IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.30648 OF 2023

Standard Trading Co.
A partnership firm,
Through its partner
Mr. Sanjay Raja, having its office at
18 NW-A, The Ruby,
Senapati Bapat Marg,
Dadar (W), Mumbai – 400028 ….. Petitioner

Versus

1 The Shipping Master,
Govt. Shipping Office, Mumbai,
A Central Government Department,
Nau Bhavan, 10 RK Marg,
Ballard Estate, Mumbai - 400001

2 Director General of Shipping
9th Floor, Beta Building
i-think Techno Campus, Kanjurmarg(E),
Mumbai – 400 042

3 Union of India
Through Ministry of Ports,
Shipping and Waterways,
Headquarters at Parivahan Bhavan,
1, Parliament Street, New Delhi and
also having its office at Nau Bhavan,
10 R K. Marg, Ballard Estate,
Mumbai – 400001

4 M/s. Lords Sticker Company
Unit No.3003/3004, 3rd Floor,
Bhandup Industrial Estate,
Pannalal Compound, LBS Marg,
Bandup(W),
Mumbai – 400078 ….. Respondents

Mr. Venkatesh Dhond, Senior Advocate with Mr. Rishikesh Soni, Mr. Shailesh Poria and Ms. Dhruvee Patel i/b. Economic Laws Practice for the Petitioner
Mrs. Shehnaz V. Bharucha for Respondent Nos.1 to 3
Mr. Zoheb Shaikh for Respondent No.4

CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. & AMIT BORKAR, J.

DATE : JUNE 10, 2024

ORAL JUDGMENT:

1. Heard learned counsel representing the respective parties.

2. This petition invokes our jurisdiction under Article 226 of the Constitution of India with the prayer to quash the work order dated 1st September 2023, issued by the Shipping Master, Mumbai – Respondent No.1, whereby the work relating to personalisation of pre-printed Indian CDC & COC Booklets & Renewal Stickers and Seamen (Sails) Identity Card has been awarded to Respondent No.4. Simultaneously, challenge has been made to another order, dated 13th October 2023 issued by Respondent No.1 extending the date of commencement of the work from 1st October 2023 to 1st November 2023. The impugned work order has been awarded in favour of Respondent No.4 for a period of five years.

3. The Petitioner also challenges the letter issued by Respondent No.1, dated 8th September 2023, whereby the Petitioner has been informed that post successful completion of tender process, Respondent No.4 has been found L-1 and accordingly, has been awarded the tender. By the said letter, it has also been informed to the Petitioner that its bid has been rejected and that the earnest money deposit is being returned.

4. Prayer has also been made to issue direction to Respondent No.1 to reconsider the bid submitted by the Petitioner and in the alternative, to quash the tender with further direction to float a fresh tender.

5. Respondent No.1 issued tender notice No.1/2023 on 17th March 2023, inviting bids for personalisation of pre-printed Indian CDC & COC Booklets & Renewal Stickers and Seamen (Sails) Identity Card. At this juncture, we may state that Respondent No.1 is a Government of India office viz. the Office of Shipping Master, Government Shipping Office, Mumbai. As per the tender conditions, the tender evaluation comprised of three steps viz. (i) Technical Bid Evaluation (Stage-1), (ii) Financial Bid Evaluation (Stage-2) and (iii) Post Financial Bid

Evaluation Demonstration (Stage-3).

6. The Petitioner was the existing service provider of the said work and on publication of tender notice, it along with other bidders, has also participated in the tender. As per the submission made on behalf of the Petitioner, the technical bid documents were made public by uploading it on the portal of Respondent No.1 on 9th May 2023, according to which, it was only the Petitioner and Respondent No.4 who were found to have technically qualified.

7. On uploading the result of evaluation of technical bid on 9th May 2023 on the portal by Respondent No.1, the Petitioner is said to have found some discrepancy in respect of the technical qualification seemingly possessed by Respondent No.4 and accordingly, on 10th May 2023, a letter was written by the Petitioner to Respondent No.1, whereby petitioner complained that certain eligibility criteria were not fulfilled by Respondent No.4.

