

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
Constitutional Writ Jurisdiction
Appellate Side**

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 2537 of 2022

M.P. Sitani and Sons.

Vs.

National Projects Construction
Corporation Limited & ors.

For the petitioner	:	Mr. Bikramaditya Ghosh. Mr. Abhishek Baran Das. Mr. Supriya Singh. Ms. Srijoni Chongdar.
For the respondent nos. 1 & 2	:	Mr. Debjyoti Basu. Ms. Reshmi Mukherjee.
For the respondent no. 3	:	Mr. Arun Kumar Upadhyay.
Last Heard on	:	02.09.2022.
Delivered on	:	05.09.2022.

Moushumi Bhattacharya, J.

1. The petitioner is aggrieved by the rejection of the Technical Bid submitted by the petitioner for construction of Kendriya Vidyalaya Schools at Raninagar, West Bengal. The petitioner's Technical Bid was rejected on the ground of the petitioner not submitting the required balance-sheet and not submitting documents in relation to a Site visit in terms of the Pre-qualification and Instructions to Bidders in relation to the Tender. The petitioner prays for a direction on the respondent no. 1, National Projects Construction Corporation Ltd for cancelling the rejection and for a direction on the respondent no. 1 to consider the financial bid of the petitioner along with the other financial bids received by the answering respondent.

2. The petitioner assails the impugned rejection on two grounds. First, that the petitioner complied with the Site visit requirement under the terms of the tender documents and also furnished the required turn over/balance-sheet in terms of the tender documents. Learned counsel appearing for the petitioner also complains against the selection of the private respondent/respondent no. 4 on the ground that the said respondent did not fulfill the pre-bid qualifications criteria of the tender documents.

3. Learned counsel appearing for the respondent no. 1 takes a point of maintainability and places clauses 75.0 and 76.0 of the tender documents which provide for arbitration and an exclusive jurisdiction clause of Courts in

New Delhi and Gurugram having the sole jurisdiction to deal with matters arising from the tender.

4. The maintainability point should be considered and answered before the Court deals with the merits of the matter. Both clauses 75.0 and 76.0 make it clear that the said clauses would be applicable with regard to any dispute, controversy or claims arising out of or relating to this “Agreement”. The agreement/contract has been defined in clause 1.0 as *“the documents forming the tender and acceptance thereof and the agreement executed between the competent person on behalf of NPCC and the contractor....”*. Hence, the arbitration and jurisdiction clauses would kick in only upon the offer of NPCC (respondent no. 1) being accepted by the contractor (the successful bidder) and upon an agreement being executed between the two pursuant to such acceptance of the offer. The present case is at the Notice Inviting Tender stage and the petitioner is complaining against its rejection at that stage. The clauses relied on by learned counsel appearing for the respondent no. 1 would be applicable only after a contract is executed between the petitioner and the respondent no. 1.

5. The other point taken of this Court not having the territorial jurisdiction to entertain the writ petition is also not acceptable since Article 226(2) of The Constitution of India confers the power under Article 226(1) on High Courts to issue directions, orders or writs to any Government, authority or person in relation to the territories within which the cause of action, wholly or in part,

arises for the exercise of such power notwithstanding the seat of such Government or authority not being within those territories. This takes care of the respondent's argument as the tender documents reflect that the Kendriya Vidyalaya Schools were to be constructed at West Bengal. The petitioner also received the impugned rejection within the territorial jurisdiction of this Court. *Sri Pankaj Panwar vs. Lalit Kala Akademi; AIR 2015 Cal 67* may be referred to in this context which held that service of an order or notice is an event which is essential and integral to the *lis* connected with the action impugned in a writ petition. The Court was further of the view that affectation of a right or interest by reason of such order/notice is a substantial fact forming a part of the bundle of the facts constituting the cause of action and would be relevant for determining the question whether the writ petition should be entertained or not.

6. By reason of the above, this Court is inclined to accept the contention of the petitioner and hold that the present writ petition is maintainable.

