

In the High Court at Calcutta
Constitutional Writ Jurisdiction

Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.10028 of 2023

Shapoorji Pallonji and Company

Vs.

The West Bengal Power Development Corporation Ltd. and others

For the petitioner	:	Mr. Sakya Sen, Mr. Asif Hussain, Ms. Labani Pan
For the WBPDC	:	Mr. Abhrajit Mitra, Mr. Jishnu Chowdhury, Mr. Debanjan Mandal, Mr. Chayan Gupta, Mr. Sandip Dasgupta, Mr. Aviroop Mitra, Ms. Mahima Choura
Hearing concluded on	:	10.05.2023
Judgment on	:	08.06.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner has challenged a Tender cum Reverse Auction floated by the respondents in respect of Flue Gas De-sulphurisation (FGD) Package in respect of four units of the Sagardighi Thermal Power Project (2x300 MW + 2x500 MW). The specific premise of the challenge is Clause 26.0 of the Notice Inviting Tender (NIT). The petitioner has also challenged the rejection of the petitioner's bid at the technical stage.

- 2.** Learned counsel for the petitioner argues that there is inherent discrepancy between the different sub-clauses of Clause 26.0, which comprise the 'Must Conditions'. Whereas for Phase-I units, Limestone Consumption of FGD System shall not exceed 3.68 T/hr. at 100 per cent unit MCR with SO₂ removal efficiency of 80 per cent, such consumption for Phase-II units, as per the NIT, are not to exceed 7.61 T/hr. at 100 per cent unit MCR with SO₂ removal efficiency of 96 per cent.
- 3.** However, in spite of such provisions in paragraphs 3 and 4 of sub-clause 26.1, in paragraph 5 of the same sub-clause, the maximum Total Auxiliary Power Consumption for Phase-I units is 5900 KW with both units operating at 100 per cent TMCR whereas for Phase-II, such consumption shall not exceed 4800 KW operating also at 100 per cent TMCR condition.
- 4.** It is submitted that such inherent discrepancy governing Phase-I and Phase-II units vitiates the clause. Whereas Limestone Consumption would be less with worst coal firing and SO₂ removal efficiency at 80 per cent for Phase-I units, while the maximum Total Auxiliary Power Consumption for FGD System for such units is 5900 KW, for Phase-II units, the Limestone Consumption shall not exceed 7.61 T/hr. with worst coal firing and SO₂ removal efficiency of as high as 96 per cent, while the Total Auxiliary Power consumption for such units cannot exceed 4800 KW.
- 5.** It is further argued that such clause is not only arbitrary, such conditions are technically impossible for any operator to meet.

6. Moreover, it is contended that the criteria stipulated in such clause do not have any correlation with the purpose of the Tender and the product sought.
7. Learned counsel for the petitioner next argues that the said clause is contrary to the Notification dated March 7, 2019 issued by the Central Electricity Regulatory Commission (CERC), in particular Regulation No.49 thereof (amended on August 25, 2020 and further amended on February 2, 2021).
8. It is also pointed out that whereas Phase-I units contemplate 300 MW, Phase-II units are intended for 500 MW, which does not tally with the converse ratio of power consumption as per the impugned Clause 26.1.
9. Moreover, learned counsel for the petitioner submits that the rejection of the petitioner's bid was bad even in terms of the NIT provisions. Clause 24.2 of the same provides that a substantially responsive bid is one that meets the requirement of the Bidding Document without material deviation, reservation or omission. Such terms, if accepted, are defined to be ones which:
 - i) affect in any substantial way the scope, quality or performance of the plant and installation services specified in the contract; or
 - ii) limit in any substantial way, inconsistent with the Bidding Document, the Employer's right or the Public's obligations under the proposed contract.
10. Thus, the petitioner also challenges the rejection of the petitioner's bid at the technical stage.

