In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 23775 of 2022

BLA Projects Private Limited

vs.

Damodar Valley Corporation & Ors.

For the petitioner	:	Mr. Jaydip Kar, Adv. Mr. Amitesh P. Ray, Adv.
For the UOI	:	Ms. Purabi Saha (Das), Adv.
For the respondent nos. 1 to 3 / DVC	:	Mr. Anirban Ray, Adv. Mr. Swarajit Dey, Adv. Mr. Subhadeep Basak, Adv.
Last Heard on	:	16.11.2022.
Delivered on	:	02.12.2022.

Moushumi Bhattacharya, J.

1. The petitioner is aggrieved by a rejection in respect of a tender floated by the respondent no. 1, Damodar Valley Corporation (DVC). The bid was in respect of lifting of coal from the coal mines in Talcher area in Odisha. The impugned communication is dated 31st October, 2022. A further letter dated

5th November, 2022, brought on record by way of a supplementary affidavit, reiterates the petitioner's rejection from the bidding process. The letter of 5th November, 2022 was given in response to the petitioner's letter of 1st November, 2022 asking for furnishing of reasons for the rejection.

2. The first letter dated 31st October, 2022 simply states that the petitioner's tender was rejected during technical evaluation by a committee of DVC for "Techno Commercial not compliant". There is no other reason indicated in this letter. The subsequent letter dated 5th November, 2022 spells out the reason; namely that the petitioner was related to pilfering of DVC's good quality coal and replacing the same with other materials while executing a coal transportation contract with DVC. The letter mentions an FIR registered on 9th June, 2018 and a Chargesheet/final report issued on 24th October, 2019. The letter alleges that the petitioner suppressed the pilferage and fraudulent activities and concludes that the petitioner has transgressed section 3 of the Integrity Pact.

3. Learned counsel appearing for the petitioner submits that the petitioner fulfilled each of the qualifying criteria in the tender documents and the Invitation for Bids. Counsel submits that the petitioner was not given any opportunity of hearing despite several mails requesting for such. Counsel submits that the charge of pilferage and fraudulent practices are of 2018. It is also submitted that the petitioner has not been convicted in any criminal cases and that mere pendency of a criminal case cannot act as a bar on participating or succeeding in the tender.

4. Learned counsel appearing for DVC places emphasis on the charge-sheet filed against the petitioner under several sections of the Indian Penal Code. Counsel submits that the petitioner suppressed material facts at the time of participating in the tender and relies on section 2(1)(c) of the Integrity Pact which requires that the bidder shall not commit any offence under the Indian Penal Code or the Prevention of Corruption Act. Counsel submits that the petitioner's bid has been rejected on the ground of violation of section 3 of the Integrity Pact and not section 5. Section 3 provides for disqualification from tender process in case of such violation and section 3 does not limit the period to 3 years. It is submitted that the DVC is entitled to doubt the reliability and credibility of a bidder and particularly where the petitioner has suppressed material facts. Counsel disputes any arbitrary treatment of the petitioner.

5. The decision to exclude the petitioner from the tender is premised on the transgression of section 3 of the Integrity Pact. The (loftily-named) Integrity Pact forms part of the tender documents and is essentially a set of organisational procedures for ensuring fairness and transparency in the tender process. Section 3 of the Integrity Pact empowers the Principal to disqualify a bidder/contractor from a tender process if the bidder has violated the provisions of section 2 before the award or during execution or in any other form such as to put his integrity in question. Section 2 – "Commitments of the Bidder(s)/Contractor(s)" provides for a set of requirements which the bidder will have to commit to in order to prevent corrupt practices. The requirements are in the nature of refraining from wrongful material benefit, entering into undisclosed agreements with other bidders, consequences of

commission of offences under the IPC/Prevention of Corruption Act and offences of a similar nature.

6. The reason for disqualifying the petitioner, as stated in the subsequent letter of 5.11.2022, is that the petitioner has indulged in fraudulent practices which resulted in an FIR being registered on 9.6.2018 and a charge-sheet of 24.10.2019. The charge of pilferage and fraudulent practices do not form part of the commitments under section 2 of the Integrity Pact. This is relevant since the impugned disqualification is grounded on transgression of section 3 which in turn is confined to a violation of section 2 of the Integrity Pact. Section 3 does not refer to any past transgression. Notably, the letter communicated on 5.11.2022 refers to an FIR of 2018 and a charge-sheet of 2019 in connection with alleged pilferage on the part of the petitioner.

