(2016) 08 DEL CK 0128

In the Delhi High Court

Case No : W.P.(C) 5913/2016 and CM 24334/2016

Food Planet Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 10-08-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2016) 8 ADDelhi 87

Hon'ble Judges : Badar Durrez Ahmed and Ashutosh Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Parthiv K. Goswami with Mr. Samit Khosla and Ms Diksha Rai, Advocates, for the Petitioners; Mr. Nikhil Majithia with Mr. Jagdish Goyal, Law Officer, IRCTC, for the Respondent No.2; Mr. Manish K. Bishnoi with Mr. Venkat Poonia, Advocates, for the Respo

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J. (Oral)—This petition pertains to the Notice Inviting Tender (NIT) for the setting up, operation and management of Food Plazas at railway stations across the country. The present petition is only concerned with the bids for the food plaza at Andheri. The Notice Inviting Tender was issued in February, 2016. The bids were to consist of two packets ? Packet ''A'' and Packet ''B''. Packet ''A'' was to consist of the technical bid and other conditions as laid down in the bid document and packet ''B'' was to consist of the financial bid as per the conditions laid down in the subject bid document. The petitioner No.1, amongst others, participated in the said tender. The petitioner No.1 is aggrieved by the fact that its bid was rejected on the ground that it did not fulfil the technical requirements. Therefore, packet ''B'' of the petitioner No.1, which consisted of the financial bid, was returned to the petitioner No.1 unopened along with the EMD.

2. A copy of the minutes of the Tender Committee for short-listing applicants for the purpose of opening financial bids for award of the licence for setting up,

operation and management of the food plaza at Andheri railway station was handed over to us, which we took on record. Before we refer to the said minutes, it would be necessary to indicate the relevant provisions of the instructions to bidders as also the tender conditions and technical bid. Paragraphs 11, 12 and 13 of the instructions to bidders are as under:-

"11. Technical bid (Packet A) and Financial bid (Packet B) should be submitted in two different sealed envelope, clearly indicating applicant''s name and name of the Food Plaza on both the envelops. Both these envelopes may be kept in another envelope indicating the Name of the Food Plaza, date of opening of the tender and name of the applicant.

12. The applicant should submit complete set of documents in support of Eligibility Criterion mentioned in this Document (Annexure ? B).

13. In support of Five years experience, attested copy of authentic documents currently valid, clearly proving applicant''s existence in catering / hospitality business, involving production and sale/service of cooked food items since at least 5 years, such as (one of the following):-

i) Award of currently valid license in favor of applicant by Railways/IRCTC or by any statutory/private or public organization, dating more than five years.

ii) Currently valid EPF Registration for the catering/hospitality- business dating more than five years.

iii) Currently valid ESI Registration for the catering/hospitality business, dating more than five years.

iv) Currently valid Food license (FSSAI) of the operational unit dating more than five years.

v) State/Central Government currently valid document indicating presence in catering/hospitality business dating more than five years.

AND in support of the business, furnish ALL the currently valid following documents: -

i) Income Tax returns of last completed five Financial Years.

ii) Currently valid VAT OR Service tax registration certificates dating more than five years."

3. It will be seen that paragraph 12 requires that the applicant should submit the complete set of documents in support of the eligibility criteria mentioned in "this document (Annexure?B)". The document entitled ''Tender Conditions and Technical Bid'' comprises of, inter alia, paragraph 1.0, which relates to general information. The said paragraph reads as under:-

"1.0 General Information

1.1 Format for submission of Bids is enclosed at Annexure-A

1.2 Format for Eligibility Criteria is enclosed at Annexure-B

1.3 Location of the proposed unit, approximate size of the unit, Minimum license fee, Security Deposit is enclosed as Annexure-C

1.4 Site/Sketch plan of all specified stations/locations intended for award of licence is enclosed as Annexure-D

1.5 Format for integrity pact, if applicable, is enclosed as Annexure-E

1.6 Format for Packet- ''B'' (Financial Bid) is enclosed as Annexure ?F

1.7 Draft Agreement is enclosed as Annexure-G"

It will be clear from paragraph 1.2 above that the eligibility criteria and the format thereof is prescribed in Annexure-B.

