In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.25906 of 2023

Saheli Nandi
Vs.
Union of India and others

For the petitioner	:	Mr. Satrajit Sinha Roy, Ms. Amrita Maje
For the Union of India	:	Mr. Dhiraj Trivedi, Mr. TrithapatiAcharyya
For the State	:	Mr. Somnath Ganguli, Ms. Priyamvada Singh
For the respondent nos.6 to12	:	Mr. Swarup Paul, Mr. Surya Maity, Mr. Guru Saday Dutta, Mr. Anish Roy
For the respondent no.13	:	Mr. Anubhav Sinha
Hearing concluded on	:	04.12.2023
Judgment on	:	12.12.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner participated in a tender floated by the respondent-Authorities for supply of cooked diet for the indoor patients of the ESI Hospital, Uluberia. The present challenge has been thrown against a Resolution dated September 4, 2023 whereby the tender conditions were modified to the extent that bids below Rs.88.63p will not be considered as a valid bid during financial evaluation.

2. Learned counsel argues that the said major alteration in the terms of the tender was brought in much after the submission of the bids.

3. It is argued that the said alteration was brought in to favour a particular bidder, that is, the respondent no.13 herein.

4. It is argued that the change is arbitrary and, having been made after the submission of the bids, alters the entire premise of the tender, thereby depriving the petitioner of a level playing field.

5. It is submitted that the said alteration is violative of Article 14 of the Constitution of India. Learned counsel cites, in support of his contentions, two judgments of the Supreme Court. The first such judgment is *Jagdish Mandal v. State of Orissa and others,* reported at *(2007) 14 SCC 517*and the second*Agmatel India (P) Ltd. v. Resoursys Telecom and others,* reported at *(2022) 5 SCC 362*.

6. The private respondent nos. 6 to 12, who are other bidders in the tender and suffer equally as the petitioner, submit that the impugned resolution, apart from altering the minimum bid price, also alters another vital term of the tender. As per the original tender document, if there was a tie, the decision would be taken by draw of lots. However, as per the last clause of the impugned resolution, in case of a tie, the bidder who has the lowest rate of at least five diets out of the 8 diets for which the tender is floated, would be considered as L-1.

7. A third alteration which has been brought in is that a zero service chargewould not be accepted, which was not there in the original tender.

8. The different yardsticks sought to be brought in by way of the amendment are thus impugned by the private respondent nos.6 to 12 as well.

9. Learned counsel for the State respondents argues that as per Clause 5(iii) of the tender document, the expression "if any" has been used to suffix profit and taxes, and not service charges. Thus, the original tender afforded no scope for offering zero service charge but provided such relaxation only for profit and taxes.

10. Learned counsel for the State contends that the alteration in the minimum bid price has been brought in in terms of the latest rates fixed by the Agricultural Marketing Board (AMB). It is submitted that even the tender document mentions about the AMB rates being the determinant.

11. Learned counsel for the State further argues that the petitioner's bid quoted a price lower than even the existing supplier and the prices of the previous year. Thus, the petitioner's bid is suspect. It is argued that in the event the bidders offer absurd low prices, it is the interest of the patients of the concerned hospital which wouldultimaely suffer, since the quality and quantity of the food would be compromised. Thus, the amendment was brought in public interest.

12. Learned counsel appearing for the contesting private respondent no.13 argues that the present scheme, of tenders being floated to invite private contractors for supply of cooked diet to Government hospitals, started in the year 2002. The rates are revised every three years so that the quality of food is not compromised.

13. It is argued that the petitioner showed zero service charge in her quotations, which was contrary to the tender terms.

14. Learned counsel argues that there are three components of price - food product, cooking gas and service charge. Whereas the food product price would be determined by the AMB rates, cooking gas rate would be uniform for all the bidders. It is contended that service charge is a field where unscrupulous bidders quote extremely low prices, which ultimately compromise the quality of the food given to the patients.

