AD-08
Ct No.09
22.11.2023
TN

WPA No. 26163 of 2023

Sandip Halder
Vs.
The State of West Bengal and others

Mr. Saptansu Basu,
Mr. Swarup Paul,
Mr. Surya Maity,
Mr. Anish Roy,
Mr. Gurusaday Dutta
.... for the petitioner

Mr. Anirban Ray,
Mr. T.M. Siddque,
Mr. Tanoy Chakraborty
.... for the State

Mr. Abhratosh Majumdar,
Mr. Arjun Roy Mukherjee,
Ms. Debapriya Mitra
.... for the respondent no.5

1. Learned senior counsel for the petitioner contends that the previous order of this court in WPA No. 19281 of 2023 dated October 19, 2023 has been flouted. The petitioner had taken out several objections to the tender process, in respect of which this court had directed by the said order that the respondent-authorities should consider the representation of the petitioner within a particular period and the outcome of the said consideration should be intimated to the participants immediately thereafter.

2. It is contended that the outcome was never intimated to the petitioner at any point of time.

3. It is, thus, doubted as to whether in compliance with the said direction, the authorities took into consideration the objections raised by the petitioner at all.

4. It is also pointed out that the petitioner took certain specific objections as to the outer limit of the tender being required to be 180 days, to meet the actual requirement regarding current rates with the expected rates as indicated in the tender. That apart, several irregularities committed by the private respondent no. 5 in the tender were also glossed over by the respondent-authorities.

5. Learned senior counsel argues that over and above, the petitioner's technical bid has been rejected on a frivolous ground altogether. By placing reliance on the invitation to e-tender dated May 11, 2023, it is highlighted by learned senior counsel that in case the tender documents are downloaded from the website of the West Bengal Government e-procurement system, the same "may" be signed and submitted as per the e-tender procedure mentioned thereinafter. The expression "may" lends a discretionary colour to the said requirement. Hence, since the petitioner did not sign the downloaded document, the petitioner's bid could not be rejected altogether. In particular, it is argued that the petitioner signed all other relevant documents which were required to be submitted by the bidders.

6. Learned counsel for the State points out that it was not possible for the respondent-authorities to intimate individually the outcomes of the considerations to each of the participants; however, in terms of the order dated October 19, 2023, the respondent-authorities duly considered all the objections raised by the petitioner and, in fact, in consonance with such consideration, seventeen out of the total twenty-three bids were rejected.

7. Learned counsel for the State places reliance on paragraph 16 of the order dated October 19, 2023 where the court had directed that the respondent-authorities shall also ensure that the tender process shall be finalized as expeditiously as possible, positively by November 17, 2023.

8. It was, thus, not possible to physically communicate the outcome of the consideration to each of the participants, it is argued. However, since the outcome of the technical evaluation was uploaded on the official website, containing the reasons of rejection and acceptance in the remarks column for each of the bidders, the direction of this court was substantially complied with.

9. Learned senior counsel appearing for the respondent no.5 submits by placing reliance on a bunch of documents handed over in court that the said respondent, who ultimately turned out to be successful in the tender process, complied with all due formalities as required under the tender.

10. By placing specific reliance on the particular arguments made by the petitioner, it is argued that Income Tax Clearance Certificate for last three years was duly produced although not quoted to be under Section 143(1) of the Income Tax Act, 1961, which, in any event, is not mandatory.

11. It is further argued that Annexure-A and the Check List were not required to be certified by an authorized CA firm even as per the tender clauses. However, the turnover certificate for the three years was duly certified by the authorized CA firm as required.

12. In such regard, learned senior counsel places reliance on the pre-bid meeting and the minutes thereof, annexed at page-39 of the writ petition. It is submitted that it was never contemplated in the clauses thereof that the Annexure-A or the Check List were to be signed by any authorized CA firm.

13. Heard learned counsel for the parties.

14. The first argument advanced by the petitioner is that the order dated October 19, 2023 was not complied with.

15. However, the argument of the State is more acceptable to the extent that it might not have been possible for the respondent-authorities to communicate the outcome of the consideration of the representation of the petitioner individually to each of the twenty-three bidders. That is all the more so in view of the paucity of time due to the specific direction in the order dated October 19, 2023 that the tender process was to be finalized positively by November 17, 2023.

16. In any event, detailed reasoned orders were not directed to be given by the respondent-authorities in the said order of this court. The respondent-authorities are not expected, akin to courts of law, to pass elaborate and reasoned orders on the representations and complaints made by the bidders. The technical evaluation sheet annexed at page-61 of the writ petition clearly discloses that in the remarks column, detailed reasons of the rejections of each of the rejected bidders have been substantially given, which is sufficient compliance of the clause in the said order dated October 19, 2023 to intimate the outcome of the consideration to the participants.

