**(2019) 07 CAL CK 0011**

**In the Calcutta High Court**

**Case No :** Writ Petitions (WP) No. 11789 (W) Of 2019

Electrosteel Steels Limited & Anr — APPELLANT

Vs

State Of West Bengal & Ors — RESPONDENT

**Date of Decision :** 01-07-2019

**Acts Referred:**
Constitution Of India, 1950 — Article 12, 14

**Citation :** (2019) 07 CAL CK 0011

**Hon'ble Judges :** Debangsu Basak, J

**Bench :** Single Bench

**Advocate :** S.K. Kapoor, Rudraman Bhattacharya, Amrita Panja Moulick, Sourojit Dasgupta, Priyanka Prasad, Partha Sarathi Basu, Satyajit Talukdar, Sirsanya Bandyopadhyay, Arka Kumar Nag, Alok Kumar Ghosh, Arijit Dey

# Judgement

Debangsu Basak, J

Learned Senior Advocate appearing on behalf of the petitioners submits that, Clause 3(b) and 5.2 of the notice inviting tender dated June 3, 2019

issued by the State Authorities are ultra vires the provisions of Article 14 of the Constitution of India. Both the clauses cannot withstand the test of

reasonableness and rationality.

According to him, clause 3(b) of the tender documents required that a Ductile Iron Pressure Pipes (in short DI Pipes) manufacturer should have

minimum single order credential of Rs.115 crores for supply of DI pipes or 2 (two) numbers of order value of Rs.86 crores within last five financial

year. He submits that, such supply is required to be made to State/Central Government, State/Central Government Undertaking/Statutory/Autonomous

Bodies. Supply to private players will not qualify. He refers to a corrigendum issued by the authorities on June 27, 2019 and submits that, the corrigendum also require supply to the same entities without private players being ousted.

According to him, ousting supply to private entities from the qualification clause unreasonable and irrational. The nature of the product manufactured

by the petitioners is such that it is to be utilized by the entities spoken of and not by private players. The petitioner just came out from insolvency

proceeding before the National Company Law Tribunal. The imposition of such qualification in the Clause 3(b) will prevent the petitioner from bidding

in the tender process although the petitioners have requisite financial capability to do so. He refers to a writing dated February 23, 2011 where the

Finance Department noted that, new entities are coming up and that, restrictive clauses in the tender documents should be revisited. He submits that,

in a tender initiated on July 16, 2014, the relevant clause included supply to reputable private sector bodies in the qualification criteria. According to

him, the authorities cannot now include Clause 3(b) and have the same modified on June 27, 2019 to the prejudice of the petitioners.

Relying to Clause 5.2 of the tender documents, he submits that, the authorities are giving preference to the manufacturing units located in the State.

Moreover, the authorities are seeking to give price preference to medium and large-scale industries, which are not permissible. In support of his

contentions, learned Senior Advocate appearing on behalf of the petitioners relies upon (2010) 6 SCC 303 (Shimnit Ursch India Private Ltd. & Ar. Vs.

West Bengal Transport Infrastructure Development Corporation Ltd. & Ors. ) and (2016) 11 SCC 1 ( Essar Steel Limited vs. Union of India & Ors.).

Learned Junior Standing Counsel, appearing on behalf of the State submits that, Clause 3(b) as subsequently amended on June 27, 2019 is not

unreasonable or irrational. It is same as that of the March 12, 2015 Notification of the Public Works Department. He submits that, there is nothing

surreptitious about the corrigendum dated June 27, 2019 as the same was uploaded in the website. June 27, 2019 was a Thursday. According to him,

the policy of the authorities underwent a change since the tender process of July 16, 2014 as evinced from the Notification dated March 12, 2015.

So far as the Clause 5.2 is concerned, learned Junior Standing Counsel appearing on behalf of the State submits that, the Finance Department issued a

Notification dated October 10, 2017 where price preferences were allowed to the units described therein. Clause 5.2 is in terse with the Notification dated October 10, 2017 published by the Finance Department.

Learned Senior Advocate appearing on behalf of the petitioners relies upon an Office Memorandum dated December 17, 2002 and submits that, no

bidder should be denied pre- qualification/post-qualification for reasons unrelated to its capability and resources to successfully perform the contract.

According to him, the Notification dated March 12, 2015 of the Public Works Department relates to works contract and has nothing to do with a

procurement contract as in the instant case.

As noted above, two Clauses of the tender process are under challenge in the present writ petition on the ground that they do not satisfy the test of

reasonableness and rationality. The two relevant Clauses in the tender notice dated June 3, 2019 are as follows:-

â??Clause 3(b). The DI Pipe Manufacturer should have minimum single order credential of Rs.115 crore for supply of DI Pipes or 2(two) nos of

order value of each 86 crore within last five financial years in State/Central Govt, State/Central Govt undertaking, statutory/Autonomous bodies

constituted under the central/State statute which has been completed to the extent of 80% or more, on the executed value of completed work

(Completion certificate) will be taken as credential.