4. The document described as Annexure-B pertains to the eligibility criteria for food plazas at railway stations. The technical criteria are divided into three categories ? General information, mandatory criteria and desirable criteria. Serial Nos. 1, 2 and 3 fall within the category ''general conditions'', serial Nos. 4-19 fall within the category ''mandatory criteria'' and serial Nos. 20-22 fall within the category of ''desirable criteria''. In the present petition, we are only concerned with serial Nos. 8 and 16, which fall within the category ? ''mandatory criteria''.

5. It is the case of the respondents that the petitioner No.1 did not fulfil the criteria set out in serial No.8 as also the criteria set out in serial No. 16. The said two criteria are reproduced herein below:-

"8) Minimum 5 (five) years experience in the field of Catering/Hospitality in India involving production and sale/service of Cooked food items. Trader/Stockiest/ Distributors are not eligible. Please refer to item no.13 of the ?Instructions to the Tenderers".

"16) Copy of duly acknowledged Service tax returns of the last completed financial year."

6. The Tender Committee in the said minutes, to which we referred above, analysed the technical bid of the petitioner No.1 in the following manner:-

"5. M/s. Food Planet Pvt. Ltd, Mumbai (File No. 3/9 ADH)—The applicant is a Company vide incorporation certificate dated 9.3.2010. The applicant .has submitted valid EMD, cost of tender as indicated in the above table. The applicant has also submitted complete tender document duly signed and stamped by Shri Amit S Mittal, who is Director of the applicant firm.

The applicant''s average annual turnover in last three financial years, from Catering/Hospitality/F & B business is Rs. 5.86 Crore. In regard to the experience applicant has enclosed copy of Leave & Lease agreement between PVR Ltd. and

Food Planet Pvt. Ltd. for a period of two years w.e.f. 10.2.2010, Supplier''s agreement between PVR Ltd. and Food Planet Pvt. Ltd. for a period of two years w.e.f. 25.7.2014, Registration certificate of establishment dated 20.4.2013 valid up to 31.12.2016 for Fast Food at Cinema Theatre, Inox Leisure Ltd., Mumbai, Registration certificate of establishment dated 19.9.2013 valid up to 31.12.2016 for Canteen at Fast Food at PVR Cinemas, City Mall, Mumbai, Registration certificate of establishment dated 26.3.2013 valid up to 31.12.2016 for Canteen at Phonix Market City Mall, Mumbai, VAT registration certificate dated 8.12.2010 and ITR for last 5 AYs. The applicant is not qualifying in five year experience (eligibility criteria item no. 8) of eligibility in the field of Catering/Hospitality in India involving production and sale/service of Cooked food items.

Applicant has enclosed registration certificate of establishment dated 26.3.2013 issued by office of the Maharashtra Shops and Establishment for Canteen (Fast Food) at Mumbai, in support of criteria regarding one catering outlet. Applicant has submitted certificate of net worth of Rs. 85.01 lakh.

The applicant has not been awarded any Food Plazas/Fast Food Units over Indian Railways as per SN.18 which is less than 10% of Food Plazas, Fast Food Units & Food Courts over Indian Railways and does not have any Food Plaza/Fast Food Unit/Food Court in BCT Division.

Applicant has submitted Chartered accountant certificate stating that the applicant has not defaulted on any bank/financial institution loans in the past; there are no statutory dues and undisputed liabilities. The applicant has submitted copy of documents regarding solvency, PAN, VAT and Service tax registration certificates & its returns, and IT returns. Applicant has submitted ESI registration certificate dated 20.06.2011 & EPF registration certificate dated 25.01.2016.

