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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 18411 of 2023

Gangarampur Unemployed Engineer's
Co-operative Society Ltd. & Anr.
Vs,
State of West Bengal & Ors.

Mr. Sunil Kumar Gupta,
Mr. Arindam Paul
...for the petitioners

Mr. Tanoy Chakraborty,
Ms. Rajyashree Mukherjee,
Mr. M. Majumder
...for the State

1. The petitioner no. 1 is one of the unsuccessful participants in a tender process regarding the protection of river embankment.
2. Learned counsel for the petitioners submits that the petitioners' technical bid was rejected by considering the petitioners to be disqualified in view of trade licence having not been furnished by the petitioners.
3. Learned counsel for the petitioners submits that the mere submission of the trade licence could not have been an essential eligibility criterion in the tender process.
4. The petitioners made a representation for reconsideration in that regard on July 20,

2023. However, the said representation was rejected by the respondent-authorities, who proceeded ahead with the bidding process.

5. It is submitted that in hot haste, immediately after filing of the writ petition, the work order has also been issued in favour of third parties.
6. It is contended by the petitioners that even as per the provisions of the tender document, the submission of trade licence could not have been an essential criterion.
7. Learned counsel places reliance on a tabular chart with the head 'Document format for uploading in OID folder'. In Item No. II thereof, 'Company Details' has been mentioned as the category concerned. Under the sub-category description, it has been mentioned that for the purpose of participation, a valid trade licence/acknowledgement or receipt of application for trade licence/revalidation should be furnished by the bidder.
8. It is contended that, thus, it is clear that the furnishing of a valid trade licence was not an essential criterion, since a mere acknowledgement or receipt of application for trade licence would suffice. Hence, the disqualification of the petitioners on such technical ground ought to be set aside.

9. Learned counsel places reliance on a Memorandum dated January 15, 2019, issued by the Principal Secretary to the Government of West Bengal, whereby it was clarified that the bids in the e-portal system of the Government of West Bengal should not be rejected on clerical/rectifiable deficiencies. The bidders ought to be given an opportunity to make good such deficiencies or clarify the deficiencies, as per the memorandum.
10. The same tenor can be seen in the Memorandum dated June 07, 2022, which is also annexed to the writ petition, as per the General Instructions Clause 3(d) of which, sometimes it is seen that tenders are being rejected in pre-qualification stage due to minor clerical/rectifiable deficiencies. The same was deprecated and it was observed in the said memorandum that in such cases, the bidders would be given an opportunity to explain their position within seven working days through e-mail.
11. It is, thus, submitted that the rejection of the technical bid of the petitioners ought to be set aside and the tender process ought to be restarted from the stage of participation of the petitioners.

12. Learned counsel places reliance on the judgment of *Rashmi Metaliks Limited and Another vs. Kolkata Metropolitan Development Authority and Others*, reported at (2013) 10 SCC 95 for the proposition that if a clause in a tender document cannot be viewed as an essential term or ingredient, the tender ought not to be rejected on the ground of non-compliance of the same.
13. Learned counsel appearing for the respondent-authorities controverts the submissions made by learned counsel for the petitioners and places reliance on *Silppi Constructions Contractors vs. Union of India and Another*, reported at (2020) 16 SCC 489. In the said judgment, the Supreme Court observed, inter alia, that the court should exercise a lot of restraint while exercising their powers of judicial review in contractual and commercial matters. The courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues, the courts should be even more reluctant because, as held by the Supreme Court, most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues

beyond our domain. The essence of law laid down in the judgments referred to therein, it was observed, is the exercise of restraint and caution. The need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities was highlighted in the said judgment.

14. Learned counsel further submits that the contract has already been issued to a third party on August 02 and August 04, 2023. The entire period of the contract was two months, which has elapsed in the meantime.
15. Although learned counsel for the respondent-authorities is not certain as to whether the time for completion of the work has been extended in the meantime, it is submitted that there ought not to be any interference at this juncture.
16. Learned counsel for the respondent-authorities also argues that the memoranda and Circulars relied on by the petitioners are in respect of different departments of the Government and do not apply to the present case.
17. In the present case, the dispute hinges around the question as to whether the furnishing of trade licence was an essential or non-essential criterion of the tender. As pointed out by the

petitioners, in Row- II of the Table given in the tender document, it was mentioned that for proprietorship firms, partnership firms, registered companies, etc., valid trade licence, alternatively acknowledgement or receipt of application for trade licence or revalidation should be furnished by the bidders.

