(2010) 07 MP CK 0037

In the Madhya Pradesh High Court

Case No : Writ Petition No. 771 of 2010

Kineco Pvt. Ltd. APPELLANT

Vs

West Central Railways and Others RESPONDENT

Date of Decision : 23-07-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) ILR (MP) 2489 : (2011) 1 MPLJ 392

Hon'ble Judges : S.R. Alam, C.J;Alok Aradhe, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.R. Alam, C.J.

In the instant petition, the Petitioner, a private limited Company, has sought a writ of Mandamus commanding the West Central Railway, Jabalpur, to consider its commercial bid submitted pursuant to the tender notice dated 13-4-2008. Further prayer has been made to quash the letter of approval dated 25-1-2010 contained in annexure P/5 in favour of Respondents No. 3 and 4 and the communication dated 4-2-2010 dismissing the appeal preferred by the Petitioner against non-acceptance of its bid.

The facts leading to filing of the present petition, briefly stated, are that the Petitioner is engaged in manufacturing of Fibre Reinforced Plastic Products for train interiors. The Respondent No. 2 Controller of Stores, West Central Railway, Jabalpur, vide notification dated 21-10-2008 invited tender for the work of design, supply and supervision of installation of furnishings and fittings for world class rake railway coach interiors at coach rehabilitation workshop, Bhopal. Under the aforesaid tender notification work of 111 coaches was to be undertaken. It appears that a pre-bid conference was held on 22-9-2008 in which nine bidders participated. However, only four tenderers including the Petitioner and Respondents No. 3 and 4 submitted their bids. The Petitioner has claimed that its offer was the lowest with a special discount of 16% on the engineering, development and supervision of installation cost, hence the Respondents ought to have accepted its bid. However, when bid of Petitioner was not accepted, it preferred an appeal on 7-9-2009 before the General Manager of the Respondent No. 1, which was rejected vide order dated 4-2-2010 on the ground that the bid being consolidated was found to be not in terms and conditions contained in tender notice.

The Respondents No. 1 and 2 in their return pointed out that as per Clause 4 of the tender booklet Part II, in case of multi item or single item with multi consignees, the bid was required to be submitted item-wise because the inter-se position of the bidders was to be decided item-wise and consignee-wise, unless otherwise some other evaluation criteria is specifically mentioned in the tender. Clause 4.2 of the tender provides that only unconditional rates quoted will be considered for determining inter se ranking. Conditions incorporated in the Tender Booklet Part-II were known to the Petitioner. However, Petitioner offered a consolidated financial bid which was impermissible as the tender was a multi-item tender and, therefore, inter se ranking of the tenderers could only be decided item wise and not in a consolidated manner. It was mandatory for the Petitioner to have submitted its commercial bid item wise. Since it failed to do so, therefore, the commercial bid of the Petitioner did not deserve consideration. It was not possible to assess the commercial bid of the Petitioner. As per Central Vigilance Commission guidelines only lowest bidders were called for negotiation. The letter of approval has rightly been issued to Respondents 3 and 4 and there is nothing arbitrary and unfair about it.

Shri R.N. Singh, learned senior counsel appearing for the Petitioner, contended that the bid submitted by the Petitioner was the lowest. The Petitioner had submitted bid for an amount of Rs. 35.76 Crore after discount whereas Respondents No. 3 and 4 have offered Rs. 37.62 Crore and Rs. 43.13 Crore respectively. Learned senior counsel while referring to the financial bid submitted by the Respondent No. 4 as well as by the Petitioner contended that though the Respondent No. 4 did not quote item-wise price (design and supervision cost) as sought for in format ''D'', yet it was called for negotiation and letter of acceptance has been issued in favour of the Respondent No. 4. While referring to financial bid submitted by the Petitioner, it was pointed out that the Petitioner has quoted supervision cost coach-wise along with material cost. It is further submitted by him that if Respondents No. 1 and 2 could evaluate figures given by the Respondent No. 4, there was no justification in refusing to evaluate the commercial bid submitted by the Petitioner and not to invite Petitioner for negotiation. It has further been argued that in the tender which was invited in the year 2006, the Petitioner had quoted consolidated price against the similar work and the same was considered. Therefore, it is now not open to Respondents No. 1 and 2 to reject commercial bid on the ground that the same is unresponsive. It has further been argued that consolidated price of design and engineering for similar work was accepted by Interior Coach Factory, Chennai and, therefore, the stand taken by Respondent No. 1 and 2 that commercial bid of the Petitioner was not responsive cannot be said to be justified. It has further been contended that though the Respondent No. 4 had also submitted a conditional bid, i.e. with discount, yet the same was considered and accepted whereas in the case of Petitioner, Respondents No. 1 and 2 have refused to consider financial bid on the ground that the offer submitted by the Petitioner is conditional one and, therefore, Respondents No. 1 and 2 while dealing with the financial bid of the Petitioner have practiced discrimination which is impermissible in law. It was also submitted that deliberate exclusion of Petitioner''s bid from consideration is mala fide, illegal and arbitrary.