8. It is the assertion of the Petitioner that sometime in August, 2023, the Petitioner came to know that the price bids have also been opened, however, the opening of price bids was

not done with prior intimation to the Petitioner as per the requirement of Clause 4.1 and 4.2 of the tender conditions. Tender conditions No.4.1 and 4.2 which are alleged to have been violated and breached by Respondent No.1 while proceeding with the tender, are quoted below:

> ***"TECHNICAL BID EVALUATION [Stage 1]***
>
> *4.1 The nominated committee will open and evaluate Technical Bids to determine the eligibility, required experience, manufacturing capacity, proper authorisation in case of company representing the manufacturer and adequate financial capability. The EMD of rejected bidders will be returned at this point, without opening Financial Bids. The format of Technical Bid is given at Annexure A (A1-A8).*
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> *Financial Bids of only those bidders, who have qualified technical evaluation, shall be opened. EMD of technically unsuccessful bidders shall be returned at this stage too. EMD of the any offers rejected on account of not meeting the technical criteria or failing in technical evaluation will be returned without opening the financial bid. Due notice will be given to technically qualified bidders to attend the Financial Bid opening.*
>
> ***FINANCIAL BID EVALUATION [Stage 2]***
>
> *4.2 The bid per CDC/COC/Seamen (Sails) Identity Card per page personalisation rates in India (in Indian Rupees INR) offered will be excluding any government charges such as importing personalisation machines, all customs and excise duties and other national/local taxes excluding Service Tax on the bid rate. No license fee would be payable for any driver/software/firmware/hardware etc. The nominated Committee will then open the Financial Bids of the technically qualified Bidders on the date duly notified in the presence of bidders' representatives who chose to remain present. A Financial Evaluation Committee (FEC) would scrutinize the price bids. The bids found lacking in strict compliance to the price bid format will be rejected straight away."*

9. The Petitioner has averred in the writ petition that a meeting was held with Respondent No.1 on 1st September 2023,

where the Petitioner submitted a letter highlighting irregularities observed in the tender process. In the said meeting, the Petitioner is said to have apprised the authorities of Respondent No.1 that price bids were opened without any communication to the Petitioner in contravention of Clause 4.1 and 4.2 of the tender conditions which reflects lack of transparency in the entire tender process.

10. It has further been averred by the Petitioner that on 1st September 2023 itself financial bids summary mentioning that price bids for the subject tender had been opened on 9th May 2023 at 5.00 pm. and was uploaded on the tender portal. The comparative statement of the financial bid as uploaded on the tender portal by Respondent No.1 is on record of the instant writ petition at page No.326, according to which, the price quoted by Respondent No.1 was the lowest. However, the said document reveals that three members of the Evaluation Committee had signed the document on 9th May 2023, but it was uploaded on the portal on 1st September 2023 at 14.56.16 (IST). Accordingly, on the basis of this document, it has been argued and submitted by the Petitioner that there is a huge gap between opening of financial bids which allegedly was opened on 9th May 2023, and

uploading of this information on the tender portal which was done only on 1st September 2023 i.e. after lapse of a period of about 4 months. In this view, the submission is that delay in uploading such a significant information in the tender process i.e. the financial bid itself manifests non `transparency and unfair procedure adopted by Respondent No.1 in the entire tender process. The allegation, thus, is that the preparation of financial bid summary (opening of financial bids) has been back-dated by Respondent No.1 which explicitly establishes and proves the *mala fide* and non-transparent manner in which the entire process has been conducted by Respondent No.1.

11. Our attention has also been drawn by the learned Senior Advocate Mr. Dhond representing the petitioner that on 1st September 2023 itself the work order has also been issued, which is under challenge in this petition. On the basis of these documents, it has been contended by learned Senior Advocate representing the Petitioner that (i) the financial bid was opened without any intimation to the Petitioner as per the requirement of Clauses 4.1 and 4.2 of the tender conditions, (ii) the summary of the financial bid said to have been prepared on opening of the financial bids on 9th May 2023 was admittedly uploaded on the

tender portal only on 1st September 2023 without any plausible explanation for such delay and accordingly, this fact manifests that the tender process has not been transparent, (iii) the work order was issued on 1st September 2023 itself when the Petitioner not only met Respondent No.1 and submitted its objection about the non-intimation of opening of the financial bid on the said date i.e. on 1st September 2023, which fact goes on to show that the process adopted has been opaque.

