBSEDCL issued a Notice Inviting Request For Proposal (NIRFP) for Empanelment of Internal Auditor for 850 auditable locations all over the State. Experienced and reputed professional firms of Chartered Accountants, Cost Accountants, Engineers, Information Technology professionals with specialisation in internal audit were asked to submit their proposal after fulfillment of the qualifications in the Notice. Qualifying criteria and specifications of the audit team were indicated in the NIRFP. The Reserve Price for professional fees cum Price Bid was also indicated in the Notice (Clause 11.0). The Clause provides the Reserve Price for professional fees, daily allowance of the Partner and the Team Leader in a chart set out under Clause 11.0 and the Firm / bidder was required to match the price offered by the L1 bidder.

4. According to learned counsel appearing for the petitioner, the price offered by two of the L1 bidders were subsequently again negotiated with the

respective two bidders by WBSEDCL and revised L1 prices were communicated to the petitioners by way of the impugned letter. Counsel submits that the petitioners were present at the time of the initial offer made by the L1 bidder which was substantially higher than the renegotiated price subsequently arrived at between the L1 bidders and WBSEDCL. Counsel submits that the fee chart in the impugned letter dated 11.3.2022 reflects the renegotiated price which is substantially lower than the initial price offered by the L1 bidders. It is also submitted that the revised offer was unviable for CA Firms.

5. Learned counsel appearing for the respondents/WBSEDCL relies on a Report filed by the WBSEDCL which states that 15 out of 27 Firms qualified for the tender and the price bid was opened on 22.2.2022 in the presence of the representatives of all 15 Firms.

6. All the 15 Firms were found to be successful in terms of the technical part of their respective bids. Counsel submits that the tender Committee of WBSEDCL having found the L1 rates to be significantly lower than the Reserve Price mentioned in the NIRFP, decided to ask the other 13 Firms to match the revised price offer made by the two L1 bidders. It was on 9.3.2022 that the Tender Committee arrived at the subsequent negotiated rates which were then shared with all the 15 eligible Firms by way of the impugned letter dated 11.3.2022. Counsel submits that the petitioners were excluded from the bid and were free to participate in the tender at the revised prices stated in the impugned letter of 11.3.2022.

7. The controversy in this writ petition revolves around the renegotiation of rates between WBSEDCL and the two L1 bidders. The price quoted in the impugned letter of 11.3.2022 was actually a revised offer that was subsequently arrived at between the WBSEDCL and the two L1 bidders is an admitted fact. The contents of the impugned letter, as well as the statements made in the Report of WBSEDCL, confirm the fact of renegotiation. The question is, whether the subsequent negotiation with the two L1 bidders warrants judicial review of the said action under Article 226 of the Constitution of India.

8. Notwithstanding, the limited scope of interference with respect to tenders in writ jurisdiction, a Writ Court would not hesitate to interdict an action taken by a tendering authority if the action falls short of acceptable standards of accountability and transparency. A tender may be challenged on the anvil of an unreasonable clause or the method of selection which favours a particular bidder or a group of bidders and excludes others from the fray. Any act which would casts a shadow on transparent processes and mechanisms would be amenable to judicial review. Public bodies, particularly those engaged in public utility services, have a higher benchmark of accountability in tender matters.

9. The act of subsequently negotiating with the two L1 bidders after the closure of the Request for Proposal submission date, fails the test of transparency in the following ways.

10. First, Clause 9.9 of the NIRFP provides that

"The RFP once submitted by intending firm cannot be revised, modified or re-submitted"

Clause 20.7 provides that empanelled Firm/s shall be selected after giving them the option to match the L1 price.

Clause 20.9 provides that the confirmations received from the firms matching the L1 bidder price shall be considered for subsequent selection and empanelment.

11. The above Clauses indicate that the fulfillment of the eligibility conditions by the intending Firms, the Price Bids given by the Firms, the selection of the L1 offer (the lowest Price Bid offered by the eligible Firm / bidder) and the subsequent matching of the L1 price by the other firms were to take place and be considered by the tendering authority at one go. In other words, each of the aforesaid stages of the tender, particularly the selection of the L1 bidder/s and the other bidders asked to match the L1 price, were to take place in a linear and sequential manner as provided in the Notice. More importantly, each of the stages was to be governed by Clause 9.9- which has been set out above- which prohibits any subsequent revision, modification or re-submission from the stage of submitting the Price Bids till the stage of matching of Price Bids to the L1 offer. The admitted renegotiation between the tendering authority / WBSEDCL and the two L1 bidders on 9.3.2022 (Paragraph 5 of WBSEDCL Report) is hence a departure from the tender conditions and particularly Clause 9.9 thereof.