11. Learned counsel for the respondents, at the outset, argues that the impugned tender has already reached its culmination, upon the price bids being opened and the L-I and L-II bidders being declared.
12. Hence, the clock ought not to be set back to the stage of inception of the writ petition.
13. Next, it is argued, the petitioner fully participated in the tender process and thereafter, subsequent to the rejection of its technical bid, has come up with the present challenge, by taking a chance in respect of the outcome of the auction. Moreover, the delay in preferring the present challenge is inordinate. Hence, the writ petition ought to be dismissed, if not for any other reason, on the grounds of delay and *mala fides*.
14. With regard to the amendment of Regulation 49 of the relevant Notification, learned counsel argues that there was no material alteration therein of the impugned clause. For such purpose, learned counsel for the respondents places the exact amendment and the Gazette Notification thereof. Hence, the petitioner's argument that the impugned clause was contrary to such Regulation/Notification is not tenable in the eye of law.
15. That apart, it is argued that the application of cap at the rate of 1 per cent both for Phase-I and Phase-II units is absolutely reasonable and not, in any manner, arbitrary.
16. The respondents cite an unreported judgment dated February 11, 2022 passed by the Supreme Court in *Balaji Ventures Private Limited Vs. Maharashtra State Power Generation Company Ltd. and another* for

the proposition that unless a clause was tailor-made to suit a particular bidder, the owner should always have the freedom to provide the eligibility criteria in a tender and a challenge on the ground that the bid condition/clause might not suit a particular bidder cannot be any ground for challenge.

17. Next citing a Division Bench judgment of this Court reported at 2020 SCC OnLine Cal 2213 [*Subir Ghosh Vs. State of West Bengal and others*], it is argued that the challenge to a tender has to be before the time to put in the bids is closed. If a bid is made and is thrown out on an illegal or unfair condition in the tender document, even then, a challenge can be fashioned.
18. Learned counsel for the respondents also places reliance on *Greentech Environ Management Pvt. Ltd. and others Vs. the Union of India and others*, reported at MANU/WB/0054/2021, where it was held by this Court that it did not lie in the mouth of the petitioners therein to challenge the tender process after having participated in the same and having turned out to be unsuccessful.
19. Learned counsel for the respondents next cites *National High Speed Rail Corporation Limited Vs. Monte Carlo Limited and another*, reported at (2022) 6 SCC 401, to indicate the limited grounds on which there can be interference under Article 226. Such criteria having not been satisfied in the present case, it is submitted, the writ petition ought to be dismissed.
20. From the cited judgments, certain principles can be elicited.

21. The limited scope of challenge to a tender process, according to the Supreme Court [in *Balaji Ventures (supra)*], is that a particular clause or condition of a tender is tailor-made to suit a particular bidder or is arbitrary. Otherwise, the owner/employer should always have the freedom to provide the eligibility criteria and the terms and conditions of the bid, unless those are *mala fide*.
22. The bidder cannot be permitted to challenge a clause merely because it does not suit him and/or is inconvenient to him.
23. It has further been observed by courts that a challenge to tender documents on the ground of being unfair or illegal has to be thrown before the time to put in the bids is closed.
24. In the event the bidder participates and awaits the outcome of the bids, a challenge at the behest of such bidder ought not to be allowed.
25. In *National High Speed Rail Corporation (supra)*, the Supreme Court stipulated specific grounds of interference under Article 226. The grounds were, whether the process or decision made by the authority is *mala fide* or intended to favour someone, or is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached it; also, whether the public interest is affected.
26. In the present case, the challenge to the impugned Clause of the NIT is three-fold. As to the first limb of the challenge, the petitioner argues that the conditions stipulated therein are technically impossible to meet. However, the petitioner has failed to establish such ground in any cogent manner. Moreover, in the meantime, the

financial bids have been opened and two bidders have already come out successful, being declared as L-I and L-II, which itself demolishes the myth that the tender conditions could not be fulfilled.