12. The Petitioner again is said to have written a letter to Respondent No.2 stating therein that the price bid could not have been opened without intimating the date of its opening to the Petitioner. Mr. Dhond has drawn our attention to the screen-shot of the tender portal, dated 5th June 2023, wherein, the portal shows that the financial bid opening is in progress. He has also drawn our attention to another screen-shot of the tender portal, dated 27th June 2023, where again financial bid opening is shown to be in progress. These two documents are available at pages 492 and 493 of the paper book as Exhibit-B of the rejoinder affidavit filed by the Petitioner to the affidavit-in-reply filed by Respondent No.1. Accordingly, it is the submission of Mr. Dhond that when the screen-shot of the portal, dated 5th

June 2023 and the screen-shot of 27th June 2023 clearly show that the financial bid opening was in progress, it was not possible that the financial bid would have been opened on 9th May 2023.

13. Learned Senior Advocate has again sought our attention to the screen-shot of the tender portal, dated 30th October 2023 which is available on record of the petition as Exhibit-E to the rejoinder affidavit filed by the Petitioner to the reply filed by Respondent No.1, wherein, the status of award of contract does not carry tick mark (√) though the document contains tick marks (√) against the status of document bid opening, document evaluation, financial bid opening and financial evaluation. Thus, the submission is that if the work order was issued on 1st September 2023 itself, there was no reason why the tender portal would show on 30th October 2023 that award of contract was not done by the said date. Accordingly, the submission is that even the work order has been back-dated by Respondent No.1.

14. Apart from the aforesaid grounds, it has also been argued on behalf of the Petitioner that Respondent No.1 was not even

technically eligible to participate in the tender process for the reason that as per the tender requirement a bidder was required to be either Original Equipment Manufacturer (OEM) or should submit an authorization form the Manufacturer (MAF) of booklet printing, proposed to be used, whereas, Respondent No.4, though claimed to be an OEM in the tender document submitted by it, but in fact, the tender document submitted by it showed that it was an OEM for stickers and labels and not for booklet printers. It is the submission on behalf of the Petitioner that the printing machines for booklets and printing machines for stickers/labels are different and the requirement of the tender that the bidders should be an OEM for booklets, was not thus fulfilled by Respondent No.4.

15. Thus, in sum and substance, the award of work in respect of the subject tender in favour of Respondent No.4 has been questioned by the Petitioner on the ground of the tender process being absolutely non-transparent and unfair, which according to the Petitioner, was resorted to in contravention of the tender conditions such as non-following the prerequisite of prior intimation of the date of opening of the financial bid, back-dating of the summary of financial bids, back-dating of the work order

and technical ineligibility of Respondent No.4 inasmuch as that Respondent No.4 was not an OEM for printing booklets as per the requirement, rather; it was an OEM for printing stickers and labels. It has, thus, been contended by Mr.Dhond that the entire tender process was vitiated on the ground of same being opaque, non-transparent and unfair and is liable to be struck down.

16. The submission made on behalf of the Petitioner challenging the award of tender in favour of Respondent No.4 has been contested by Respondents No.1, 2 and 4 by filing their respective affidavits in reply.

17. Learned Counsel for Respondent No.1 has only submitted that the petition is misleading and misconceived and that the entire process of inviting and opening the tender was on-line and hence, there was no possibility or chance of the same being non-transparent. It is also the submission on behalf of Respondent No.1 that the Petitioner cannot have any vested right of being selected for the award of work and that the technically qualified bids were opened as per fair procedure. It is also stated that the financial bid was opened on 9th May 2023 and the Petitioner was

well informed about opening of financial bid as the same was reflected on the Central Publication Information Portal. At this juncture, however, we would note that the said assertion that the Petitioner was well informed about the opening of financial bid, is not substantiated by any documentary proof.