15. Learned counsel places reliance on Clause 5(iii), which provides that the rate offered should be consolidated but has three components, being (a) cost of raw material, (b) cost of cooking gas and (c) service charge. It is argued that the expression "if any" refers to profit and taxes which appears after the expression "service charge".

16. Even Clause 26(d) which speaks about furnishing of rates stipulates that consolidated rate against each diet is to be quoted taking together the components (a)+(b)+(c) for the supply of each category of diet. Rates must be quoted against each category of diet and each scale of diet and not a single category of diet should be left unquoted. The bid would be cancelled as per the said clause if the bidder does not quote the rates properly. It is argued that thus, the petitioner fell foul of such clause, having not quoted any service charge. Moreover, the amendment curtailing zero service charge was in consonance with the original tender clauses.

17. Insofar as the fixation of minimum rate by the amendment is concerned, learned counsel for the private respondent no.13 highlights Clause 33(a) which provides that the bidder should not quote the rates above the standard rate for all categories of diet to ensure the quality and quantity of diet as per rates obtained from AMB, West Bengal. As per sub-clause (b) of Clause 33, if the bidder offers abnormally low rate, he/she should justify his/her quoted rate with facts and figures and a Tender Selection Committee will decide whether the rate is applicable or not. Such justification has not been given by the petitioner for not quoting any service charge.

18. Learned counsel further argues that Clause 39 provides the mode of calculation of rates. As per the said term, the calculation of rates of acceptable bidders will be on the basis of overall monthly financial implication for supply of all categories of diet based on weighted average of monthly consumption figure of last three previous years whose rates quoted by the bidder.

19. It is argued that there is a huge gap between the time when the tender was floated, that is, on June 13, 2023 and the time when the work order would ultimately be issued, necessitating a change in cost components by factoring in the current rates in the meantime.

20. Thus, the tender authorities were well within their power to take into consideration the current rates based on the AMB assessments, andintroduce the minimum quotation rate accordingly.

21. Thus, it is argued that the petitioner, having quoted zero service charge, is not qualified to make the present challenge and has no *locus standi* to present the writ petition. Moreover, the respondent-Authorities were justified in bringing about the amendment.

22. The petitioner has relied on two judgments of the Supreme Court, the ratio of which is well-settled. A tender process can be interdicted in judicial review under certain circumstances such as the decision or act of the Tender Issuing Authority being arbitrary, *mala fide*, tailor-made to suit a particular bidder or violative of public interest. Otherwise, the Tender Issuing Authorities have a play in the joint.

23. It is also well-settled that "the goal posts cannot be changed once the game has begun". In the present case, the respondent-Authorities have altered the cardinal premise of the tender, that is, the minimum quotable rate, after all the bidders submitted their bid and had no occasion to alter the same. Such arbitrary fixation of a minimum price after taking in all the bids is unheard of and *ex facie* arbitrary. If the petitioner and the private respondent nos.6 to 12 and the other bidders were aware that the minimum rate was Rs.88.63p they would havedefinitely taken the same into consideration and put in their bids accordingly. In fact, fixing a particular minimum rate has its own demerits. It is often seen that in such cases several, if not all, bidders quoteexactly the minimum rate as their own quotations, which would render an otherwise competitive tender a farce.

24. In the present case, a perusal of the materials indicate that it is the respondent no.13 which would solely benefit from the alteration and fixation of minimum bid price. It is unknown as to what prevented the respondent-Authorities from mentioning the minimum price as per the AMB rates at the outset while floating the tender and to incorporate the same in the tender document in the first place.

25. The argument of the respondent no. 13 that due to efflux of time between floating of the tender and the issuance of the work order, the alteration of price was necessary to maintain quality of food, is ridiculous, to say the least. It is absurd that the tender was floated on June 13, 2023 and in three months, there was such a fluctuation in price that the minimum bid price was to be arbitrarily fixed. No proof in that regard has been furnished as well. In any event, if it were so, the authorities could always have recalled the tender and issued the same afresh upon indicating the altered price indicia.

