

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

W.P.O. 353 of 2023

IA No: GA 1 of 2023

Lalit Kumar Kothari & Anr.

Vs.

Union of India & Ors.

For the petitioners : Mr. Jishnu Saha, Sr. Adv.
Mr. Ishaan Saha, Adv.
Ms. Puja Tripathi, Adv.

For the UOI : Mr. Sanajit Kumar Ghosh, Adv.
Mr. Tapan Bhanja, Adv.

For the respondent no. 5 : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Ms. Rajshree Kajaria, Adv.
Mr. Sarvapriya Mukherjee, Adv.

Last Heard on : 01.05.2023.

Delivered on : 15.05.2023.

Moushumi Bhattacharya, J.

1. The writ petition has been filed in relation to a rejection of a technical bid submitted by the respondent no. 3 which is a Joint Venture

(JV) of the petitioner no. 1 and the respondent no. 4. The technical bid of the respondent no. 3 JV was rejected by the respondent nos. 1 and 2 by a mail dated 8.2.2023 alleging that the respondent no. 3 did not fulfill the minimum eligibility criteria. The tender in question was floated by the respondent no. 1 for Survey, Design, Supply etc. of Automatic Signalling in Khana-Andal Section and other sections of Asansol Division of Eastern Railway. The petitioners were granted interim protection by an order dated 21.3.2023. The order was passed on the conduct of the respondents at the material point of time and not on a consideration of the merits of the case.

2. The added respondent no. 5/MRT Signals Limited, which was the successful tenderer, filed an application seeking vacating of the interim order dated 21.03.2023. The writ petition as well as the application are being disposed of by this judgment.

3. The contentions of the parties are stated in brief.

4. According to learned counsel appearing for the petitioners, the grounds of challenge include the petitioners' rejection being bereft of reasons. Counsel submits that the respondents failed to disclose to the petitioners that the respondents had sought for confirmation of the credentials of the respondent no. 4 Kiran Infra Engineers Limited, one of the partners of the JV and that Rail Vikas Nigam Limited (RVNL) had clarified that the respondent no. 4 had performed the entire work for RVNL and had also been paid a substantial sum of money; Rs. 48.82

crores. Counsel further submits that the respondent authorities were under an obligation to conduct a reverse auction which they failed to do without any credible reason. It is submitted that the impugned rejection is discriminatory and is founded on ill-motives. Counsel submits that the impugned rejection was only a single-line rejection without reasons and places decisions to show that the Tendering Authority being an arm of the Government must act with fairness.

5. Learned counsel appearing for the added respondent no. 5, being the applicant which seeks to vacate the interim order, submits that the petitioners as the minority JV partner are not technically-eligible to participate in the tender. Counsel relies on specific clauses of the General Conditions of Contract (GCC) which is applicable for the JV and seeks to construe the conditions so as to show that the documents submitted by the JV/respondent no. 3 would prove its ineligibility. Counsel submits that the interim order is continuing to cause irreparable prejudice to applicant/successful tenderer as the Letter of Acceptance (LOA) for performing the work was already issued to the applicant on 14.3.2023 which requires the entire work to be completed within 16 months from the date of the LOA. It is submitted that the applicants should be free to start work so as to evade the possibility of disruption in the ensuing monsoon season. Counsel submits that the applicant had already furnished two Bank Guarantees aggregating to Rs. 4.49 crores and that the applicant's EMD of Rs. 44.39 lacs has also been retained as security deposit.

6. Several undisputed facts emerge from the materials placed before the Court.

7. The writ petition has been filed by the petitioners who are the minority JV partner of the respondent no. 3 JV challenging the rejection of the JV's technical bid. The essential ground of challenge is that the majority JV partner/respondent no. 4 is not technically-eligible to participate in the tender. The question of whether the JV was eligible to participate in the tender would be required to be tested against the relevant paragraphs of the GCC which are applicable to the JV.

8. Paragraph 17.15.1 of the GCC requires that the lead members of the JV must have successfully completed or substantially completed any one of the categories of works mentioned under Paragraph 10.1. The Explanation for Paragraph 10 of GCC clarifies that substantially completed work would mean an ongoing work in which payment equal to or more than 90% of the value of the ongoing contract has already been received. A credential certificate issued not prior to 60 days of the invitation to present tender is to be provided by the bidder in compliance of this condition.