18. In its reply, respondent no.1 has also stated that bidders were notified about all due processes through system generated e-mails/SMS and that physical presence and notice to bidders for opening of financial bids was also found not necessary by the Technical Evaluation Committee in line with procedure being adopted and followed by the Central Government Offices during procurement of goods/services through online bid system of Government e-market and hence, clause 4.1 relating to technical bid evaluation stage-1 and financial bid evaluation stage-2 of the tender document were not applicable.

19. So far as allegation of the Petitioner regarding technical disqualification of Respondent No.1 is concerned, the affidavit-in-reply filed by Respondent No.1 does not give any explanation, however, with the affidavit, an internal correspondence, dated 13th September 2023 made by the Tender Evaluation Committee

to the Principal Officer, Mercantile Marine Department, Mumbai has been enclosed, according to which, Respondent No.4 is the OEM of the digital booklet printing machine and that they had furnished user manual along with the technical specification and an undertaking for installation, benchmarking and to provide printing and technical service and support suitable to print securitized documents and booklets. It also states that subsequently, Respondent No.4 has also demonstrated proof of the concept with the machine by printing multiple booklets successfully as per requisite parameters specified under the tender document.

20. It is also to be noticed that the affidavit-in-reply filed by Respondent No.1 is conspicuously silent about the causes of delay in uploading summary of financial bid which is said to have been prepared on 9th May 2023 and uploaded only on 1st September 2023. Similarly, no explanation comes forth from Respondent No.1 about the delay, which according to the Petitioner, had occurred in uploading the work order, dated 1st September 2023 on 30th October 2023.

21. However, on the strength of the aforesaid submission, it

has been argued on behalf of Respondent No.1 that the writ petition is liable to be dismissed.

22. Respondent No.2 has also filed an affidavit-in-reply stating therein that Respondent No.1 is working under the administrative jurisdiction of Respondent No.2 and that the tender process was conducted by Respondent No.1. It is also stated therein that the bids were scrutinized by Tender Evaluation Committee and notified by Respondent No.1 and that the bid process management was within the purview of Respondent No.1. Respondent No.2 has also stated that on receipt of representation from the Petitioner the matter was considered and an order accordingly, was passed by the Director General of Shipping on 8th December 2023 stating therein that the Office of Director General of Shipping exercising jurisdiction in the nature of administrative superintendence does not feel the need to interfere with the tender process. The said order also states that the Office of the Director General of Shipping was aware that the Petitioner has sought legal recourse by filing a writ petition and that the said Office was taking steps in accordance with the legally mandated stipulations therein.

23. Learned Counsel representing Respondent No.4 has also opposed the writ petition and has referred to affidavit-in-reply filed by Respondent No.4. When we peruse the affidavit-in-reply filed by Respondent No.4, we find that it appears to be evasive in nature. It does not even contain the paragraph wise reply to the averments made in the writ petition. The affidavit-in-reply only contains general denial but no specific reply can be found to the assertions made by the Petitioner in respect of the irregularities as has been argued on its behalf.

24. On the basis of the pleadings available on record and the arguments submitted by learned Counsel representing the respective parties, the issue which arises for our consideration is, as to whether the tender process conducted by Respondent No.1 is opaque, non-transparent and unfair, which will vitiate, (1) the process so conducted and (2) the work order issued on the basis of such a process.

25. The legal principle that it is necessary to maintain transparency in grant of public contracts is well established. Noticing the judgment in the case of ***Nagar Nigam Vs. Al Farheem Meat Exports (P) Ltd.***[1] the Hon'ble Supreme Court

1 ***2006 13 SCC 382***

reiterated the said principle in ***Indian Medicines Pharmaceuticals Corporation Ltd. Vs. Kerala Ayurvedic Cooperative Society Ltd. and Ors.***[2]. The principle of non-arbitrariness even in contractual matters has been highlighted by the Hon'ble Supreme Court in various judgments including ***Indian Medicines Pharmaceuticals Corporation (supra)*** for the reason that the State or its instrumentality by resorting to transparent process of conducting public auctions or inviting tenders are able to ensure that procurement can be made fairly and further that the allocation is through a transparent process. In ***National Highways Authority of India Vs. Gwalior-Jhansi Expressway Ltd.***[3], the Hon'ble Supreme court has clearly held that "***<u>the objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money.</u>"*** Accordingly, in a tender process, if the tendering authority fails to adhere to a transparent mechanism, such an action on the part of the State or its instrumentality can be subjected to judicial review and if the tender process adopted is

2 ***2023 SCC OnLine SC 5***
3 ***(2018) 8 SCC 243***

found to be opaque or non-transparent, the same can even be annulled based on the principle enunciated under Article 14 of the Constitution of India.