Clause 5.2.:- It is to be noted that Finance Department Notification No. 10500-F dt. 19th Nov. 2004 read with no 6142-F(y) dt 10/10/2017 shall be

applicable for finalization of tender. As per said notification of Finance Department the State Based Manufacturing of medium & large scale

Industries will be given 10% price preference over large & medium unit & MSE units of other state. However, the price preference is allowed only

for the purpose of selection, but once a unit is selected on the basis of such preferences it has to agree to execute the work or make supplies at the

lowest valid price bid falling which orders will be placed with the organization/ firms offering the lowest valid price. The term â??State-Based Unitâ?

means and includes that unit whose major manufacturing unit (if it has got more than one unit) is situated within the state.â??

By a corrigendum dated June 27, 2019, Clause 3(b) was substituted with a fresh Clause which is as follows:-

â??i) Credential of similar nature of work of minimum value of 40% of the estimated amount put to tender during 5 years prior to the date of issue of the tender notice

OR

ii) Credential of two similar nature of works each of minimum value of 30% of the estimated amount put to tender during 5 years prior to the date of

issue of the tender notice.

OR

iii) Credential of one single running of similar nature of work which has been completed to the extent of 80% or more and the value of which is not

less than desired value as(i) above.

In case of running works, only those tenderers who will submit the certificate of satisfactory running work from the concerned Executive Engineer or

equivalent competent authority will be eligible for the tender. In the required certificate it should be clearly stated that the work is in progress

satisfactorily and also that no penal action has been initiated against the executed agency, i.e. the tenderer.

It is also clearly spelt out that â??Credential Certificate issued by Executive Engineer/equivalent or competent authority of State/Central

Govt./Undertakings/Statutory/Autonomous Bodies constituted under Central/ State Statute on the executed value of completed or running works will be

taking as Credential. Payment Certificates will not be treated as Credentials.

In case of composit works the supply component of DI Pipes should match with that of above credentials and the above criteria shall be unchanged.â??

Essentially, Clause 3(b) as it stands today require a DI Pipe manufacturer to have specified financial credential for supplying of DI pipes to entities,

which come within the meaning of Article 12 of the Constitution of India. Supply to private entities even of the financial quantity as specified will not

qualify the DI pipes manufacturer under Clause 3(b).

Office Memorandum dated December 17, 2002 is of the Central Vigilance Commission (CVC). It urges authorities under their control to ensure that,

no bidder should be denied pre-qualification/post- qualification for reasons unrelated to its capability and resources to the successfully perform the

contract. The instant tender process is at the behest of the Executive Engineer, Resources Division Public Health Engineering Department, State of

West Bengal. Whether, an office memorandum of CVC will bind of State authorities is debatable. According to the petitioners, it is a declaration of

National Policy. Assuming, it to be so, then also needs to be seen whether, the conditions prescribed are without reasons unrelated to the capability

and resources to successfully perform the contract or not.

There is a recommendation of the Committee constituted by the Principal Secretary. The recommendation allows supplies to reputable private sector

bodies to be taken into consideration as a qualification. There is also a writing dated February 23, 2019 issued by the Additional Chief Secretary noting

that, other units have come up manufacturing DI pipes and that, they should have level playing field in the participation of a tender. However, there is

a subsequent Notification dated March 12, 2015 issued by the Public Works Department, which limits the supplies to public sector enterprises and to

entities which come within the meaning of Article 12 of the Constitution. In effect, it leaves out supplies to private enterprises.

The impugned Clause 3(b) as appearing in the tender documents subsequently, modified on June 27, 2019 conforms to the Notification dated March

12, 2015. At the interim stage, it cannot be said that, the Clause 3(b) stands vitiated. Notification dated March 12, 2015 is not under challenge. It is not

for a Writ Court to substitute its wisdom with that of the administration at least on a prima facie view. The authorities, in the facts of the present case,

are acting in consonance to their declared policy as appearing from the notification dated March 12, 2015.

Clause 5.2 is on the basis of the Notification dated October 10, 2017 issued by the Finance Department. On the parity of the same reasoning as that of

Clause 3(b), Clause 5.2 cannot also be faulted at least at the interim stage.

Shimnit Ursch India Private Ltd (supra) considers the parameters when judicial review of policy decision is permissible. At the prima facie level, it

cannot be said that, the police formulated by the State as appearing in the Notification dated March 12, 2015 and the Notification dated October 10,

2017 of the Finance Department suffers from any illegality warranting an immediate intervention.

Esser Steel Limited (supra) is of the view that a policy decision is amenable to judicial review if it is established that, there is any illegality,

arbitrariness, unreasonableness, discrimination or non- application of mind in the formulation of such policy. In the facts of the present case, prima facie I cannot return a finding that, two impugned Clauses suffer from any lacuna as noted in Essar Steel Limited (supra) so as to warrant an interdict

by a Writ Court at this stage.

Interim order sought for, therefore, is refused.

Needless to say that, the tender will abide by the result of the writ petition.

Let affidavit-in-opposition be filed within three weeks from date. Reply thereto, if any, be filed within seven days thereafter.

The writ petition will be treated as ready for hearing immediately on completion of the time stipulated for filing affidavits.

Liberty is given to the parties to mention the matter for early hearing.

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

 