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12. Second, paragraph 5 of the writ petition states that the financial bids of the successful bidders were opened on 22.2.2022 and the L1 rates being Rs. 2,000/- professional fees for Partner, Rs. 2,000/- professional fees for Team Leader and Rs. 1,500/- daily allowance for Partner and Rs. 1,000/- daily allowance for Team Leader were announced to all the bidders. WBSEDCL has not controverted the L1 rates quoted in the impugned letter of 11.3.2022 where the professional fees of Partner is reduced from Rs. 2,000/- to Rs. 865/-; for the Team Leader from Rs. 2,000/- to Rs. 1,200/-; the daily allowance for Partner reduced from Rs. 1,500/- to Rs. 1,200/-. The subsequent figures are the result of the renegotiation which admittedly was arrived at in the absence of the other 13 Firms. The absence of the petitioners from the subsequent negotiation makes the process susceptible to challenge including for the distinct possibility of arm-twisting the L1 bidders to offer lower rates which would then have to be matched by the other 12 bidders in accordance with Clause 11.0 of the NIRFP.

13. The probity of conduct which is expected of a public sector enterprise is singularly lacking in the present case. The terms and conditions of the Notice contemplate a bidder exercising an informed choice before participating in the bid. The decision to participate is based on a particular set of information which is made available to a prospective bidder at the relevant point of time. The bidders expressed interest to participate in the bid on the basis of whether the bidder considered the information provided as an attractive proposition to throw his hat into the ring. The information

provided at a given point of time also presumes that the information will remain unchanged during the tenure of the bid. This presumption is crystallised in clause 9.9 of the tender conditions. Hence, the subsequent negotiation with the two L1 bidders after the other 13 bidders had been informed of the initial price bid put in by the two L1 bidders, is not only a departure from the tender conditions but also akin to changing the rules of the game after the bidders had entered the field of play on a set of rules provided at the start of the match. If the rules were at all to be changed, the bidders would certainly have a legitimate expectation to be made aware of the changed rules, which was not done in the present case.

14. The objective of a tender is to ensure broad-based participation of all eligible bidders who would then be selected in accordance with the terms of the tender and in a fair and transparent manner without any arbitrary or unfair selection of one particular bidder / group of bidders. Any tender term which has the effect of narrowing down the competition to a select few by opaque means would attract the intervention of a Writ Court.

15. In the present case, the Reserve Price fixed in clause 11.0 was the ceiling limit beyond which a bidder could not submit a price bid. The price bids of two L1 bidders were opened on 22.2.2022 in the presence of the representatives of all 15 Firms (paragraph 3 of WBSEDCL Report). Hence, the 13 other bidders were made aware of the price offered by the L1 bidders as disclosed to them on 22.2.2022. The other 13 bidders were hence required to match this price - set out in paragraph 5 of the writ petition. The

negotiation meeting between WBSEDCL and the two L1 bidders took place on 9.3.2022 where the other 13 bidders were not present. The revised offer, as stated in the impugned letter of 11.3.2022, being substantially lower than the initial price bid of the L1 bidders on 22.2.2022, was given to the 13 other bidders of 11.3.2022 and the 13 other bidders were asked to match the revised price.

16. The effect is that the 13 other bidders – 12 of who are before this Court - were given a new ceiling to match without being given an opportunity to participate or contest the renegotiated offer. The new price/revised offer has not only narrowed down the competition but is also reflective of a "*take it or leave it*" conduct of WBSEDCL. In other words, WBSEDCL has successfully excluded the 12 petitioners from the bid after negotiating the price it wanted with the two L1 bidders. There is an unmistakable sense of manipulation in asking the petitioners to match a price which was arrived at behind the back of the petitioners. The revised offer/price is not one of volition or informed decision-making, even from the view of the two L1 bidders, but a unilateral act of a dominant party prevailing over a weaker party who has a limited choice in the matter.

17. The above factors are sufficient to persuade this Court to interfere in the manner of arriving at the revised/renegotiated offer and asking the petitioners to match that offer.

18. The defence of WBSEDCL that there is no arbitrariness in the impugned letter since the petitioners are free to accept or reject the revised

offer is not a satisfactory answer. Besides the reasons stated above, WBSEDCL has unilaterally departed from the terms of the NIRFP and circumvented free participation of all the bidders including the petitioners before this Court. The bidders are essentially being asked to exercise their choice of matching the revised offer in changed circumstances of which the bidders were not given any notice. Hence, this defence does not dispel the arbitrariness in the tender process.

19. For these reasons, this Court is of the view that the impugned letter dated 11.3.2022 asking the petitioners to accept the renegotiated L1 bid price is arbitrary and unreasonable. The impugned letter hence deserves to be recalled and cancelled. WBSEDCL is accordingly directed to withdraw the impugned letter of 11.3.2022 and revisit the process envisaged in the NIRFP after discussions with the petitioners and the two L1 bidders. The process shall be concluded within four weeks from the date of the first discussion and WBSEDCL shall ensure that the selection of firms for empanelment of internal auditors is done in a fair and transparent manner.

20. WPA 7162 of 2022 is disposed of in terms of the above.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of the requisite formalities.

(**Moushumi Bhattacharya, J.**)