26. We shall, now, proceed to examine the submissions made on behalf of the Petitioner, as to whether the facts of the case and the material available on record of this writ petition show that the process adopted in processing the tender by Respondent No.1 has been transparent and fair.

27. In this regard, the submission made by the learned Counsel for the Petitioner that before evaluation of the financial bid no notice was given to the Petitioner, has though been denied, however, for such denial, no tangible material has been brought on record by the Respondents. Clause 4.2 of the conditions of tender clearly stipulates that the nominated committee will open the financial bid of the technically qualified bidders on the date to be duly notified in presence of the bidders' representative who choose to remain present and accordingly, the Financial Evaluation Committee would scrutinize the price bids. However, in the instant case, it is apparent in absence of any evidence produced by the Respondents that

before opening the financial bid, no notice was given to the Petitioner though it was one of the two technically qualified bidders. Instead of producing any material to show that prior notice to the Petitioner was given before opening of the financial bid, Respondent No.1 has conceded in its affidavit-in-reply that physical presence of bidders and notice to bidders for opening of financial bids was also found not necessary by the Technical Evaluation Committee. Thus, Respondent No.1, in its affidavit-in-reply has rather admitted that clause 4.2 which required that financial bid of the technically qualified bidders shall be opened on the date duly notified in presence of the bidders' representative who choose to remain present, has not been followed. In other words, it has been violated/breached. Requirement of prior notice and physical presence of the technically qualified bidders at the time of opening of the financial bid as mandated by clause 4.2 of the tender conditions, in our opinion has a purpose and the purpose is that the presence of the bidder makes the process of opening of financial bid transparent and non-opaque. Transparency in tender process, as observed above, has evolved as a legal principle to be followed in every Government contract, non adherence of which may vitiate the entire process.

28. Similarly, there have been other instances in this case, which if considered appropriately based on the material available on record of this petition, go on to show that Respondent No.1, while conducting the tender process, has not adopted a fair process. In this regard, we may note that the financial bid is said to have been opened on 9th May 2023, however, it was uploaded on the tender portal only on 1st September 2023 at 14.56.16 IST. This fact is abundantly clear from a perusal of the document available at page No.326 of the instant writ petition, which though bears the signature of three members of the Committee, who are shown to have signed the document (comparative statement of financial bids) on 9th May 2023, however, the digital signature along with time stamp on the said document clearly shows that document was uploaded only on 1st September 2023 at 14.56.16 IST. No explanation, much less any plausible explanation, comes forth from the Respondents as to why the comparative statement of financial bids though finalized on 9th May 2023 was uploaded after a gap of period of about four months. Such a delay in uploading the comparative statement of financial bids of the participating tenderers itself

casts a doubt on the process adopted by Respondent No.1 being transparent and fair. The document at page No.326 of the writ petition has not been denied by Respondent No.1. Accordingly, this fact also substantially contributes to the submission made on behalf of the Petitioner that the tender process adopted by Respondent No.1 lacked fairness.

29. There is yet another glaring fact which is apparent on record of this writ petition, which needs to be noticed. The Petitioner had lodged a complaint about the alleged irregularities in the tender process to the effect that the financial bid was opened on 1st September 2023 and the work order is said to have been issued on 1st September 2023 itself, though the work order was uploaded on 30th October 2023. The screen shots of the tender portal, dated 5th June 2023 and 27th June 2023, which too have not been specifically denied by the Respondents, also show that the financial bid could not have been opened on 9th May 2023 for the reason that the screen-shots, dated 5th June 2023 and 27th June 2023 clearly show that the financial bid opening was in progress. Thus, if the information available on the tender portal on 5th June 2023 and 27th June 2023 states that the financial bid opening was in progress, it is unconceivable as

to how the same could have been finalized on 9th May 2023 itself. This fact fortifies the contention of the Petitioner that while conducting the tender process Respondent No.1 has acted arbitrarily.

