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WPO/1830/2023
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

LUPIN GASES PVT LTD
VS
UNION OF INDIA AND ORS

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 13th December, 2023.

Appearance:

Mr. Sakya Sen, Adv.

Mr. Sunil Kumar Gupta, Adv.

Mr. Shuvojeet Gupta, Adv.

. . .for the petitioner.

Mr. Indrajeet Dasgupta, Adv.

Ms. Sayani Ray Choudhury, Adv.

Ms. Puspita Bhowmick, Adv.

. . .for the Railway Authority.

The Court: The petitioner's contention is that the petitioner's bid was rejected on technical ground by the Railway Authorities on the premise that the petitioner had not met the tender conditions insofar as the "Make in India" criterion was concerned.

Learned senior counsel places reliance on the relevant clause of the tender, which is Clause 4, to argue that the same mandated that all the bidders must upload a certificate from the statutory auditor or cost auditor of the company or from a practising cost accountant or chartered accountant in respect of suppliers other than the companies, giving the percentage of local content with brief description of tendered item.

The certificate which was produced by the petitioner, it is contended, was issued by a practising chartered accountant and clearly met all the criteria as per Clause 4. However, inadvertently, the exact product description was not given therein. It is argued that since the tender was a single-product tender, there could not be any ambiguity that the certificate produced was in support of the petitioner's bid with regard to the particular product as contemplated in the tender. That apart, from other documents also submitted by the petitioner, there was sufficient proof to indicate as to what was the product to be supplied by the petitioner.

Learned senior counsel also places reliance on the Techno-Commercial Tabulation annexed at page 54 of the writ petition to indicate that even the tender issuing authorities were aware of the exact product that was being offered by the petitioner, as reflected in the said tabulation.

Learned senior counsel appearing for the petitioner places reliance on *Rashmi Metaliks Ltd. and Anr. Versus Kolkata Metropolitan Development Authority and Ors.* reported at (2013) 10 SCC 95 to distinguish between the essential and

non-essential or ancillary terms of a contract/tender. In the said case, the requirement as to production of income tax return was held to be a non-essential term. The Supreme Court went on to observe that a bid could not be rejected on the ground of non-fulfilment of a non-essential term of the contract.

It is argued that in the present case, the specific mention of the name of the product in the certificate issued by the chartered accountant was a non-essential part of the terms of the tender.

Learned senior counsel also relies on certain other certificates, identical with the present one, which were used by the petitioner for similar tenders floated by the railways themselves which had been accepted by the Railways. It is, thus argued, that the Railways are estopped from challenging the veracity of the said certificate and rejecting the tender on such ground.

Learned counsel for the respondent authorities argues that the petitioner merely produced a routine certificate issued by a chartered accountant. By placing reliance on the said document, it is argued that the same omits to mention vital components of the tender, including the tender number and the description of the item put up as an offer of the petitioner. The document annexed at page 65, which is a purported clarification by the same chartered accountant, it is argued, admits the fact that the relevant tender number, opening bid date and item description were not given in the original certificate. It is submitted that such post facto clarification after the bids were submitted was not sufficient to legitimise the otherwise ineligible bid of the petitioner.

By placing reliance on the relevant condition of the tender, that is, Clause 4, it is argued that the said condition was mandatory. As such, the ratio laid down in *Rashmi Metaliks Ltd.* (supra) is not applicable as the petitioner faulted on compliance of an essential term of the contract.

Heard learned counsel for the parties. It transpires that the defect pertains to the certificate issued by the practising chartered accountant which was produced by the petitioner in support of his bid.

Whereas Clause 4 of the tender document demanded that the bidders must upload a certificate from a practising chartered accountant (in the case of suppliers like the petitioner) giving the percentage of local content with brief description of the tendered item, the certificate produced by the petitioner omitted to mention the brief description of the item. However, it clearly certified that the local content was 68%, which fulfilled the yardstick stipulated in the tender otherwise.

Although Clause 4 clearly stipulated that a certificate had to mention in brief the item description, it is evident on a composite reading of Clauses 3 and 4 that the stress was sought to be laid on the fact that the product had to have a local content equal to or more than 50%, which has also been mentioned in Clause 2 of the tender document. Thus, the tender document envisaged the product to have more than 50% local content. The certificate to be issued by the chartered accountant was essential only to the extent that it corroborates that the local content was more than 50%; nothing more, nothing else. The chartered

accountant's certificate did not have any intrinsic essentiality to the crux of the tender but merely operated as a certification of the content being more than 50% local.

The document in the case of the petitioner clearly satisfied such criterion as it was mentioned by the chartered accountant that the local content was 68%. The said certificate also referred to the fact that it was being issued in the name of the petitioner and certified about the existence of the local content for the "item procured". It further went on to mention that the certificate was being produced by the client of the chartered accountant, that is, the petitioner for the purpose of availing purchase preference under public procurement (preference to make in India).

Hence, there was sufficient indication in the certificate itself as to the product of the petitioner being comprised of more than 50% of local content.

We also have to see the tender conditions in proper perspective. The compliance of the petitioner lay not in the act of producing the certificate in isolation but in such certificate being produced in conjunction with other documents, which satisfy the tender criteria fully.

The composite reading of all the documents submitted by the petitioner with its bid shows that the product description was sufficiently satisfied by the other documents produced by the petitioner. Read in conjunction with such documents, the certificate of the chartered accountant clearly indicated as to what product was being certified. In fact, in the Techno-Commercial Tabulation

the petitioner's product had been clearly enumerated by the respondent authorities themselves in detail, leaving no doubt as to the product which was being certified.

In fact, although the chartered accountant subsequently gave clarification leaving no manner of doubt that the certification was ratified by the chartered accountant firm itself, irrespective of such subsequent clarification, since the certificate was deposited by the petitioner substantially in terms of the present tender and in support of the product offered by the petitioner, there could not have been any non-compliance of the terms of the tender on broader principles.

As held above, the stress of the relevant clauses was on the percentage of local content and not the mention of specific details of the exact product which was certified in the certificate.

Insofar as the *Rashmi Metaliks Ltd.* ratio is concerned, the same does not afford much help to the petitioner, since in the present case the condition of production of the chartered accountant's certificate as to percentage of local content itself was obviously essential, since it was the primary corroboration of the fact that the product consisted of local content of the percentage as contemplated in the tender, but the detailed product description to be given in the certificate was only an ancillary term.

The petitioner has a point in arguing that the essentiality of the certificate lay in a composite reading of the same along with other documents furnished by

the petitioner and a pedantic approach ought to have been taken by the tender-issuing authorities in that regard.

In such view of the matter, the rejection of the petitioner's bid on the hyper technical ground of lack of details in the chartered accountant's certificate (which was otherwise duly submitted in time) has to be set aside.

Accordingly, WPO 1830 of 2023 is allowed on contest, thereby setting aside the impugned rejection of the bid of the petitioner at the technical stage. The respondent shall now proceed on the premise that the petitioner's bid was otherwise technically valid and shall take up the tender process from there onwards.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

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