

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 27132 of 2022

M/s. Navkar Global Infra

vs.

Damodar Valley Corporation

With

W.P.A 27137 of 2022

M/s. Navkar Global Infra

vs.

Damodar Valley Corporation

For the petitioner	:	Mr. Kishore Dutta, Sr. Adv. Mr. Srijib Chakraborty, Adv. Mr. Moyukh Mukherjee, Adv. Mr. Aditya Mondal, Adv. Ms. A. Bazaz, Adv.
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For the DVC	:	Mr. Samrat Sen, Adv. Mr. Swarajit Dey, Adv. Ms. Riddhi Jain, Adv.
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Last Heard on	:	08.05.2023.
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Delivered on	:	19.05.2023.
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Moushumi Bhattacharya, J.

1. The writ petitions involve similar facts and have been filed against the Damodar Valley Corporation. Both the writ petitions are being disposed of by the judgment. A few of the dates are different; the facts and dates in WPA 27132 of 2022 are being mentioned in the judgment.
2. The petitioner participated in a Tender floated by the respondent Damodar Valley Corporation for empanelment of transportation agencies for evacuation of ash from ash ponds of Durgapur Steel Thermal Power Station of DVC. The Tender was dated 9.9.2022. The petitioner has challenged the rejection of the petitioner's techno-commercial bid on 1.12.2022 on the ground of being "Non Compliant".
3. At the time of moving the matter the petitioner's grievance was that the petitioner's bid was admitted by the Tender Evaluation Committee on the same day i.e. 1.12.2022 at 2:04 pm but was rejected 11 minutes later at 2:15 pm.
4. The petitioner was granted interim protection by an order dated 9.12.2022 noting the narrow-margin of 11 minutes and directing DVC to keep any further evaluation of the Tender in abeyance until the matter is heard out on the returnable date. The interim order was extended thereafter. Affidavits are now complete in the matter.
5. Learned counsel appearing for the petitioner submits that the petitioner was eligible under the Tender conditions and the techno-commercial bid submitted by the petitioner was rejected without application

of mind and for extraneous considerations. Counsel puts emphasis on the margin of 11 minutes between the petitioner's bid being accepted at 2:04pm on 1.12.2022 but thereafter being rejected at 2:15 pm on the same day. Counsel places documents to show that the reason given for the impugned rejection, namely, "Techno Commercially Non Compliant" is not a ground of rejection contemplated in the Notice Inviting Tender. Counsel submits that the petitioner had submitted all documents as required by the NIT and no reasons have been given in support of the impugned rejection.

6. Learned counsel appearing for the respondent DVC submits that the scope of work in the NIT, namely, evacuation of ash from ash ponds of the Durgapur Steel Thermal Power Station of DVC and nuisance-free transportation along with disposal of the ash in designated places outside the plant boundary requires uninterrupted and continuous operation. Counsel submits that DVC is seriously prejudiced by the operation of the interim order. Counsel seeks to dislodge the allegation of the 11 minutes margin by stating that the bids were opened on 17.10.2022 and the Tender Inviting Authority informed the petitioner on 1.12.2022 of the impugned rejection. Counsel submits that the impugned decision is fundamentally different from administrative orders issued by the authorities in the general running of the Government and that the decision taken in the present matter is in the realm of contracts. Counsel submits that the authority is not required to give a reasoned order as long as the rejection does not suffer from any irregularity. Counsel places the affidavit filed on behalf of DVC to

submit that the petitioner's techno-commercial bid was rejected for justifiable reasons.

7. Upon considering the material on record in connection with the submissions made on behalf of the parties, the Court arrives at the following findings.

8. Although the primary contention at the time of interim relief was the 11 minutes difference in the admission and rejection of the petitioner's techno commercial bid, a closer look at the documents reveals otherwise. The petitioner's bid was opened on 17.10.2022 along with the bids of other bidders who have participated in the tender. A host of correspondence followed thereafter including on 15.11.2022, 17.11.2022, 24.11.2022, 28.11.2022 and 29.11.2022. The correspondences are part of the affidavit filed by the DVC. The correspondence show that DVC sought for clarifications on the documents submitted by the writ petitioner and that the writ petitioner furnished documents to provide such clarifications. The petitioner's techno-commercial bid was rejected on 1.12.2022 only after DVC considered these documents.

9. Further, the tender process was admittedly conducted through the Central Public Procurement Portal (CPPP) which generated a system-generated mail whenever the Portal was accessed. This system-generated mail was what the petitioner relied on as an "admission" of the petitioner's bid at 2:04 P.M. on 1.12.2022 which was followed by the impugned rejection at 2:15 P.M. on the same day. The documents also show that similar

system-generated mails were sent to all the participating bidders on 1.12.2022 at 2:04 P.M.

10. Therefore, the argument of rejection of the bid within the span of 11 minutes of admission of the same is belied from the documents on record.