Applicant was advised to submit documents/clarification as mentioned in enclosed letter dated 13.04.2016(SN.13/2) regarding Certificate of Breakup of Sales turnover duly certified by Charted Accountant, as per Para 10 of Annexure B & Copy of duly acknowledged Service Tax returns for last Completer financial year, as per Para 16 of Annexure B of tender document, as the Applicant had submitted incomplete Service Tax returns i.e 1st half for FY 2015-16 and 2nd half for FY 2014-15 submitted. Applicant has submitted the requisite documents/ clarifications vide enclosed email dated 16.4.2016 (SN 13/3-13/18). All the above details are mentioned in the brief note at SN. 13-13/1.

None of documents as mentioned in Item no. 13 Instructions to the Tenderer i.e. FSSAI, ESI, EPF, currently valid document from Central / Govt. indicating the presence of the catering & Award of currently valid license by Rlys /IRCTC or by any statutory / private or public organisation in favour of applicant, fulfil the criteria of experience of 5 years as per eligibility criteria (item no. 8) of Annexure B of tender document. Therefore, applicant may not be considered eligible for opening of Pkt-B (Financial Bid).

In view of the above deliberations, on account of five year experience as per item no. 8 & item no. 16 of Annexure B of tender document, TC recommends that applicant may not be considered for opening of Financial Bid (Pkt B)."

7. On going through the above discussion in the minutes of the Tender Committee, it is apparent that, according to the Tender Committee, the petitioner No.1 does not have the requisite five years experience as per item No.8. It is also clear that the petitioner No.1, according to the Tender Committee, did not fulfil the requirement of item No. 16 of Annexure-B. Therefore, the Tender Committee recommended that the petitioner No.1 be not considered for opening of the financial bid (packet-B). Consequently, as indicated above, the respondent No. 2 returned the packet-B (financial bid) unopened as also the EMD.

8. The learned counsel for the petitioners drew our attention to paragraph 13 of the instructions to bidders and submitted that the minimum five years experience was to be supported by any one of the documents mentioned in the first part of paragraph 13 in sub-paragraphs (i) to (v) thereof. He submitted that if any one of the five documents was submitted by the petitioner No.1 that would be sufficient compliance insofar as first part of paragraph 13 of the instructions to bidders was concerned. He submitted that paragraph 8 of Annexure-B also had clear reference to item No. 13 of the instructions to tenderers and, therefore, serial No. 8 of Anneuxre-B and item No. 13 of the instructions to tenderers would have to be read together. That being the case, the learned counsel for the petitioners submitted that it had, in any event, fully complied with the requirement of submitting a document of the State/Central Government which was currently valid indicating its presence in catering/hospitality business dating more than five years. He submitted that the petitioners had furnished a certificate of registration dated 08.12.2010 issued under the Maharashtra Value Added Tax Act, 2002 which clearly indicated that the petitioner No.1''s nature of business was ''Manufacturer, Restaurant''. The learned counsel for the petitioners also submitted that in order to obviate any controversy, the petitioners had also submitted a registration certificate under the Central Sales Tax (Registration and Turnover) Rules, 1957 dated 08.12.2010 which also clearly indicated the petitioner No.1 to be in the business of ''restaurant'' as well as a ''manufacturer''. Since both these documents were dated 08.12.2010, they clearly satisfied the minimum five-year period that was stipulated in item No. 13 of the instructions to tenderers read with serial No. 8 of Annexure-B. This is so because the last date of submission of bids was 29.02.2016 and the date of the certificates, being 08.12.2010, clearly spanned the period of five years, as was required.

