AD-84
Ct No.09
13.06.2023
TN

WPA No. 13370 of 2023

Southern Health Improvement Samity
Vs.
The State of West Bengal and others

Mr. Shuvra Prakash Lahiri,
Ms. Nayab Mulla,
Mr. Srijit Chatterjee,
Mr. Rajesh Naskar

.... for the petitioner

Mr. Samrat Sen,
Mr. Nilotpal Chatterjee,
Ms. Amrita Panja Moulick

.... for the State

The present challenge has been thrown against a fresh tender issued by the respondent-authorities despite the petitioner allegedly having acquired a right in terms of the previous tender to get an assignment of the contract-in-question.

A contract was floated by the respondent-authorities for operation of Mobile Boat Clinics in South 24 Parganas, Diamond Harbour Health District and Basirhat Health District, West Bengal.

Learned counsel for the petitioner contends that, in terms of Clause 15 of the tender document, in the event of failure on the part of the L1 bidder to comply with the Standard Operating Procedure (SOP), the contract would have to be awarded to the next lowest bidder, that is, the present petitioner.

In the present case, after the contract was awarded to the successful bidder, that is, the L1 bidder, it was communicated on the part of the said L1 bidder that due to certain constraints, the said bidder could not honour the contract and, as such, withdrew from the said contract.

Thereafter, vide communication dated February 28, 2022, the respondent-authorities invited the petitioner, who was the L2 bidder, to take up the assignment in terms of Clause 15 of the tender document; however, at the rate offered by the L1 bidder. It is submitted that the said rate of the L1 bidder was tremendously low, which can be demonstrated even from the refusal of the L1 bidder to honour the contract on the ground of impending monetary loss if the same was implemented.

It is further argued, on the premise of certain cited judgments of the petitioner as reported at *(1979) 3 SCC 489 [Ramana Dayaram Shetty vs. International Airport Authority of India]* and *(1991) 3 SCC 273 [Poddar Steel Corporation vs. Ganesh Engineering Works and others]*, that State largesse cannot be distributed by the government arbitrarily or in an irrational manner.

Unlike private employees, the standards or norms which have to be followed by the State have to be reasonable, non-arbitrary and demonstratively transparent.

Learned senior counsel appearing for the State contends that Clause 15 ought to be interpreted in a different manner than that sought to be done by the petitioner. It is argued that the said Clause stipulates that the contract would be initially signed for one year from the date of signing of the agreement and would be renewed thereafter every year, subject to satisfactory performance.

The second limb of the Clause provides that any failure to comply with the SOP on the part of the bidder or serious fault deduced and reported time to time may invite non-renewal of agreement *at the end of the assessment year.* Only in such situation, it is submitted, the contract would be awarded to the next lowest bidder. In the present case, however, such occasion did not arise as the L1 bidder did not proceed with the awarded contract at all.

It is further argued by the State that the communication dated March 10, 2023 was erroneously done on the part of the respondent-authorities and is not in terms of Clause 15. It is contended further that even if the said communication be deemed to be an offer made by the State, the petitioner herein did not accept the said offer in an unbridled manner. Rather, a counter-offer was sought to be given by the petitioner insofar as the petitioner did not agree to take up the contract at the rate as offered by the respondent-authorities.

Insofar as the cited judgments are concerned, it is argued that there is no doubt that State action is required to be transparent. However, in view of the precise language of Clause 15, it can only be interpreted in a single way, as per the arguments of the respondents.

Upon a consideration of the materials annexed, it is seen that the State had given an offer, after the failure on the part of the L1 bidder to take up the contract, to the present petitioner, who was the L2 bidder. The said offer dated February 28, 2022, however, quoted a particular amount which was equivalent to the rate offered originally by the L1 bidder. In its reply thereto dated March 15, 2023, also annexed to the writ petition, the present writ petitioner did not agree to such price. As a counter-offer, the petitioner stated that it was agreeable to give certain concessions to their original quoted price of Rs. 3,52,638/-, but it would not be possible to take up the contract job at fifty per cent discount.

Although the petitioner is justified in arguing that the rate at which the L1 bidder quoted is not economically viable even at the first blush, since the L1 bidder itself resiled from its original promise of taking up the contract, that *ipso facto* does not justify that any right is created in favour of the petitioner, as the L2 bidder, by virtue of Clause 15.

A careful perusal of the said clause clearly shows that the second limb thereof stipulates that even in case of failure by the L1 bidder to comply with the SOP, only at the juncture when the assessment year ends, a non-renewal of the agreement with the L1 bidder can be considered. In such situation and in such situation alone, the contract could be awarded to the next lowest bidder.

The first limb of the said clause, on the other hand, clearly indicates that although the rate shall be valid for three years from the date of commencement of the work, the contract would initially be signed for one year from the date of signing of the agreement. Thereafter, the contract would be renewed every year subject to satisfactory performance. In the present case, there did not arise any scope of satisfactory performance, since there was no performance at all as the contract with the L1 bidder did not reach fruition. Even if a liberal view in favour of the petitioner were to be taken, the failure on the part of the L1 bidder to comply with the Standard Operating Procedure could only attract a non-renewal of the agreement of the L1 bidder at the end of the assessment year. Since the occasion of a fresh contract being awarded to the next lowest bidder arises only on such non-renewal, in the present case, the said situation has not arisen at all, which might have conferred a right on the L2 bidder to invoke the said clause.

In such scenario, it can only be held that the offer given by the respondent-authorities on February 28, 2022 was *de hors* the tender and was a unilateral offer given by the respondent-authorities beyond the scope of the tender, which was, in any event, not accepted as it is by the present petitioner.

In view of the above facts, the respondent-authorities were justified in floating a fresh tender on May 22, 2023 for the same work.

In any event, there was nothing to prevent the petitioner from participating in the said fresh contract. Since the bid submission closing date is today itself, that is, June 13, 2023 and the time for filing the last bid is up to 5.00 p.m. today, the petitioner will be at liberty to participate by filing a bid in the fresh tender by 5.00 p.m. today, since it is only about 3 p.m. now. Nothing in this order shall preclude the petitioner from participating in the said fresh tender process and if so, the respondent-authorities shall consider such bid, subject to the same being otherwise valid in terms of the tender, in due process of law. However, there is no scope of interference in the present writ petition.

Accordingly, WPA No. 13370 of 2023 is dismissed on contest with the above observations.

There will be no order as to costs.

At this juncture, learned counsel for the petitioner makes a prayer for stay of operation of the above order. However, keeping in view the extreme urgency implicit in the very nature of the tender, which would cater to the medical needs of people coming from not-so-fortunate sections of the Society, such prayer for stay is refused.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)