7. The merits of the matter should be divided into two aspects. First, the issue of the Site Visit. Clause 2.14 of the Pre-qualification and Instructions to Bidders requires the bidder to visit and examine the Site of Works and its surroundings. Clause 2.14e further requires that the Agency should visit the site and certify the same by the concerned Zonal Manager and that the failure to do so would lead to disqualification. The name of the contact person has been provided together with the telephone number. The documents placed

before the Court clearly show that the petitioner wrote to the respondent no. 1 on the date specified for Site Visit that the petitioner had complied with the said condition. This is corroborated by photographs as well as a letter dated 22.8.2022 from a person of the Raninagar area. Significantly, this letter was withdrawn on 26.8.2022 on a flimsy ground. The call records annexed to the writ petition further shows that the petitioner had made several attempts to connect with the designated person mentioned under clause 2.14e but failed to do so. This is also recorded in letter dated 22.8.2022 from the petitioner to the respondent no.1.

8. The rejection of petitioner's bid on the ground of failure to submit the Site Visit is hence contrary to records and cannot be sustained.

9. The second ground for disqualification is the non-submission of the balance-sheet for 2021-2022. A proforma/statement of the respondent no. 1 which was used in relation to this particular requirement and is part of the supplementary affidavit filed by the petitioner indicates that the qualifying criteria would include attaching the balance-sheet along with profit and loss statement duly certified by the chartered accountant for last three years ending 2020-21. The criteria does not include 2021-2022. In any event clause 1(iv) of the pre-qualification terms provides that in case of non-availability of balance-sheet for FY2021-22, a provisional balance-sheet duly certified by chartered accountant may be considered. Incidentally, the petitioner uploaded the provisional balance-sheet for 2021-2022 within the time frame provided in the

tender documents and before opening of the Technical Bid. Therefore, this Court is also unable to find any non-compliance of the tender conditions on the part of the petitioner or the basis for the petitioner's disqualification on this ground.

10. The disqualification of the petitioner in respect of the alleged non-furnishing of the required balance-sheets would become more suspicious when compared to the documents uploaded by the private respondent who was declared the successful bidder. The documents bear the stamp of a chartered accountant where several pages of the balance-sheets do not have the signature of the chartered accountant. This Court also finds substance in the requirement to provide a Unique Document Identification Number (UDIN) for practising chartered accountants from 1st February, 2019 which has not been provided by the private respondent. The UDIN requirement would appear from a circular of The Institute of Chartered Accountants of India.

11. The credential evaluation at Stage-II of the pre-bid qualification gives a table of allotment of points depending on the description of the work experience and other credentials of the bidder. The petitioner has relied upon a chart giving the break-up of marks according to the petitioner's credentials which reflects that the petitioner should have been awarded 88 marks at Stage-II of the tender documents. Therefore, even if the petitioner's alleged non-furnishing of the documents stated in the rejection is taken into account, the petitioner's projected score is much above the criteria under clause 2 (i) where a bidder is

required to score a minimum of 70% marks in technical / credential evaluation for being considered as technically qualified.

12. The above factors persuade this Court to hold that the petitioner has made out a case for grant of relief. Significantly, the petitioner does not seek cancellation of the tender or stay of the process. The petitioner only seeks a direction on the respondent no. 1 to revisit the disqualification of the petitioner on the two grounds stated in the rejection. The petitioner also prays for a direction on the respondent to consider its financial bid. The arguments of the private respondent on the private respondent complying with the tender conditions is not relevant since the petitioner does not seek a cancellation of the selection of the private respondent as the successful bidder.

13. *Silppi Constructions Contractors vs. Union of India*; (2020) 16 SCC 489 and *N.G. Projects vs. Vinod Kumar Jain*; (2022) 6 SCC 127 has been cited on behalf of the respondent no. 1 for the proposition that a writ court should be circumspect in examining the terms and conditions of a tender process and do not assist the case of the respondent no. 1. The difference between a writ court interfering with a fructified decision and a decision-making process is well settled. There are several well-known decisions where a writ court has been encouraged to interfere with a decision making process which is either illegal, arbitrary or against the procedural fairness. The present case fulfills the aforesaid criteria as the disqualification of the petitioner is found to be arbitrary and contrary to the very terms set by the respondent no. 1 in the pre-

qualification instructions. The decision making process in rejecting the technical bid of the petitioner is irregular and calls for interference by the writ court.

14. WPA 2537 of 2022 is accordingly disposed of with a direction on the respondent nos. 1 and 2 to revisit the disqualification of the petitioner and come to a fresh decision on the technical bid submitted by the petitioner. The petitioner's financial bid shall also be considered by the answering respondents over the work described in the tender. The petitioner's eligibility shall be evaluated/re-evaluated in accordance with the tender conditions and in accordance with law before the respondent no.1 proceeds further in terms of the tender documents.

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

(Moushumi Bhattacharya, J.)