

27.06.2024
Sl. No.6(DL)
srm

W.P.A. No. 16070 of 2024

EMRI Green Health

Versus

State of West Bengal & Ors.

Mr. S.N. Mookherjee, Id. Sr. Advocate
Mr. Sabyasachi Choudhury,
Mr. Deepan Kumar Sarkar,
Ms. Tiana Bhattacharya,
Ms. Deepti Priya,
Ms. Anshumala Bansal

...for the Petitioner.

Mr. Probal Kumar Mukherjee, Id. Sr. Advocate,
Mr. Siddhartha Chowdhury,
Mr. Rajat Dutta

...for the Respondent No.4.

Mr. Anirban Ray, Id. GP
Mr. Biswabrata Basu Mallick

...for the State-respondents.

1. Affidavit-of-service is taken on record.
2. The writ petition arises out of inaction on the part of the respondent Nos.1 to 3 in considering the objections raised by the petitioner with regard to selection of the respondent No.4 in the technical bid. By a letter dated June 6, 2024, the petitioner had intimated the tendering authority that the respondent No.4 had provided incorrect information and did not disclose the litigations pending against it. The respondent No. 4 has since been

declared as the successful bidder. The work order has not yet been issued.

3. Mr. S.N. Mookherjee, learned Senior Advocate appearing for the petitioner submits that Clause 7 of the notice inviting tender mentions the eligibility criteria. It states that all the participants were mandated to possess the financial capacity as also the technical capability, including experience and credentials. Mr. Mookherjee submits that the expression 'credentials' was consciously included in the terms and conditions. It meant that the tender evaluation committee was required to know the past performances, the background and the standing of the participants in respect to other works which they had executed earlier.
4. Referring to the clause dealing with technical and financial criterion, Mr. Mookherjee submits that all participants were required to disclose whether they had suffered any order of blacklisting by the Central Government, State Government, public sector undertakings or local bodies. Annexure 1 of the NIT has been disclosed before this Court, which indicates that an affidavit would have to be affirmed by each participant, indicating that the participant had neither been

blacklisted nor convicted nor was any criminal case pending against the participant before any court of law.

5. Relying on Clause 18, it has been submitted that if any information given by a bidder was found to be incorrect, manufactured or fabricated, the bid document was liable to be cancelled.
6. Reference has been made to a decision of the Guwahati High Court and also a list of cases which are pending against the respondent No.4. It has been contended that the Guwahati High Court had been approached by the respondent No.4 when a particular tendering authority in the State of Assam had found the bid of the respondent No.4 to be unresponsive. The Guwahati High Court had refused to interfere with the decision of the authorities. The Court had held that although the minimum requirement as per the corrigendum dated January 25, 2023 appeared to have been met by the petitioner, the same would not restrict the State-respondents from considering the information provided in Clause 4.7 of the ITB at the stage of opening of the technical bid, as the same could be a determinative factor to be considered by the State-respondents. The apprehension of the State-respondents that the contract may not be satisfactorily

performed by the respondent No.4 and instead, they could be saddled with further litigation, was found to be justified. Thus, it is submitted that the information provided by the petitioner would be indicative of the fact that the respondent No.4 lacked the credibility.

7. Mr. Probal Kumar Mukherjee, learned Senior Advocate appears on behalf of the respondent No.4 and submits that disclosure of all pending cases, was not an essential requirement. The cases mentioned by the petitioner in the writ petition, involve ex-employees of the respondent No.4 as also other persons who are not connected with the present bidding process. The affidavit required disclosure of criminal cases and two such criminal cases which were pending, had been disclosed. Clause 7 of the technical and financial criteria talks about blacklisting and the respondent No.4 was never blacklisted. Moreover, even after the contract is awarded, the authority retains the power to cancel the contract. After receiving the representation of the petitioner, the authority did not deem it necessary to cancel the contract as the authority was satisfied with the answers given by the respondent No.4.