11. It is also arguable whether the petitioner was qualified to submit the bud under the eligibility criteria set out in clause 5.01 of the Detailed Invitation For Bid of the NIT. Clause 5.01 requires the bidder to furnish details of having completed “similar works” within India during the last 7 years ending the last day of the month previous to the one in which the offer is invited.

12. Clause 5.01 contains three classifications of the works including two similar completed works each costing not less than an amount equal to Rs. 15,08,48,404/-. The “Notes” for the technical criteria for clause 5.01 further explains the meaning of “completed work” and “similar work”.

13. The affidavit filed by DVC shows that the petitioner failed to furnish details of similar or completed works of the financial parameters mentioned in clause 5.01 of the NIT. The insufficiency of the documents includes the petitioner’s disclosing the Letter of Intent without submitting documents of completion or the value of the work actually completed. In other cases where the petitioner has disclosed Letters of Intent along with work done supported by certificates of completion, the documents do not indicate segregation of the value of work in relation to similar nature of work. DVC has also given instances of requesting submission of appropriate documents

from the petitioner's employer Tata Project Limited but did not receive any response from the petitioner's employer as to the value of work which could be categorised as transportation which was the requirement of the NIT. Moreover, the purchase orders submitted by the petitioner for different items of work done are less than the minimum financial requirement in clause 5.01.

14. The affidavit of DVC, which deals with the petitioner's documents in detail, raises a doubt as to whether the petitioner was at all eligible to participate in the Tender under the parameters including clause 5.01 (of the Detailed Invitation For Bid of the NIT) or otherwise.

15. In *Silppi Constructions Contractors v. Union of India*; (2020) 16 SCC 489, the Supreme Court relied on *Jagdish Mandal v. State of Orissa*; (2007) 14 SCC 517 to hold that evaluating tenders and awarding contracts are essentially commercial functions where the principles of equity and natural justice stay at a distance. It was further held that while rejecting a tender, the authority inviting the tenders is not required to give reasons even if it is within a State under Article 12 of the Constitution. The Supreme Court took a practical look of the matter to opine that giving of reasons at every stage would disrupt the commercial activities of the State. In the present case, the tender authority rejected the petitioner's techno-commercial bid by stating that the bid was found to be techno commercially non-compliant at the stage of evaluation by duly constituted Committee of DVC. The impugned rejection cannot be interfered with on the ground of being insufficient or

arbitrary following the decisions of the Supreme Court in *Silppi Constructions* and *Jagdish Mandal*.

16. The prohibition of *Mohindhr Singh Gill v. Chief Election Commissioner; New Delhi; (1978) 1 SCC 405* would apply when the authority tries to supplement reasons already given with fresh reasons. This would further not apply to the present case which involves the evaluation of a tender and in light of the pronouncement of the Supreme Court in *Silppi Constructions* where the Supreme Court held that the authority can provide the reasons for rejection of a bid in the counter to the writ petition.

17. Even otherwise there are several decisions of the Supreme Court which reiterate the limited power of judicial review in matters of tender including *N.G. Projects Limited v. Vinod Kumar Jain; (2022) 6 SCC 127* and *National High Speed Rail Corporation Limited v. Montecarlo Limited; (2022) 6 SCC 401*. In the last decision, namely *Montecarlo*, the Supreme Court observed that before interfering with a contract in exercise of the powers of judicial review, the Court should ask itself whether the decision of the authority is *mala fide* or intended to favour someone or whether the process adopted is so arbitrary and irrational that no responsible authority acting reasonably could have reached that decision.

18. The facts which emerge from the records and the settled law of the subject persuade this Court to deny the relief prayed for.

19. The decisions cited on behalf of the petitioner namely *Bharat Singh v. State of Haryana; (1988) 4 SCC 534* required a party to complete and prove

facts by evidence and from the pleadings on record. Contrary to the contentions of the petitioner, the present matter does not involve any point of law which is required to be substantiated from the material on record. It is essentially a factual dispute where DVC has brought the relevant facts before the Court. *A.K.K. Nambiar v. Union of India*; (1969) 3 SCC 864 is on verification of an affidavit/petition and its admissibility as evidence. The petitioner has sought to dispute the authority of the deponent of the affidavit filed by the DVC. The deponent of the affidavit is the Joint Director (HR)- Law of DVC and there is nothing on record to raise doubts as to his authority to verify and affirm the affidavit. *M.P. Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited*; (2023) 2 SCC 703 lays down the scope of judicial review at the post-contract stage. Hence, this decision may not assist the petitioner at the stage of a tender which is essentially pre-contract.

20. Both WPA 27132 of 2022 and WPA 27137 of 2022 are found to be without merit for the reasons stated above. The writ petitions are hence dismissed and the interim orders dated 9.12.2022 are accordingly vacated. Connected applications, if any, are also disposed of. There shall be no order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)