

22.12.2022
sayandeep
Sl. No. 03
Ct. No. 05

WPA 24943 of 2022

Lalita Devi Sureka
-Versus-
Union of India & Ors.

Mr. Rupak Ghosh
Mr. Jayanta Sengupta
Ms. Shebatee Datta
Ms. Poulami Roy

....for the petitioner

Mr. Kalyan Kr. Chakraborty

.....for the UOI

Mr. Satrajit Sinha Roy

.....for the respondent No. 7

The petitioner is aggrieved by a reply dated 17.10.2022 to an application made by the petitioner for information relating to a tender in which the petitioner participated in August, 2022. The information given by the PIO under the Right to Information Act, 2005 is that the petitioner, although adjudged as L2 in the tender, was not issued the letter of acceptance by reason of not fulfilling the eligibility criteria.

The admitted case before the Court, as would be reflected from the submissions made on behalf of the parties, is that the petitioner's tender was rejected as the petitioner did not upload the requisite information as per Annexure-VIB along with copies of audited balance sheets duly certified by a Chartered Accountant.

The respondent Eastern Railways was directed to file a Report indicating the cause of the rejection of the petitioner's bid. The Report discloses that the only reason for the petitioner's disqualification is that the petitioner failed to upload the document under Serial No. 1 of the eligibility conditions in the Tender Document.

The tender relates to painting of coaches of the Eastern Railways. The eligibility conditions under Clause 4 of the Tender Document required submission of the information as per Annexure-VIB along with copies of audited balance sheets duly certified by a Chartered Accountant. Annexure-VIB is part of the records and is in a particular format which the bidder was required to fill in along with its signature and seal. The petitioner admittedly uploaded a document dated 22.7.2022 signed by Chartered Accountants confirming that the petitioner received 4 crores as minimum average contractual payments in the last three financial years from the Indian Railways as required under the financial eligibility criteria under Clause 18.2 of the Tender Document. The supporting documents are also part of the records and were made available to the Tendering Authority at the relevant point of time. In other words, the petitioner uploaded the documents required under Clause 18.2 of the Tender Document, but not in the recommended format of Annexure-VIB.

The question to be decided is whether the petitioner substantially complied with the tender conditions - specifically Clause 18.2 - and whether such substantial compliance could lead to the petitioner's disqualification.

Learned counsel appearing for the Eastern Railways and the private respondent submit that the petitioner's disqualification was in view of non-compliance of an essential condition in the Tender Document. It is also submitted that a work order has been issued in favour of the private respondent sometime in September, 2022.

Clause 18.2 of the Tender Document which sets out the financial eligibility criteria requiring the tenderer to submit requisite information as per Annexure-VIB along with copies of audited balance sheets duly certified by a Chartered Accountant does not fall under "essential conditions" so to speak. Essential conditions or mandatory requirements are always specifically categorised as such in a tender document. Without there being any such categorisation in the present tender document, this court is not inclined to come to any such conclusion. Further Clause 15 of the Tender Document provides for clarifications on the tender submitted where the Railways may ask the tenderer for any clarification in order to assist in the evaluation of tender. Admittedly,

the Railways did not seek any clarification on the disputed aspect, namely, whether the petitioner's uploading the requisite information without Annexure-VIB, would amount to non-compliance of the tender conditions.

The fact that the Clause 18.2 or any other similar clause relating to financial eligibility criteria was not treated as an essential condition even by the respondent Railways would be evident from the petitioner being adjudged as L2. This is reflected from the reply under the RTI Act. The petitioner could have been excluded at the very outset if the petitioner had been in breach of an essential condition. Further, the nature of a clause/tender conditions is assessed by the consequence of non-compliance of such clause. The present Tender Document does not indicate any such irreversible condition.

In *Tata Cellular vs. Union of India*; (1994) 6 SCC 651, a Special Bench of the Supreme Court opined that a mistake in relation to a non-essential matter which is peripheral and collateral should be viewed in a favourable light. A learned Single Judge of this Court, as his Lordship then was, in *Skanska International Civil Engineering AB vs. West Bengal State Electricity Board*; (2001) 2 Cal LT 133 held that the details of a bid must be read in totality and not in isolation of one another. The Court was also of the view that non-essential terms

of a tender while taking a decision should not be rigidly followed.

Vidarbha Irrigation Development Corporation vs. Anuj Kumar Agarwala; (2020) 17 SCC 577 relying on *Bakshi Security & Personnel Services (P) Ltd. vs. Devkishan Computed (P) Limited*; (2016) 8 SCC 446 held that an essential condition of a tender has to be strictly complied with. Since this court is of the view that the financial eligibility criteria is not an essential condition, *Vidarbha Irrigation* does not assist the private respondent.

In any event, this court is of the view that the petitioner had uploaded all the requisite information under Clause 18.2 and / or such other similar clauses in the Tender Document before the Tendering Authority at the relevant point of time. The view taken by the Tendering Authority of the alleged non-compliance is only by reason of the information not being uploaded in the format of Annexure-VIB. This is clearly a rigid and technical view of the matter.

The Railways and the private respondent have also not been able to state any particular date on and from which the private respondent has been engaged by the Railways. No such evidence has also been furnished in the Report.

All the above factors taken together persuade this Court to hold that the disqualification of the petitioner

on the ground stated in the reply of the PIO is arbitrary and unreasonable. It is also significant that the order of rejection was not communicated to the petitioner but had to be obtained by the petitioner by filing an application under the RTI Act.

WPA 24943 of 2022 is accordingly disposed of by restraining the respondents from giving any further effect to the decision taken by the Eastern Railways in rejecting the offer of the petitioner. The Railways shall not proceed in terms of the impugned decision of disqualification of the petitioner. The respondents shall revisit the decision and evaluate the eligibility criteria of all the bidders including the petitioner afresh and come to a reasoned decision within 6 weeks from date. The reasoned order shall be communicated to the petitioner within a week from the date on which such reasoned order is passed by the Eastern Railways / the Tendering Authority.

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

(Moushumi Bhattacharya, J.)