

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 9529 of 2023

Rishikesh Chem & Anr.
Vs.
The State of West Bengal & Ors.

For the writ petitioners	:-	Mr. Biswaroop Bhattacharya, Adv. Mr. Pratik Majumder, Adv.
For the State	:-	Mr. Nilotpall Chatterjee, Adv. Mr. Amrita Lal Chatterjee, Adv.
For the KMC	:-	Mr. Biswajit Mukherjee, Adv. Mr. Gopal Chandra Das, Adv.
For the respondent no. 9	:-	Ms. Noell Banerjee, Adv. Mr. Ritaban Sarkar, Adv. Mr. Anirban Sarkar, Adv. Ms. Shreya Ghosh Dastidar, Adv. Ms. Sakshi Jha, Adv.
Heard on	:-	20.04.2023 & 24.04.2023
Judgment on	:-	24.04.2023

Amrita Sinha, J.:-

The matter relates to a tender floated by the Kolkata Municipal Corporation for supply and delivery of liquid chlorine from proven and reputed manufacturer/or their authorized agent.

The eligibility criteria for participation in the tender, inter alia, mentions that the intending tenderers should produce credentials of similar nature of completed work of minimum value of 40% of the estimated amount put to tender during five years prior to the date of issue of the tender notice or the intending tenderers should produce credentials of two similar nature of completed work, each of the minimum value of 30% of the estimated amount put to tender during five years prior to the date of issue of the tender notice.

According to the tender document, similar nature of work includes supply of any material.

The notice inviting tender mentions that the bidder should have valid explosive license at the time of opening of the bid, L1 bidder should submit the authorization certificate from the manufacturer whose material it is going to supply. If the L1 bidder fails to submit the authorization certificate from the manufacturer within seven days, then the earnest money deposit of L1 bidder will be forfeited and the bidder will be debarred from participating in all future tenders upto three years.

The notice inviting tender mentions about a pre bid meeting and all the interested parties could attend the meeting for any query or information.

The petitioner no. 1 and the private respondent no. 9 participated in the tender process. Both the tenderers qualified in the technical bid and proceeded to the financial bid stage. The private respondent was found to quote the lowest price and emerged as L1 bidder. However, the work order is yet to be issued.

The petitioner submits that the earlier tenders floated for supply of the same chemical clearly mentioned that similar nature of work included 'supply of any water treatment chemical'. In the notice inviting tender for the present year, the said clause was replaced and 'supply of any materials' was included.

It has been alleged that the eligibility criteria of the notice inviting tender was tailor-made to suit the private respondent who does not have any experience with regard to supply of liquid chlorine. The private respondent not being experienced enough to participate in the tender process, the Corporation deliberately changed the eligibility criteria in the notice inviting tender.

The petitioners stress that the private respondent may have experience in supply of other materials but does not have any experience in supply of liquid chlorine. The petitioner is the best suitable candidate for being selected in the

tender process as the petitioner has enough experience in performing similar nature of work viz, supplying liquid chlorine.

It has been argued that liquid chlorine is a very important ingredient in the water treatment plant and the Corporation, in the interest of the general public, ought to have restricted the eligibility criteria to participants having wide experience in supplying liquid chlorine and not permit other suppliers to contest the tender process.

Even though there was a scope for pre bid meeting to be conducted but the said meeting never took place, and, as such, the petitioners never had the opportunity to raise issue with the eligibility criteria.

The petitioners rely upon the following judgments in support of their submission that the act of the Corporation in widening the net to include suppliers of any materials to participate in the instant tender process calls for judicial review and interference by the Court.

a) ***Dr. (Major) Meeta Sahai vs State of Bihar & Ors.*** reported in **(2019) 20 SCC 17.**

b) ***Chhanda Koley vs Bharat Petroleum Corporation Ltd. & Ors.*** reported in **2018 SCC Online Cal 16849.**

c) ***Meerut Development Authority vs Association of Management Studies & Anr.*** reported in **(2009) 6 SCC 171.**

Prayer has been made to either set aside the tender process or set aside the bid of the private respondent being the L1 bidder and consequently issue work order in favour of the petitioners.

Learned advocate representing the private respondent opposes the submissions of the petitioners. It has been submitted that the petitioner no.1 being aware of the eligibility criteria specified in the notice inviting tender participated in the same. The petitioners never raised any objection with regard to the eligibility

criteria prior to participation or even at the pre bid stage. Till the technical round stage, the petitioners and the private respondent were in the same plane. It is at the financial bid stage that the private respondent outbid the petitioner no.1.

Being unsuccessful in the selection process, the petitioners have filed the instant writ petition. The petitioners are estopped by their action to challenge the eligibility criteria after participating and being unsuccessful in the financial bid stage.