17. Insofar as the illegality allegedly committed by the respondent no.5 is concerned, it is a cardinal principle of law and well-settled by several courts including this court and the Supreme Court that it is the employer whose reasonable interpretation of the clauses of a tender document are to be given effect to. It is not for the court to sit in threadbare judgment over such interpretation given by the employer.

18. In the present case, sufficient justification has been given by the respondent no.5 and the respondent-authorities insofar as the eligibility of the respondent no.5 is concerned.

19. Inasmuch as the Income Tax clearance certificate is concerned, the respondent-authorities are of the opinion that those were duly submitted and supporting documents in that regard have been handed over in court today by learned senior counsel for the respondent no.5.

20. A perusal of the pre-bid meeting minutes, in particular Clause 9 thereof, shows that the agency should have an annual turnover of Rs.1 crore in each of the three assessment years, that is, 2020-21, 2021-22 and 2022-23 as same as financial years 2019-20, 2020-21 and 2021-22, otherwise the bid is liable to be rejected. Such requirement has been fulfilled by the respondent no.5.

21. It was further mentioned in the said clause that financial turnover must be certified by any authorized CA firm. In the present case, as evident from the documents handed over, the turnovers for the three relevant financial years have been duly certified by a chartered accountant firm.

22. Thereafter in Item 9 of the minutes it is stated that “the same” will be applicable “at check list and Annexure-A”.

23. Contending arguments have been advanced by both sides as to the interpretation of the expression “the same”. One possible interpretation is that the said phrase qualifies the expression that it must be certified by any authorized CA firm. The other interpretation is that the said phrase qualifies “financial turnover” as indicated in the earlier portion of Item 9 of the minutes.

24. When two possible interpretations are possible, some leeway has to be given to the employer/tender issuing authority to interpret the said clause as per their requirement.

25. Since the respondent-authorities themselves are of the opinion that the expression “the same” pertaining to check list and Annexure-A refers to the financial turnover, it is not for the court or the petitioner to upset such interpretation of the tender issuing authorities. In such scenario, the court cannot go to the extent of setting aside the said interpretation of the tender issuing authority merely because an alternative interpretation of the relevant clause was possible. Hence, I do not find any illegality in acceptance of the bid of the respondent no.5 by the tender issuing authorities.

26. The other factor which remains is the legality of the rejection of the petitioner’s bid.

27. The reason given therefor in Item 23 of the duly uploaded technical evaluation sheet is that the terms and conditions are not signed and sealed as per tender clause.

28. The relevant clause in the tender document stipulates that the tender documents are comprised of terms and conditions of contract would govern any contract made along with tender application form and other relevant documents enclosed therewith.

29. Although it was mentioned in the invitation of tender that the tender documents can be downloaded and in such case, the same “may” be signed and submitted as per the e-tender procedure mentioned thereinafter, a complete reading of the said document clearly shows that in the present case, the expression “may” has to be read as “shall”, since the tender document-in-question also contains all the relevant clauses of the terms and conditions of the contract and had to be signed by the bidder.

30. Learned senior counsel for the petitioner has quite interestingly argued that terms and conditions of contract are only required to be entered into when the actual contract is awarded to the successful bidder and not at the juncture of submitting a bid.

31. However, it is not a question of the bidder entering into the terms and conditions of a contract, which naturally cannot happen before a contract is ultimately entered into, but it is a question as to whether the bidder who is participating in a tender process submits to the condition that he is agreeable to accept the terms and conditions of the contract when entered into. Such consent of the bidder is an implicit and integral part of a bid.

32. A bidder, when participating in the tender by submitting his bid, has mandatorily to agree that if and when a contract is awarded to him, he will agree to the terms and conditions thereof as indicated in the tender document itself. Hence, there are two layers to the bidders submitting to the terms and conditions, one at the initial stage of submission of the bid and the other at the later juncture when the contract is actually entered into between the bidder and the employer.

33. Seen from such perspective, it was an incorrigible error on the part of the petitioner not to sign the document, which not only was the tender document but also contained the prospective terms and conditions of contract which the bidder would have to agree to enter into once a contract is awarded to him.

34. In such context, it cannot be said that there was any irregularity on the part of the tender issuing authorities in rejecting the petitioner's bid and accepting that of the respondent no. 5 or on the part of the respondent no.5 who is the successful bidder.

35. Accordingly, WPA No. 26163 of 2023 is dismissed on contest without any order as to costs.

36. 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.)