9. The documents submitted by the JV / respondent no. 3 in relation to the completed works show that it is a Performance Certificate and not a Completion Certificate / Substantially Completed Certificate as required under Para 17.15.1 / Explanation to Para 10 of the GCC. Further, the document is dated 31.3.2022 which is almost 8 months prior to the date

of the e-Tender Notice. The date of e-Tender Notice is 24.11.2022. The Explanation to Paragraph 10 of the GCC requires proof of ongoing work, payment of 90% of the ongoing contract value and a Credential Certificate issued within 60 days prior to the invitation of the present tender. Moreover, the value of the ongoing contract is Rs. 3,60,21,51,900/-, 90% of which would be Rs. 3,24,19,36,710/-. The document shows that RVNL made payment of Rs. 3,14,03,19,177/- which is less than 90% of the value of the ongoing contract.

10. Even if the Performance Certificate dated 31.3.2022 issued by RVNL is regarded as a “substantially completed” Certificate under Para 17.15.1 of the GCC, the statements made in the writ petition show that the respondent no. 4 as the Majority JV Partner in the contract was carrying out the work as a JV Called DRA-Kiran (JV) with respondent no. 4 having 45% share. The petitioners as the Minority JV Partner however contend that the respondent no. 4 (Majority JV Partner) has received Rs. 1,41,31,43,629.65/- out of which Rs. 48,82,08,035.36/- was only for the signaling work / works similar to the present tender and is accordingly greater than 30% of the tender value (requirement under one of the categories of works mentioned under Paragraph 10.1 of the GCC).

11. The Technical Credentials relied upon by the petitioner are moreover in the nature of a self-certification as opposed to a certificate issued by RVNL who is the employer in the contract reflected in the Performance Certificate dated 31.3.2022. The petitioners have not provided any documents to show that the respondent no. 4 received Rs.

48,82,08,03,5.36/- as payment for signaling work. Even if it is assumed that this amount was received by the respondent no. 4 for signaling work (similar to the work of the tender), the note to Para 17.15.1 reflects that the completed work done by the respondent no. 4 in the contract would be taken into consideration only to the extent of the share of the respondent no. 4 in DRA-Kiran (JV) that is 45% of Rs. 48,82,08,035.36/- = Rs. 21,96,93,615.91/- which is less than 30% of the Tender value.

12. This Court also finds substance in the case of irreparable prejudice made out by the added-respondent no. 5 which is the successful tenderer. The reasons for the finding are as follows. The Letter of Acceptance was issued in favour of the added respondent / applicant on 14.3.2023. The Letter of Acceptance indicates that the entire work is to be completed within 16 months from the date of the LOA. More than 2 months have already passed in the window for completion of the work. The relevant Clause of the GCC-Para 62(1) and (2) indicate that default on the part of the contractor to complete the work will result in penal consequences. Admittedly, the applicant / added respondent has already submitted two Bank Guarantees aggregating to Rs. 4,49,31,837/- crores which is also part of the records and has also put in on EMD of Rs. 44,39,100/-.

13. The decisions cited on behalf of the Railways reinforces the importance of contracts being completed as expeditiously as possible and judicial review being kept at a minimal level. In *Sterling Computers Limited v. M/s M & N Publications Limited*; (1993) 1 SCC 445 and *Afcons*

Infrastructure Limited v. Nagpur Metro Rail Corporation Limited; (2016) 16 SCC 818, the Supreme Court restricted judicial review in respect of administrative decisions to where the threshold of mala fides, express favouritism, arbitrariness or perversity are met. The interim order dated 21.3.2023 was granted only on the limited ground of the petitioners being before the Court and the Railways not being able to take any steps to render the challenge infructuous. The Railways was hence directed not to give effect to the work order until the matter is heard out. The interim order was not passed on a consideration of the merits of the matter.

14. Upon considering the facts and the documents brought to the Court by the parties, it is evident that the petitioners were not eligible to challenge the selection of the added respondent since the petitioners were not technically-eligible even to participate in the Tender. Paragraphs 17.15.1 and 10.1 of the GCC and other documents relied on by the applicants/respondent no. 5 makes this clear. The interim order is hence vacated and WPO 353 of 2023 is accordingly dismissed without any order as to costs. The vacating application GA 1 of 2023 is also disposed of.

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

(Moushumi Bhattacharya, J.)