On the other hand, Shri Sheel Nagu, learned Counsel appearing for the Respondents No. 1 and 2, has contended that the Petitioner had offered the consolidated financial bid which was impermissible as the tender was a multi-item tender and inter se position while assessing various offers made by various tenderers could be decided item-wise only and not in consolidated manner. Learned Counsel for the Respondents No. 1 and 2 has further contended that in format T)'', incorporated in tender documents, a tenderer was supposed to fill up various columns towards break-up of prices enabling the evaluation of the bid item-wise on landed cost basis. Since, the Petitioner had quoted lump-sum price for engineering, development and supervision of installation cost along with project supervision/management cost for all the coaches clubbed together along with landed cost for all the 111 coaches, it was not possible to evaluate the bid as per item-wise landed cost as laid down in the tender document. The Petitioner had filled up lump-sum price of Rs. 38,12,61,759/- in column ''total cost'' of the format ''D'', therefore, financial bid was considered commercially unresponsive. It has further been submitted that once a condition of determining inter-se ranking of the offers has been specified in the tender document, the tender has to be evaluated accordingly without any deviation in view of the judgment of the Delhi High Court. A copy of the said decision has been annexed as Annexure R-1/8 to the return. It has further been argued that reliance placed by the Petitioner with regard to acceptance of consolidated price of Design and Engineering for a similar work which was accepted by Interior Coach Factory, Chennai, is of no assistance to the Petitioner as the same was a tender of different organisation and tender in question is governed by different set of tender conditions.

It has further been argued that Respondents No. 1 and 2 have followed the norms, rules and regulations in letter and spirit as per tender conditions and have not violated any condition specified in tender documents while determining the inter se ranking of tenderers. Negotiations were held with the lowest bidders in terms of the guidelines of Central Vigilance Commission. After negotiations, letter of approval was issued on 29-1-2010 in favour of Respondents No. 3 and 4. The contention of the learned Counsel for the Petitioner that conditional offer of the Respondent No. 4 has been accepted does not deserve acceptance as Respondents No. 1 and 2 have only considered the rates without discount which were offered by the Respondent No. 4. The tender process is transparent and clear and there is no element of arbitrariness in it.

We are conscious of the fact and there cannot be any quarrel with the proposition of law that under Article 14 of the Constitution and also as per judicially evolved rule of administrative law that State or its agency in the matter of awarding contracts or issuing licences cannot act arbitrarily at its own sweet will like a private individual. Reference may be made to the judgment of the Apex Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . It is equally well settled principle of law that an authority inviting tender is bound to give effect to every term mentioned in the notice in meticulous detail and cannot ignore or give a go-bye to any terms, conditions and procedure given in the tender notice.

It would be worthwhile to mention here that in a tender notice normally 2 types of conditions are provided. The conditions which are of mandatory nature, could be classified in the first category and those which are incidental and ancillary and their non-compliance may not be strictly construed, could be placed in the second category. This aspect has been considered by the Apex Court in M/s. G. J. Fernandez Vs. State of Karnataka and others, . Following the view taken in C.J. Fernandez (supra) the Apex Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, observed that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary, with the main object to be achieved by the condition. In the former case, the authority issuing the tender may be required to enforce them rigidly whereas in the latter case they may deviate from and not insist upon the strict literal compliance of the condition in appropriate cases.

Similar view was again reiterated by the Apex Court in Kanhaiya Lal Agrawal Vs. Union of India (UOI) and Others, wherein it has been held that when essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether such condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. Therefore, in view of the exposition of law made by the Apex Court the requirements of the conditions placed in the first category are mandatory and its non-observance would entail rejection of the tender whereas non-compliance with the conditions classified in the second category may not entail rejection of tender.

