AD-06
Ct No.09
05.07.2023
TN

WPA No. 15856 of 2023

Vasav Enterprises Private Limited and another
Vs.
Damodar Valley Corporation and another

Mr. Mainak Bose,
Mr. Rishabh Karnani,
Mr. Anurag Bagaria

.... for the petitioners

Mr. Swarajit Dey,
Ms. Riddhi Jain

.... for the respondent no.1

Mr. Soorjya Ganguli,
Ms. Radhika Mishra

.... for the respondent no.2

Learned senior counsel for the petitioners contends that the petitioners' bid has been rejected on a Techno-Commercial evaluation on a hyper-technical approach to the matter on the part of the respondent-authorities. It is submitted that one of the requirements of online submission of the bids was the submission of an Integrity Pact, a format of which was a part of the Notice Inviting Tender. It is submitted that although the petitioners duly submitted such pact online along with other relevant documents required by the respondents much before the last date of submission of such documents, the respondent-authorities waited till July 03, 2023 to intimate the petitioners that the petitioners' technical bid had been rejected.

It is submitted that the tender was floated on May 09, 2023. The petitioners' documents, along with the Integrity Pact-in-question, were uploaded in soft version on May 20, 2023. The last date of submission was June 08, 2023.

However, nothing was intimated by the respondents to the petitioners at any point of time, throughout the period, regarding there being any defect in the online submission of the petitioners. However, on a subsequent e-mail of the petitioners, it was intimated to the petitioners that the petitioners' bid had not qualified in the Techno-Commercial evaluation. The reason for such disqualification, as given in the e-mail, was that the bidder had not submitted the Integrity Pact "in totality" as per e-catalogue.

Learned senior counsel for the petitioners places reliance on the language of the relevant clause in the Notice Inviting Tender. The said clause, that is, clause (C), falls under the heading 'Category of Requirements for participation in online e-auction' and contemplates that a scanned copy of the Integrity Pact, duly signed in all pages by the authorised signatory who is signing the Bid as per format enclosed, is to be uploaded with qualifying requirement and the same must be produced before issuance of sale release order.

Bids without scanned copy of Integrity pact uploaded in the portal of the mjunction (respondent no.2), which was maintaining the said portal for DVC for the purpose of the tender, was to be rejected outright.

It is submitted on behalf of the petitioners that the rejection of the "bid" pre-supposes that the stage of such rejection would not come before the last date of submission of the bid. That apart, there is a provision in a note given under clause (C) that hard copies of the above-mentioned documents, including the Integrity pact, would also have to be submitted by the successful buyer.

Hence, there was ample scope of rectification of the technical error cited by the respondents for rejecting the petitioners' bid. It is reiterated that the respondent-authorities ought to have given an opportunity to the petitioners to satisfy the respondents as regards whatever defect might have visited the uploaded document.

In such context, learned senior counsel for the petitioners cites *Rashmi Metaliks Limited and another* *vs. Kolkata Metropolitan Development Authority and Others*, reported at *(2013) 10 SCC 95.*

In the said judgment, it is contended, the Supreme Court proceeded on the premise that a clause in the tender involved therein regarding the production of income tax certificate was not an essential element or ingredient or concomitant of the subject NIT.

As such, since the income tax return was filed by the appellants therein in course of the hearing, it was observed that an opportunity ought to be given to the appellants therein to make good the non-submission of such document in the said case.

By relying on the said judgment, the petitioners contend that in the present case also, the Integrity pact-in-question is a non-essential requirement of the tender and, at least, the petitioners ought to be given a further opportunity to produce the entire document, if so required.

Learned counsel appearing for the respondent no.1 places reliance on the ingredients of the tender document. It is submitted that the requirements were for participation in the online e-auction after compliance of the clauses as given thereunder. One of such clauses, being Clause (C), specifically enumerated that a scanned copy of the Integrity pact, duly signed in all pages, as per the format enclosed, was to be uploaded along with the other documents.

Learned counsel also places reliance on a copy of the format of the said document given with the tender document.

It is highlighted that there are certain sections in the said pact, which are integral for assessing the worth of the bidders. As for example, learned counsel cites Section 3 in the said pact, which pertains to Disqualification from Tender Process and Exclusion from Future Contracts in the event the event proposed therein was not complied with.

Section 5 of the same document stipulates previous transgression and provides that the bidder has to declare that no previous transgressions occurred in the last three years with any other Company in any country conforming to the anti-corruption approach or with any Public Sector Enterprise in India that could justify his exclusion from the tender process.

Sub-clause (2) of Section 5 of the pact also provides that if the Bidder makes incorrect statement on this subject, he can be disqualified from the tender process or action can be taken as per the procedure of "Banning of business dealings" of the Principal. By placing reliance on other clauses and sections of the said pact, it is argued that the submission of the said Integrity pact in its entirety is an essential requirement for participation in the tender process.

It is submitted, by placing reliance on a printout of the copy of the Integrity pact allegedly submitted online by the petitioners, which is handed over by learned counsel for the respondent no.1 in court today, that the second and third pages of the document were missing in such copy. The copy filed by learned counsel for the respondent no.1 be kept on record.

Since the matter is extremely urgent, affidavits are not directed at this stage, since the same would frustrate the very purpose of urgent mentioning of the matter and the same being taken out of turn at the behest of the petitioners.

Proceeding on the premise that the copy handed over in court today was the actual copy which was uploaded by the petitioners, it is seen that several vital sections of the Integrity pact are missing from the said documents. As such, it cannot be said that the error committed by the petitioners was merely technical in nature, since the respondent no.1 is fully justified in arguing that the contents of the Integrity Pact directly affect and are germane for the assessment of the worth of the bidder insofar as the participation in the tender process is concerned.

That apart, learned counsel for the respondent no.2, which is the company in charge of maintaining the portal at the relevant juncture, submits that it is not feasible practically to intimate each of the participants in the tender process individually as regards the technical flaws in their bid documents, that too, at the online submission stage.

There is substance in such contention, since even the tender document does not contemplate any such opportunity to be given at the preliminary stage of filing of documents online.

If such a provision is read into the tender terms and is construed in a hyper-technical manner, then in every case, public authorities would have to intimate each of the individual participants in the tender process, even at the preliminary stage of online submission of bids, as to the errors committed by each of them at such preliminary stage. The same is not feasible, as it would involve much time, unnecessary delay and useless expenditure of resources.

Insofar as the contention of the petitioners is concerned, that the requirement-in-question was not an integral part of the document or essential for the tender process, the same cannot be accepted in view of the clauses thereof being essential to establish the integrity and acumen of the participants, to aid the authorities to select appropriate candidates.

That apart, it is rightly pointed out by learned counsel for the respondent no.1 that the general instruction to bidders, which immediately follows the requirement for participation in the tender document, specifies in bold letters that all transactions entered into by the buyer/bidder arising out of the e-auction shall be governed by the Integrity Pact as per Annexure - VI thereof.

In view of the above discussions, I do not find that there is any scope of interference with the discretion of the authorities, which was exercised in consonance with the terms of the tender, in the present writ petition.

If a further opportunity is given to the petitioners to rectify its defect, the same will create an unnecessary disadvantage to the other participants in the tender process, since there might have been others whose bids were rejected on similar technical grounds but who would not get the opportunity to participate in the tender by rectifying their bid documents.

Moreover, in any event, if such opportunities are given at every stage, the tender process in respect of public utility services would never reach finality.

In view of the above reasons, there is no scope of interference in the present writ petition.

Accordingly, WPA No. 15856 of 2023 is dismissed without any order as to costs.

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.)