30. It is also worth noticing at this juncture itself that screen-shot of tender portal dated 30th October 2023 shows that award of contract was not made by the said date i.e. 30th October 2023. Hence, in such a situation, it is again uncomprehensible as to how the work order was issued on 1st September 2023 itself.

31. The facts as discussed above lead us to conclude that the tender process adopted by Respondent No.1 in respect of subject tender has been completely arbitrary, unfair and non-transparent for the reason that (i) the financial bid was opened without any intimation to the Petitioner in his absence which violated clauses 4.1 and 4.2 of the tender conditions; (ii) no explanation comes forth as to why the summary of financial bid said to have been prepared on 9th May 2023 was uploaded after a gap of about 4 months i.e. 1st September 2023, (iii) the circumstances surrounding uploading of the summary of financial bid and the work order as discussed above create a thick cloud

over the process adopted by Respondent No.1 which has not been cleared in the affidavits-in-reply filed by the Respondents.

32. Though the Petitioner has also impeached the tender process and the work order issued in favour of Respondent No.4 on the ground that Respondent No.4 was not technically qualified for the reason that it failed to establish that it was the OEM for printing booklets as per the requirement of the tender conditions, however, the Respondents, on demonstration made by ***Respondent No.4*** appears to be satisfied about ***Respondent No.4*** being OEM for the requisite process and hence, we need not go into this aspect of the matter.

33. However, we have already culled out the reasons for arriving at the conclusion that Respondent No.1 has not been fair and transparent in conducting the tender process which, in our opinion, not only violates certain tender conditions as discussed above but is also in violation of the principle of equality enunciated under Article 14 of the Constitution of India, inasmuch as that any opaque and unfair process adopted by the State or its instrumentality in the matter of Government contracts breaches the right of equal participation in the matter

of State largesse and denies an eligible bidder a level playing field. Such a non transparent and opaque process leads to the possibility of there being nepotism and favouritism and the same cannot be justified.

34. In a widely celebrated judgment on the subject of distribution of State largesse, the Hon'ble Supreme Court, in the case of ***Ram and Shyam Company Vs. State of Haryana & Ors. (1985) 3 SCC 267***, <u>has propounded the legal proposition that even in administrative action relating to distribution of State largesse by the State or State instrumentality the authority must act fairly which means in accordance with the principle of natural justice variously described as fair play in action.</u>

35. Thus, if we examine the process adopted by Respondent No.1 in conducting the tender and its award to Respondent No.4 in the facts of the instant case, what we find is that the Petitioner has suffered an unfair treatment by Respondent No.1 which violates the fundamental principle of fair play and transparency in Government actions. It is not only that the process adopted by Respondent No.1 is in breach of the settled principle of good governance of every Government action

being transparent and fair but such an action has resulted, as observed above, in denial of right of the Petitioner of equal participation in the process of Government contract which is denial of fundamental right under Article 14 of the Constitution of India.

36. For the reasons given above, the writ petition is allowed in the following terms:

a) The work orders dated 1st September 2023 and 30th October 2023 issued by Respondent No.1 in favour of Respondent No.4 as are contained in Exhibit-R to the writ petition are hereby quashed.

b) Respondent No.1 is directed to issue a fresh tender notice for procuring the work of personalisation of pre-printed Indian CDC & COC Booklets & Renewal Stickers and Seamen (Sails) Identity Cards and finalize the same within four months from the date this order is uploaded.

c) Respondent No.4 shall, however, be permitted to continue to execute the work till the fresh tender process under this order is completed and fresh work order accordingly is issued by Respondent No.1.

d) Respondent No.4 shall also be entitled to payment against the work which it might perform till a new process under this order is finalized.

37. There will be, however, no order as to costs.

38. The Interim Application, if any, stands disposed of.

(AMIT BORKAR, J.) **(CHIEF JUSTICE)**