The allegation made by the petitioners that the private respondent is ineligible and does not possess the requisite eligibility criteria to participate in the tender process is denied. It has been submitted that the private respondent possesses the requisite criteria as mentioned in the notice inviting tender and, accordingly, the bid of the private respondent has been accepted and the private respondent was declared as the L1 bidder. The present writ petition has been filed with mala fide intention to nullify the tender process.

The private respondent relies upon the following decisions in support of the submission that the objection raised by the petitioners at this stage ought not to be entertained and the Court ought not to interfere in the tender process.

a) ***Silppi Constructions Contractors vs Union of India & Anr.*** reported in ***(2020) 16 SCC 489.***

b) ***Tafcon Projects (I) (P) Ltd. vs Union of India & Ors.*** reported in ***(2004) 13 SCC 788.***

c) ***Opaque Infrastructure Pvt. Ltd. vs Union of India & Ors.*** reported in ***MANU/DE/0964/2015.***

Prayer has been made for dismissal of the writ petition.

Learned advocate representing the Kolkata Municipal Corporation opposes the prayer of the petitioners. It has been submitted that a tenderer in a tender process cannot dictate terms upon the authority which floats the tender. It is for

the authority to fix the eligibility criteria and it is not for a tenderer to specify conditions which ought to have been mentioned in the notice inviting tender.

The petitioners had enough opportunity to raise the issue at the pre bid stage. After the final result was declared, the objection of the petitioners regarding the eligibility criteria in the notice inviting tender cannot be considered. It has been denied that the change in the eligibility criteria was tailor-made to accommodate the private respondent. It has been submitted that the change was necessitated to give opportunity to suppliers of other materials so that there is stiff competition and the best candidate may be selected at the best available rate. Supply of clean water is a matter of general concern of the citizens and, accordingly, the Corporation acted in the best interest of the public at large.

No manufacturer of chlorine ever participated in any tender process floated by the Corporation. Only the middlemen who are the suppliers having explosive license are eligible to participate. As suppliers of liquid chlorine are very limited, accordingly, the suppliers form a cartel and raise the bid amount. Wider participation allows the Corporation to exercise choice and as a result of it approximately rupees eighty lakh and odd public money has been saved which may be used for other projects. The suppliers are not required to have any special acumen apart from holding an explosive license to participate in the tender process which is mandatory to control damage/leak in cylinder. Liquid chlorine is supplied by manufacturer and immediate testing is not possible. Liquid chlorine is an essential chemical required to supply potable water to the citizen of Kolkata.

The Corporation prays for dismissal of the writ petition so that the work order may be issued in favour of the successful bidder.

I have heard and considered the rival submissions made on behalf of all the parties.

The petitioners and the private respondent both are contenders in a tender process floated by the Kolkata Municipal Corporation. The tender was

for supplying liquid chlorine. According to the petitioners, they are the most suitable candidate to be awarded the work order, as the petitioners have a lot of experience in the field of supplying liquid chlorine.

The petitioners are aggrieved as the Corporation has changed the eligibility criteria for participating in the tender process. The petitioners highlight that in the previous years the Corporation invited bids only from the candidates having experience in supplying liquid chlorine, but in the present year, the Corporation has loosened the eligibility criteria and permitted suppliers of any materials to participate in the tender process.

The petitioners submit that due to inadvertence they missed to notice the change in the eligibility criteria and unknowingly participated in the tender process without raising any objection. The change in the eligibility criteria came to the notice of the petitioners only after opening of the financial bid.

The contention of the petitioners is that the change was made only for the benefit of the private respondent who has emerged successful in the financial bid. The private respondent does not have any experience in supply of liquid chlorine and the company of the private respondent is a supplier of sand, stone chips etc.

On a perusal of the notice inviting tender it appears that the eligibility criteria were clearly mentioned in the said document. A bidder who intends to participate in the tender process ought to have gone through all the clauses of the said notice. After having participated in the tender process and till its completion, the petitioners never raised any objection. It is only after the financial bids were opened and the petitioners failed to qualify as the lowest bidder and became unsuccessful, that the petitioners have raised the issue of change in the eligibility clause of the tender document.

It is not the case of the petitioners that the eligibility clause was changed after the tender process started. The change, if any, was very much there on

the first day when the notice inviting tender was published. The Corporation which floated the tender is the best authority to decide as to what is required from the participants. The Corporation may have felt the need to expand the scope of participation and, accordingly, did not restrict participation from amongst participants having experience in supplying liquid chlorine, but opened the field for suppliers of all and any materials; provided, of course, the other conditions in the notice inviting tender are fulfilled.

The Corporation will certainly look for a bidder who will supply the material at the lowest cost possible. The same is going to save revenue of the Corporation. Had the petitioners been successful in quoting the lowest rate, the present writ petition would not have been filed. It is only because the petitioners failed to qualify in the financial bid that the petitioners came up with the allegation of change in the eligibility criteria of the tender process. But for the change in the eligibility clause, the petitioners have not raised any other grievance or illegality in the tender process.