9. The learned counsel for the petitioners also submitted that the second part of item No. 13 of the instructions to bidders was also satisfied by the petitioner No.1 inasmuch as income tax returns of the last completed five financial years had clearly been submitted. Insofar the submission of the currently valid VAT or service tax registration certificates dating more than five years was concerned, the learned counsel for the petitioners submitted that either of the two

documents would satisfy the criteria set out in item No. 13 of the instructions to bidders read with serial No. 8 of Annexure-B. That being the case, the learned counsel for the petitioners submitted that the currently valid VAT registration had been submitted as indicated above. Therefore, according to the learned counsel for the petitioners, the entire requirement under item No. 13 of the instructions to bidders read with serial No. 8 of Annexure-B stood satisfied.

10. The learned counsel for the respondents, however, controverted this and submitted that the documents as required under item No. 13 had not been furnished to fulfil the criteria of minimum experience of five years.

11. After having considered the arguments on both sides and having gone through the decision of the Tender Committee, we are of the view that the petitioners are right on this aspect of the matter, meaning thereby that the petitioner No.1 did fulfil the criteria set out in item No. 13 of the instructions to tenderers read with serial No. 8 of Annexure-B. This is so because in our view, as rightly contended by the learned counsel for the petitioners, the petitioners had submitted the requisite document as per sub-para (v) of the first part of item No.13 as also the requisite documents as per sub-paras (i) and (ii) of the second part of item No.13. The requirement of service tax registration under second part of item 13(ii) was an alternative to the currently valid VAT registration. This, the petitioners had done by submitting the Maharashtra Value Added Tax Registration Certificate dated 08.12.2010. Therefore, there was no requirement to also submit a service tax registration certificate which was currently valid and was dating more than five years. Therefore, on the first point, that is, on the alleged non-compliance of item No. 13 of the instructions to tenderers read with serial No. 8 of Annexure-B, we find in favour of the petitioners.

12. However, the matter does not end here. This is so because the Tender Committee also rejected the technical bid of the petitioner No.1 in view of the eligibility criteria set out in serial No. 16 of Annexure B. It is the case of the petitioners that they have substantially complied with this requirement inasmuch as the petitioners had submitted the service tax return for the period October, 2014 to March, 2015 and subsequently also for the period October 2015 to March, 2016. The case of the respondents, on the other hand, was that the service tax return should have been for the complete financial year which could have been either 2013-14 or 2014-15 as stipulated in serial No. 16 of Annexure-B. It was submitted on the part of the respondents that the petitioners only submitted service tax return for part of the financial year 2014-15, that is, for the period October, 2014 to 31st March, 2015 and no return was furnished for any period prior thereto, including for 2013-14. Therefore, it was contended that the petitioner No.1''s bid was non-compliant. It was further submitted that the petitioner No.1 was only registered under the service tax regime in January, 2015 and started filing returns for October, 2014 onwards only.

13. We have considered the arguments advanced by the learned counsel for the parties and are of the view that the argument of the learned counsel for the

petitioners on this aspect of the matter cannot be accepted. First of all, the expression used in serial No. 16 of Annexure-B is ''service tax returns''. It is common knowledge that service tax returns are to be furnished on a six monthly basis. Therefore, the reference is to more than one return and it also relates to the last complete financial year. Since the bids were notified in February, 2016, the last completed financial year would only relate to the period ending on 31st March, 2015. If that be the cut-off date, then the requirement was clearly that there should be more than one service tax return for a full financial year prior to 31.03.2015. In fact, the respondent No. 2 was slightly liberal on this by giving an option of also submitting service tax returns for the financial year 2013-14 in case a bidder did not have service tax returns for the financial year 2014-15. In any event, the fact of the matter is that the petitioners had submitted only a six-monthly return for October, 2014 to 31st March, 2015, which was the cut-off date, whereas the requirement was of submitting ''service tax returns'' (i.e. more than more return) for a full financial year (2013-14 or 2014-2015). We are, therefore, of the view that the Tender Committee was not wrong in rejecting the petitioner No.1''s bid insofar as compliance with serial No. 16 of Annexure-B was concerned.

14. Consequently, the writ petition is dismissed. There shall be no order as to costs.

