(2020) 01 CAL CK 0130

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 23772 (W) Of 2019

Kendriya Bhandar And Another APPELLANT

Vs

State Of West Bengal And Others RESPONDENT

Date of Decision : 22-01-2020

Acts Referred:
Constitution Of India, 1950 — Article 14

Citation : (2020) 01 CAL CK 0130

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Abhrajit Mitra, Debanjan Mondol, Chayan Gupta, Biswajit Kumar, Debayan Sen, Amitesh Banerjee, Ipsita Banerjee, Arkaprava Sen

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The writ petitioners have moved this court with the grievance that, despite the technical bid of the petitioners having been accepted on December 6, 2019, and the petitioner having come out as the lowest financial bidder, on the same date as the opening of the financial bid, that is, December 11, 2019, the technical bid of the petitioners was retrospectively cancelled.

2. The tender?in?question was floated in respect of 'dhuti', woollen blankets and 'lungi'.

3. By placing reliance on clause XII, learned senior counsel appearing for the petitioners argues that there were various stages contemplated for the bids. As per the said clause, the technical bids would be opened in the first instance, at the prescribed time and date, and the same would be scrutinized and evaluated. Thereafter, at the second stage, the financial bids of only the technically qualified offers (as decided in the first stage above) were to be opened for further scrutiny, evaluation, ranking and placement of supply order. By placing reliance on sub?clause (iv) of clause XII, learned senior counsel for the petitioners argues

that medium enterprises were also included within the periphery of the said tender.

4. It is submitted on behalf of the petitioners, on the basis of the documents annexed to the present writ petition, that the amount quoted by the petitioners for the commodities, woollen blanket and lungi, passed the stage of technical bids after scrutiny and evaluation. Thereafter, when the financial bid was opened, it was also found that the amounts quoted for the said commodities by the petitioners were the lowest. Despite such lowest quotes, the said commodities were offered to other bidders, thereby adopting a patently discriminatory approach on the part of the respondent authorities, by retrospectively cancelling the technical bid of the petitioners.

5. It is argued that, in terms of clause XII of the notice inviting tender, once the stage of technical scrutiny was over, the same could not be reopened, that too, after the financial bid was opened and the entire world came to know as to what amount was quoted on behalf of the bidders. This would give an unfair edge to the other bidders and such exercise was patently colourable.

6. In reply, learned counsel appearing for the respondent authorities submits that, after acceptance of bid from third?parties, work orders have already been issued, as such, rendering the present challenge infructuous.

7. This contention is controverted on behalf of the petitioners by arguing that the said work order(s), if any, was/were issued during pendency of the writ petition, which was fully within the knowledge of the respondents, in hot haste, in order to bypass the result of the present writ petition in an irregular and surreptitious manner.

8. Learned counsel for the respondent authorities continues, that clause XII of the terms of tender envisages that there can be a further scrutiny after the financial bids are opened, followed by evaluation, ranking and placement of supply order.

9. Moreover, it is also provided in clause XII that, during scrutiny, if it comes to the notice of Tender Inviting Authority at any point of time that the credential or any other papers of the bidders were found incorrect/ manufactured/ fabricated/ tampered/ forged, that tenderer would not be allowed to participate in the tender and that tender would be rejected without any prejudice, with forfeiture of EMD, along with other consequences.

10. It is further submitted on the strength of sub?clause (iv) of clause XII that the technical bid form necessitated submission of, inter alia, trade licence /S.S.I. Registration (Udyog - Aadhaar) as per the Notification of Ministry of Small Scale Industries/Ministry of Micro, Small and Medium Enterprises of the Government of India. It is further submitted that sub?clause 3 of clause I of the terms and conditions of tender, which contained the pre?qualification criteria, commenced with the expression "All registered SSI units of the State of West Bengal" and as

such, did not envisage medium units, such as that of the present petitioners.

11. Accordingly, it is submitted that there was no bar in scrutinizing the correctness of the technical bid afresh at the financial bid opening stage and, upon coming to learn that appropriate papers regarding small scale units were not submitted by the petitioners, it was well within the jurisdiction of the respondent authorities to cancel the bid of the petitioners and to grant work orders to the next competent bidders.

12. In reply, learned senior counsel for the petitioners relies on clause I, sub?clause 3 of the terms and conditions of tender itself, which provides, after the portion placed by the respondent authorities, that, separated by the conjunction "and", all industrial undertakings/organizations in the large/medium sector owned/managed by the State Government (West Bengal) were also included within the purview of the said provision. As such, the conjunction being disjunctive, the tender was not restricted to SSI units but also covered the medium sector.

13. That apart, sub?clause (iv) of clause XII also envisaged Trade license / S.S.I. Registration (Udyog?Aadhaar) as per notification of the Ministry of Small Scale Industries / Ministry of Micro, Small and Medium Enterprises of the Government of India. As such, since medium enterprises were not excluded, the petitioners could not have been disqualified for not having fallen within the purview of small industries, as sought to be made out by the respondent authorities.

14. That apart, it is reiterated that, once the stage of opening of the technical bids upon scrutiny was over, there could not be a further scrutiny on the technical bid.