26. A noteworthy feature here is that the respondent-Authorities have effected several corrigenda in the Notice Inviting Tender, at least on July 12, 2023 and July 17, 2023, but never thought it fit to incorporate the minimum price therein. In any event, the reference to the AMB rates cannot be a justification to alter the base price subsequent to the bids being submitted.

27. Clause 33(a) merely stipulates that the bidder should not quote the rates above the standard rate for all categories of diet to ensure the quality and quantity of diet as per rate obtained from AMB, West Bengal. It was open to the respondent-Authorities to assess whether the quoted rates of the bidders were below the standard rate for all categories of diet as obtained from the AMB and decide on the eligibility of the bids accordingly. Clause 33(b) already stipulates that if the bidder offers abnormally low rate, he/she should justify his/her quoted rate with facts and figures.

28. In the present case, what the respondent-Authorities could not directly do, they have attempted to do indirectly. The bids of the petitioner or the respondent nos.6 to 12 have not been rejected on the ground that those where abnormally low or otherwise. Rather, the rules of the game have been sought to be altered after the last date of submission of bids to suit the interest of respondent no. 13, which would ultimately have the effect of excluding all the other bidders.

29. Clause 39, also relied on by respondent no. 13, provides the mode of calculation of rates. The calculation of acceptable bidders were to be on the basis of overall monthly financial implication for supply of all categories of diet based on weighted average of monthly consumption figure of last three previous years whose rates are quoted by the bidder. The same does not have any bearing on the issue at hand or furnish justification for the impugned resolution.

30. Surprisingly, the minimum price fixed by the impugned resolution suited the only respondent no.13 and none of the other bidders.

31. Another important feature in the impugned resolution is that it excludes bids with zero service charge.

32. The private respondent nos.6 to 12 have successfully shown from the format of the tender itself that the minimum wages including bonus as fixed by the West Bengal Government time to time, employers' contribution towards ESI and EPF would be reimbursed separately as per manpower guideline.

33. Hence, contrary to what has been sought to be projected by the respondent no.13, the 'service charge' component in the bid price does not include wages of labour. The said component is merely an additional charge which can be arbitrarily put in by the bidder for rendering the service. It is well within the domain of the bidder to waive such service charge to offer a competitive bid. Thus, the service charge component might very well be zero if a bidder chooses to give a go-bye to the same even without compromising the other components, that is, cost of raw materials and cost of cooking gas which have been duly taken into consideration by the petitioner.

34. However, by the impugned resolution, service charge of zero has been arbitrarily invalidated without any reasonable basis. Hence, the impugned resolution is also bad on such score.

35. In fact, nothing prevented all bidders, including the petitioner and the respondent nos. 6 to 12, to have quoted competitive prices in the first place if the amended conditions were published in the tender document itself. However, by subsequent backdoor introduction of the amended clauses, such competition has been curtailed in favour of the respondent no. 13 alone.

36. Lastly, the private respondent nos.6 to 12 have sought to point out that the modalities of draw of lots in case of a tie in the original tender has been sought to be modified to suit the bidder who has the lowest rate of at least five diets out of the total 8 to be chose as L-1 bidder. Such modality is also arbitrary and has no reasonable premise whatsoever. Although there has been no tie at present, the alteration of such an important clause also materially affects the tender.

37. Thus, in the present case, the impugned resolution has been brought about solely to suit the purpose of the respondent no.13 and is tailor-made as such, apart from being arbitrary and unreasonable. Thus, the same cannot be sustained.

38. Accordingly, WPA No.25906 of 2023 is allowed on contest, thereby setting aside the resolution dated September 4, 2023. The respondent-Authorities shall now proceed with the tender process from the stage immediately after the last date of submission of bids on the basis of and in terms of the original tender document.

39. If necessary, corresponding changes in the schedule of subsequent dates after the submission of the bids will be duly published by the respondents for such purpose, if so necessitated by the pendency of the present writ petition.

40. There will be no order as to costs.

41. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)