- 27.** The next challenge is that Clause 26.1 is arbitrary.
- 28.** However, a bare perusal of the same clearly shows that the same specifies certain technical requirements. Not only is the court or any other authority than the authority floating the tender technically incompetent to decide the legitimacy of such requirement, it is well-settled that the tender-issuing authority reserves absolute right in specifying its requirements.
- 29.** The purpose for which tender was floated in the present case was technically very specific. The thermal power project was to get four units of a Flue Gas De-sulphurisation Package, two of 300 MW and other two of 500 MW.
- 30.** There is parity between Paragraphs 3 and 4 of Clause 26.1, insofar as both have been capped at One per cent in terms of the relevant Notification.
- 31.** The requirements of Phase-I and Phase-II units are entirely different, for which the Limestone Consumption of FGD System vary in respect of both, as well as the worst coal firing and SO₂ removal efficiency.
- 32.** The Total Auxiliary Power consumption for the FGD System, accordingly, varies as per the need of the respondent-Authorities for the particular project.
- 33.** Nothing has been shown by the petitioner to indicate that the said conditions are patently arbitrary or *mala fide* and/or tailor-made to

suit the particular purpose of any particular bidder or a small section of bidders.

- 34.** The question of arbitrariness does not arise, insofar as the authorities have ample jurisdiction to determine their own criteria for a particular project for which the tender is floated.
- 35.** It is not for the court or any other authority to decide whether the criteria are not co-related with the purpose of the tender.
- 36.** Moreover, nothing has been established by the petitioner to rebut the presumption that the tender issuing authorities had cut their coat according to their own cloth.
- 37.** Even otherwise, the petitioner waited for the outcome of the technical bid, after having fully participated in the tender process, and only after having lost in the technical bid, has preferred the present challenge.
- 38.** Certain time-lines are important in this context. The tender was floated on September 30, 2021 and a pre-bid meeting was scheduled in the month of November, 2021. Thus, there was ample scope for the petitioner, along with other bidders, to clarify their queries and doubts and, if dissatisfied, to challenge the clauses of the tender. However, instead of choosing to do so, the petitioner awaited the result of the tender process, having participated therein till its technical bid was rejected as late as in the month of July, 2022.
- 39.** Such conduct of the petitioner itself is *mala fide* and reeks of opportunism.

40. Insofar as Regulation 49 of the relevant Notification is concerned, it is clear from the February, 2021 amendment thereto that the relevant provisions of Regulation 49 remained unaltered even after such amendment was effected.
41. Regulation 49, as it stood originally, provided certain norms of operation for thermal generating stations.
42. By the amendment, sub-sub-clause (iv) of sub-clause (d) of Clause (E) of Regulation 49 was omitted and a new sub-clause (f) was inserted after sub-clause (e) of Clause (E) of the said Regulation. The norms of Auxiliary Energy Consumption for Emission Control System with regard to reduction of emission of sulphur dioxide for Wet Limestone based FGD systems was capped at 1.0 per cent, which has not been shown to be arbitrary or unreasonable in any manner, to require interference under Article 226 of the Constitution of India.
43. Thus by applying the tests as provided by the Supreme Court in the cited judgments, there is no reason why the impugned clause ought to be set aside.
44. Regarding the question as to whether the petitioner's technical bid comprised of a material deviation, reservation or omission as defined in Paragraph 24.2 of Clause 24.0 of the NIT, the same is entirely subjective. Unless that much discretion is left with the authority issuing the tender, no technical tender could be floated by any authority. Such technical considerations, which have not been shown to be *mala fide* or arbitrary in any manner, are best left to the judgment of the respondent-Authorities issuing the tender. The

process by which the decision to reject the petitioner's technical bid was reached has not been shown to be flawed or irregular in any manner.

45. That apart, it is too late in the day to permit the petitioner to have the tender process recalled, after having participated in the same and having been unsuccessful.
46. Hence, there is no scope of interference either with the rejection of the petitioner's technical bid or the impugned Clause and sub-clauses of the NIT.
47. Accordingly, WPA No.10028 of 2023 is dismissed on contest, without any order as to costs.
48. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)