8. Learned Government Pleader submits that the tendering authorities are the best persons to decide whether a bidder is competent to perform the work. Interpretation of the terms and conditions of the bid document also rests with the author of the document. Upon receipt of the representation of the petitioner, the authority called for certain answers from the respondent No.4 and the respondent No.4 duly answered the queries. It is further submitted that the decision whether the cases which are pending against the respondent No.4 would be relevant for evaluation of the technical capability, involving the experience and credential of the respondent No.4, falls within the domain of the tendering authority. It is for the author of the document and tender evaluation committee to interpret the clauses in the contract and assess whether a bidder had fulfilled the terms and conditions of the contract. This Court, in judicial review, cannot evaluate the eligibility. The Court cannot decide whether a bidder is eligible or not, on the basis of a complaint by an unsuccessful participant.
9. Heard learned Counsel for the respective parties. Admittedly, the expression 'technical capability' includes experience and credentials. The expression 'credential'

means qualification, achievement background and suitability. Whether a bidder had successfully completed similar earlier contracts or had faced litigations on account of inability to perform them, are relevant considerations in my prima facie view. Thus, whether the litigations at all affect the credential of the successful bidder, must be decided by authority.

10. In this case, a clause has been inserted requiring a bidder to disclose any incident of blacklisting. Admittedly, the respondent No.4 was not blacklisted. However, the notice inviting tender stipulates that the document required to prove that the bidder had not been blacklisted, is an undertaking to be submitted on a non-judicial stamp paper as per Annexure 1. Annexure 1 is a format which includes a clause where the bidder has to declare that no criminal case against the bidder is pending in any court of law. Whether the disclosure by the respondent No.4 was correct, is a question of fact and to be looked into by the tendering authority. Whether the terms and conditions required disclosure of all cases, or whether disclosure of the two criminal cases amounted to compliance of the said clause, is also an issue to be

decided by the authority. Such decision depends on the interpretation of the clauses in the bid document.

11. It appears that a clause has been inserted in the terms and conditions which stipulates that if the bidder submits any document which is either incorrect or manufactured or fabricated, the bid would be rejected. If the contract is already awarded, the agreement would be cancelled.
12. It also appears that a proceeding before the Guwahati High Court at the instance of the respondent No.4, had failed. The Court was of the view that the decision of the authorities therein to treat the bid documents as non-responsive was justified in view of the litigations which were pending.
13. Under such circumstances, once the pending litigations have been disclosed to the tender evaluation committee, this court deems it fit to direct the committee to consider such factor before the work order is issued and the agreement is executed.
14. This order is being passed in public interest. The contract is with regard to 24x7 Emergency Transportation Service for Expecting Mothers and Sick Infants through a toll-free centralised call centre. The work is of paramount public importance. It involves dedicated and prompt service to

pregnant women and sick children who need such facility at their door step, at all odd hours. High standards of commitment have to be met by the contractor. What the authority is required to do, is to give a serious thought to the matter, upon interpretation of the clauses contained in the notice inviting tender. The question as to whether the disclosure of the pending cases, would in any way affect either the credential or the eligibility of the successful bidder, must be decided. These aspects shall be analysed by the concerned tender evaluation committee.

15. This Court is conscious of the proposition that only the tendering authority is in a position to interpret its clauses and to assess the capacity of the bidders. This Court is not entering into the domain of the committee and leaves it to the committee to take an informed decision, based on the information supplied by the petitioner and satisfy itself that that the award of tender to the respondent No.4 will be justified.

16. The writ petition is disposed of with a direction upon the tendering evaluation committee to take a decision on the objection raised by the petitioner and pass a reasoned order, which shall be communicated to the petitioner.

Thereafter, the work order shall be issued if the objections of the petitioner are found to be baseless or unjustified.

17. The committee will decide the issue independently.

18. There shall be no order as to costs.

19. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)