It has been held by the Hon'ble Supreme Court in no uncertain terms that, the scope of judicial review in tender matters is extremely limited.

The petitioners have relied upon various decisions of the Hon'ble Court in support of their submission that in the facts and circumstances of the present case, judicial intervention is required.

In Meeta Sahai (supra) the Court was posed with the issue whether experience gained by doctors in government hospitals and in hospitals established by panchayats or municipalities were similar. The Court was of the view that the purpose behind formulation of the Rules is to recognize the unique challenges that the two different set of doctors have to face. Interpreting government hospitals to include only a small class of persons who have worked under the government is clearly erroneous and anti-merit.

In the present case, the petitioners insist that similar nature of work ought to be restricted to experience only in supply of liquid chlorine and not any other material. The Corporation has widened the zone of selection and has included experience in supplying any type of material as the eligibility criteria to participate in the tender process. It does not appear to the Court that opening up the zone of selection is in any manner arbitrary or impermissible in law. The petitioners cannot insist the Corporation to restrict consideration only within a very few selected bidders.

In Chhanda Koley (*supra*) the Court reiterated that it is always open for a party to challenge the procedure in which he participated if the authorities change the rules of the procedure, after the same had begun by applying a record to note retrospectively. The same is not the case at hand. In the instant case, the notice inviting tender clearly mentioned the eligibility criteria pursuant to which the applicants filed their application. There has been no change in the criteria after publication of the notice. Accordingly, the said precedent cannot be made applicable in the facts and circumstances of the instant case.

In Tafcon (*supra*) the Court was of the opinion that after participating in the proceeding before the selection committee, a party cannot take advantage of the alleged weakness in the tender notice. In the case at hand, the parties took part in the tender process after being completely aware of the terms and conditions specified in the notice inviting tender. After being unsuccessful in the financial bid stage, the petitioners cannot turn around and cry hoarse about the eligibility criteria indicated in the notice inviting tender.

It is not the case that the petitioners were unable to participate in the tender process because of certain clauses mentioned therein. It is the case of the petitioners that the Corporation ought not to have permitted others to participate in the selection process and the selection ought to have been restricted only in respect of the bidders who has experience in supplying liquid

chlorine. The Corporation has already indicated that no special acumen is required to supply chlorine and only an explosive license is enough. The same implies that any bidder with an explosive license is eligible to contest the bidding process and no specialization is required.

In Meerut Development the Court clearly laid down that the terms of invitation to tender cannot be open to judicial scrutiny because the invitation is in the realm of contract. However, limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

Here, instead of restricting the zone of consideration amongst a select few, the Corporation has extended the zone of consideration to include others. The petitioners ought not to be prejudiced if the area of selection increases. The petitioners cannot oppose competition from others.

In Silppi Constructions (*supra*) it was held that the Court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the Court's interference should be minimal in matters of contract involving the State instrumentalities. The authority which floats the contract or tender is the best judge to interpret the documents. The Courts only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

In the present case, it does not appear that the alteration in the eligibility clause from the previous years' tender documents is arbitrary, irrational or perverse. Apart from the fact that the petitioners had to face stiff competition from the other bidders, it does not appear that there is any arbitrariness or illegality warranting interference in the present matter.

In Opaque Infrastructure (*supra*) the Court held that the petitioner, being aware of the tender conditions participated in the same and having participated in the tender, cannot challenge or impugn the tender condition. Having

participated, the petitioner can only expect equality and fair treatment in the matter of evaluation of competitive bids. The petitioner cannot be permitted to challenge the terms and conditions of the tender after he had participated in the same.

Here, the petitioners have not raised any other issues regarding unfair treatment or bias in the selection process. The only grievance is that the pool of consideration has been widened to increase participation resulting in stiff competition which is not to the liking of the petitioners. It is evident that the petitioners at the initial stage took the risk and participated in the tender process; and after becoming unsuccessful in the last stage, is crying foul.

The submission of the petitioners that they missed to notice the change in the eligibility criteria after the bidding was over is irrelevant. The same hardly makes any difference to the merits of the case. It is not expected that a bidder, unaware of the conditions mentioned in the tender document, participates in the same and thereafter being unsuccessful grunts over the same.

The learned advocate representing the private respondent insists that the pre bid meeting took place as scheduled. As none of the participants had any query or any objection with regard to the terms and conditions of the notice inviting tender, accordingly, the minutes of the meeting was not required to be recorded separately. Learned advocate for the Corporation also submits that the notice inviting tender specified the date of the pre bid meeting. If the petitioner had any grievance with regard to the tender condition, it ought to have been pointed out on the said date. The petitioners never raised any objection with regard to the eligibility clause mentioned in the notice inviting tender.

The Court does not find any error on the part of the Corporation in fixing up the tender conditions as per their need and requirement. The facts of the case do not call for interference by the Court.

In view of the above, no relief can be granted to the petitioners in the instant case. The writ petition fails and is hereby dismissed

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)