15. Learned counsel for the petitioners cites a judgment reported at (2001) 8 SCC 491 [Union of India and others vs. Dinesh Engineering Corporation and another], for the proposition that a public authority, even in contractual matters, should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognized by courts while dealing with public property. This requirement, it was held, was necessary to avoid unreasonable and arbitrary decisions being taken by public authorities, whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting the offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution of India. Accordingly, learned senior counsel argues that the arbitrary decision of the respondent authorities ought to be struck down.

16. A perusal of clause XII of the terms and conditions of the tender makes it abundantly clear that there are two stages contemplated in the said clause. The first phase contemplates that technical bids are to be opened at the prescribed time and date and that the same would be scrutinized and evaluated.

17. It was provided that, "thereafter" (which contemplates the closure of the first phase), in the second stage, the financial bids of only the technically qualified offers (as decided in the first stage above) are to be opened for further scrutiny, evaluation, ranking and placement of supply order.

18. As such, it is abundantly clear that there are two distinct stages of scrutiny contemplated in clause XII - the first pertains to a scrutiny and evaluation as to the technical bid and the second applies only to bidders who have already been declared and decided to be technically qualified, and thus are eligible for their financial bids to be opened. This provision precludes a re?visit of the scrutiny as to technical bids, since the second stage sets in only upon the first stage of technical scrutiny being over and pertains only to offers which have already crossed the hurdle of the technical scrutiny at the first stage. Hence, the "further scrutiny" which is provided in respect of the second stage of financial bids, can only be construed to pertain to a scrutiny as regards the financial part of the bid and cannot relate back to the technical part thereof, which had already been decided on previous scrutiny.

19. The next paragraph in clause XII, which opens with the expression "during scrutiny", can only refer to the respective scrutinies at the respective stages, being the opening of the technical bid and that of the financial bid. The said expression could not be a post facto power of review given to the authorities to reopen the entire process by going back to the validity of the technical bid once it was decided finally and only the technically qualified offers were opened in respect of the financial bids. It would be most unjust to construe that, after the financial bid of the respective bidders came out in the open, the authorities would have a discretion (read "arbitrary right") to discriminate and resort to nepotism by retrospectively cancelling the technical bid and accepting the financial bid of someone who had quoted higher than another technically qualified bidder.

20. The expression "at any point of time" in the second paragraph of clause XII has to refer to the expression "during scrutiny", which, as construed above, refers to each of the stages respectively.

21. Hence, taking for example that a technical bid was found to be incompetent at the time of scrutiny at the first phase, at any point of time during that phase, upon the other criteria of the second paragraph of clause XII being fulfilled, the bid could be cancelled and other steps taken.

22. Similarly, at the second stage, when already a final decision had been taken as to the technical bids surviving up to that stage upon prior technical scrutiny, there is scope of a further scrutiny, which can only pertain to the financial aspect of the bid. Therefore, the second paragraph pertains to each of the stages in their independent field of operation and could not give a blanket right to the authorities for a review by a post facto scrutiny of a previous stage. If that was not so, the scheme of the first paragraph of clause XII would be rendered

meaningless.

23. That apart, the second paragraph of clause XII, as relied on by the respondent authorities, squarely applied in a very limited field, where the credential or other papers submitted were found incorrect / manufactured/ fabricated/ tampered/ forged. None of the said cases applied to the present petitioners, who did not suppress or conceal anything or submit any incorrect document.

24. Once the respondent authorities accepted the technical offer of the petitioners as qualified after scrutiny and evaluation at the first phase, it could only make a further scrutiny as to the financial aspect of the bid, which would grant an edge to the present petitioners in view of the petitioners having quoted lower in respect of the commodities of woollen blanket and lungi, than the bid which was finally accepted. Since none of the criteria stipulated in the second paragraph of Clause XII are applicable to the petitioners' bid, the same could not have been turned down retrospectively, even on that score.

25. Hence, in view of the above discussions, the action of the respondent authorities in cancelling the technical bids of the petitioners post facto and accepting the higher quote of other bidders was a colourable and arbitrary exercise of discretion, which is required to be set aside.

26. Even adopting the principle as laid down in the judgment cited on behalf of the petitioners, the use of discretion in accepting the offer in contracts would have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. Tested on the anvil of arbitrariness and discrimination, which militates against the principle enshrined in Article 14 of the Constitution as well as the terms and conditions of the tender itself, such action on the part of the respondent authorities has to be struck down.

27. Accordingly, W.P. No. 23772(W) of 2019 is allowed, thereby cancelling the acceptance by the respondent authorities of the bid of third parties over the petitioners. The respondent authorities are directed to forthwith accept the bid of Rs.334/? for woollen blankets and Rs.144/? in respect of lungi, as given by the petitioner no. 1 in accordance with the Notice Inviting Tender dated November 11, 2019 and to issue work orders for the said two products in favour of the petitioner no.1 at the earliest, completing the entire process within one month from date.

28. Since the private respondents shall be affected adversely by the above order, the private respondents are given the liberty to approach the appropriate forum for adequate compensation against the respondent authorities for having illegally handed over the work orders in their favour, if at all. While dealing with such prayer for compensation, which is the only remedy available to the said private respondents, the appropriate authority shall also consider the complicity or otherwise of the successful bidders in the illegality committed by the respondent authorities and decide on the grant and/or quantum (if granted) of compensation

on such basis as well.

29. There will be no order as to costs.

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