18. However, the argument of the petitioners that the said provision itself indicates that the provision was non-essential may or may not be correct.

19. The question of furnishing of valid trade licence or acknowledgment of receipt of application for trade licence would depend on the circumstances of the bidder. Undoubtedly, the said clause indicates that the existence of a valid trade licence is not necessary but mere acknowledgment or receipt of application for trade licence would suffice. However, the said requirement is a bit distinct from the requirement to furnish whichever of the documents is applicable, be it a trade licence or an application for trade licence is an essential or non-essential consideration. Even if a trade licence was not essential and an application for trade licence might suffice, either of the two

documents must have been submitted at the time of e-filing.

20. In Clause 4.2C(II) of the tender document, all documents mentioned in the tabular format under Clause 4.2B and detailed thereinbelow, it is mentioned, should be uploaded during electronic bid submission in PDF files. The language used is “should” and not “may”.
21. Indeed, to furnish a trade licence or at least an application for trade licence is essential to indicate the bona fides of the bidder to complete the work, which is to be assigned under the tender.
22. Insofar as the memorandum dated July 15, 2019 and/or the other memorandum of 2022, which have been relied on by the petitioners, the said memoranda merely indicate that in case of minor clerical rectifiable deficiencies, an opportunity of explanation should be given to the petitioners. Although in the present case, it may be argued that the deficiency was rectifiable on the part of the petitioners, the petitioners’ representation was heard and it cannot be said that opportunity was not given to the petitioners to rectify the deficiency.
23. In any event, the clauses-in-question of the memoranda are applicable only in case of non-

essential ingredients of the tender documents.

The question as to whether a particular qualification is essential or not depends not solely on the perspective of the bidder or the court but primarily on the perspective of the employer, who chooses to float the tender and seeks to get its work done.

24. In the present case, the perception of the respondents, as reflected in the tender document itself, appears to be that the documents pertaining to trade licence/ application for trade licence had to be furnished at the juncture when the e-bidding was going on. Having not done so, the petitioners cannot claim as a matter of right to be given another opportunity of furnishing such document.

25. The present matter does not pertain to the infringement of any legal or fundamental right of the petitioners but revolves around the discretion of the respondent-authorities, which in the present case, has not been exercised in favour of the petitioners.

26. That apart, we cannot give a go-bye to the fact that the respondent-authorities proceeded as per the timeline of the tender document and completed the award of the work order to a third party, who was successful in the bidding

process, strictly in terms of the tender document. The haste of the respondent authorities in doing so, keeping in view the nature of the job, that is, protection of river embankment during or just prior to the monsoon season, cannot be said to be a factor which goes against the respondent-authorities. In certain cases, haste may rather be appreciated in view of the nature of the work sought to be done.

27. Thus, I do not find any occasion to hold that the respondents acted in an arbitrary or *mala fide* manner to suit the particular needs of a third party bidder apart from the petitioners in their actions.

28. Thus, the high ground for interference in judicial review under Article 226 of the Constitution of India is not satisfied in the present case.

29. Insofar as *Rashmi Metaliks (supra)* is concerned, the Supreme Court proceeded on the premise that the clause under discussion therein was not an essential one for the purpose of the tender document. It is, at best, arguable as to whether the furnishing of income tax return, in the particular context of a tender,

would be an essential or non-essential element or ingredient or concomitant of the subject NIT.

30. There is a difference between furnishing of income tax return, which indicates the financial capability of a bidder, and a trade licence or an application for trade licence, which might be construed to hit at the very eligibility of the participant in tender to complete the work in itself.
31. The proposition laid down in *Silppi Construction (supra)* also cannot be said to be strictly applicable in the present case, since in the said case, the Supreme Court was of the opinion that Judges need not ordinarily interfere in the commercial domain in case where expertise is necessary, which is best left to experts.
32. In the present case, the arguments made by the parties do not touch or involve any exercise of expertise at all but are merely restricted to construction of the terms of the tender document and the consequential circumstances.
33. Hence, there is no question of interference in commercial matter on question of expertise in the present case. Thus, *Silppi Construction* is also not applicable here.

34. In any event, since the period of work contemplated in the impugned tender in the present case is almost complete and a third party has started the work, this Court is of the opinion that there need not be any interference at this stage.

35. Hence, W.P.A. No. 18411 of 2023 is dismissed without, however, any order as to costs.

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

Sabyasachi Bhattacharyya, J.