7. Section 5 of the Integrity Pact covers previous transgressions but restricts the requirement of declaration of such past transgressions to 3 years preceding the Integrity Pact which forms part of the tender documents of September, 2022. Section 5(2) refers to disqualification from the tender process and banning of business dealings if the bidder makes an incorrect declaration of previous transgressions. The impugned letter of rejection mentions an FIR of 9.6.2018 and a Chargesheet of 24.10.2019. The petitioner participated in the bid in September, 2022. Hence, more than 3 years had passed from both the FIR and the Chargesheet and hence the petitioner does not come within the stricture of section 5 of the Integrity Pact.

8. Significantly, the impugned letter of rejection confines the ground to section 3 of the Integrity Pact which does not refer to previous transgressions

and only justifies the exclusion on violation of section 2 of the Integrity Pact. The fact that the alleged pilferage does not come within section 2 has already been discussed above. Moreover, the Principal can resort to the procedure for "banning of business dealings" under section 3 provided the bidder has committed the transgression before the award of the tender in the form of violation of section 2.

9. In this context it is further relevant to state that the allegation of pilferage and fraudulent practice made in the letter of rejection was the subject matter of an arbitration proceeding where the petitioner was cleared of all such allegations. The learned Arbitrator came to a specific finding that the allegations were false and proceeded to pass an Award in favour of the petitioner for damages to the tune of Rs. 15.41 crores. The Award dated 14.8.2021 is part of the record and was based on a claim by the petitioner against the respondent. The defence taken by DVC that the Award is now part of a setting aside application under the provisions of The Arbitration and Conciliation Act, 1996, does not detract from the admitted position that the petitioner was absolved of the allegations of pilferage and fraudulent activities as on the date of the petitioner's participation in the bid. The fact of pending proceedings and the uncertainty thereof cannot be used against the petitioner.

10. Moreover, section 5 of the Integrity Pact restricts the culpability of past transgressions to 3 years. There is also no question of the petitioner being liable for "banning of business dealings" under section 5(2) since the petitioner has not made any incorrect statement on previous transgressions within 3 years preceding the tender document, i.e. September, 2022. The

charges made against the petitioner under the FIR of 2018 and the Chargesheet of 2019 are pending adjudication and the trial is yet to commence.

11. Section 7 of the Integrity Pact refers to criminal charges against bidders and authorises the Principal to inform the Chief Vigilance Officer in case any knowledge is obtained regarding an act of corruption by a bidder. This section would also not be applicable since that is not the case made out in the rejection letter.

12. The impugned letter of rejection virtually amounts to blacklisting of the petitioner without the petitioner being given any opportunity to place its case. The respondent, being an authority amenable to writ jurisdiction, has a duty to preserve and uphold the principles of natural justice. Not affording the opportunity of hearing to the petitioner amounts to a colourable exercise of power which is contrary to Articles 14 and 19(1)(g) of the Constitution of India. The respondent can exclude the petitioner from participating in the tender provided the ground for exclusion comes within the rules and requirements framed by the respondent and referred to in the impugned letter of rejection. The ground given in the impugned letter does not match the corresponding sections of the Integrity Pact which is part of the tender documents. The argument that DVC, as the employer, enjoys a necessary leeway to decide on the threshold of integrity, though attractive, must however be within the framework of the requirements of the tender. The exclusion of the petitioner cannot be for reasons which appear to be outside the specifics of the Integrity Pact.

13. This court therefore finds the impugned decision to be arbitrary for being extraneous to the tender conditions. The fact also remains that the first letter of rejection dated 31.10.2022 is cryptic and contains no reason at all. The respondent has sought to supplement the first rejection letter by way of the second communication dated 5.11.2022. It is arguable whether the respondent can improve upon the bare-bones first rejection letter in this manner.

14. *N.G. Projects Limited vs. Vinod Kumar Jain; (2022) 6 SCC 127* involves a case where the tenderer had not submitted the documents in the required form. The present case is wholly different on facts. *Central Coalfields Limited vs. SLL-SML (Joint Venture Consortium); (2016) 8 SCC 622* involved relaxation of terms of the tenders in question. This also has no application to the facts of the case. The unreported judgment of a Division Bench of this Court in *Airport Authority of India vs. Masti Health & Beauty Private Limited (MAT 1184 of 2022)* was concerned with the tenderer not complying with the terms of the tender and challenging the tender on that basis. The petitioner in the present case complains of the rejection being on grounds outside the tender conditions.

15. The impugned letters of rejection dated 31.10.2022 and 5.11.2022 are quashed in view of the above reasons. The respondent is directed to permit the petitioner to participate in the tender and evaluate the technical bid put in by the petitioner. Admittedly, only technical bids have been opened in the tender and no work order has been issued till date.

16. WPA No. 23775 of 2022 is disposed of in terms of this judgment.

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

(**Moushumi Bhattacharya, J.**)