We, therefore, now proceed to examine the merits of the case in the light of the above exposition of law.

Respondent No. 2 invited tender for the work of design, supply and supervision of installation of furnishings and fitting for world class rake railway coach interiors at coach rehabilitation workshop, Bhopal vide Notification No. 34/2008 for 111 coaches with estimated tender value of Rs. 36.23 crores. A pre-bid conference was held on 22-9-2008 with prospective tenders to provide clarification if any regarding tender. The tender was purely stores supply tender which provides that all interior furnishing components were to be manufactured by tenderer and were to be supplied to the Railways. Tender processing system involved a two packets bid system wherein Technical as well as Commercial bids were received simultaneously. On 12-11-2008 Technical bids were opened and four offers were found technically suitable. Thus, commercial bids of all four bidders including Petitioner as well as Respondents 3 and 4 were opened on 27-5-2009.

Clause 4 and 4.2 of the "Important Instructions to Tenderers" in Part II booklet of tender document which are relevant for the purpose of the controversy involved in the instant writ petition as extracted hereinbelow:

Clause 4.0:

In case of multi item or single item with multi consignees, the inter-se position will be decided item wise and consignee wise, unless otherwise some other evaluation criteria is specifically mentioned in the tender",

Clause 4.2:

Only unconditional rates quoted will be considered for determining inter-se ranking. Thus, conditional discount (for quantity, early payment, delivery at other than specified locations, etc.) will not be considered for determining inter se ranking. However, railway reserve the right to use the discounted rate/rates considered workable and appropriate for counter offer to the successful tenderers.

The tender in question involved design, supply and supervision of installation of furnishing and fittings for nine different types of coaches at one consignee location. The tender was a multi-item tender and hence the inter-se ranking was to be decided item-wise. From perusal of Clause 4 of the "Important Instructions to Tenderers" incorporated in Part II booklet of tender documents, it is apparent that tenderers were required to submit their offers item-wise so that their inter-se ranking/position could be decided item-wise. From perusal of the financial bid submitted by the Petitioner (Annexure R-1/4) it is clear that Petitioner has quoted consolidated price for engineering, development and supervision of installation cost along with project supervision/management cost per coach against the break-up of prices. Therefore, it was not possible to evaluate the bid item-wise. Thus, the tender submitted by the Petitioner was in violation of Clause 4 of "Important Instructions to Tenderers" incorporated in Part II booklet of tender documents. Accordingly, in our opinion, Respondents No. 1 and 2 rightly found the commercial bid submitted by the Petitioner, being consolidated one, unresponsive and it was not possible to evaluate it. It is pertinent to mention here that Engineering, Development and Supervision of Installation of furnishing and fittings was to be done under the tender in respect of nine different coaches.

Since coaches were of different types, therefore, design cost would vary according to type of coach and, therefore, cost element was required to be mentioned separately. Thus, in our considered opinion, Respondents No. 1 and 2 have rightly found that commercial bid submitted by the Petitioner was not capable of evaluation. Further the Petitioner offered the conditional bid which was not permissible in Clause 4.2 wherein it was made clear that only unconditional rates quoted will be considered for determining inter se ranking.

From perusal of financial bid submitted by the Petitioner, it is clear that the Petitioner has not mentioned total cost in respect of each coach separately whereas from perusal of financial bid submitted by the Respondent No. 4 it is apparent that Respondent No. 4 has mentioned total cost in respect of each type of coach separately, therefore, it was possible to evaluate the bid submitted by the Respondent No. 4. Thus, contention of the Petitioner that while evaluating the financial bid of the Petitioner vis-a-vis the Respondent No. 4 different yardsticks were applied has no force and cannot be accepted for the reason that figures given by the Respondent No. 4 about total cost of each type of coach was separately mentioned and, therefore, it was possible to work out separately whereas the Petitioner furnished the total cost in respect of coaches and did not mention cost of each coach separately as a result of which separate cost of each coach could not be arrived at. Thus, the Petitioner has violated Clause 4 of the "Important Instructions to Tenderers" incorporated in Part II booklet of tender documents. Commercial bid submitted by the Petitioner has not been considered on the ground that the same is unresponsive. We are of the view that where terms and conditions of N.I.T. provides the manner and procedure to do a particular thing, then it has to be performed in that particular manner and all other modes of performance are necessarily forbidden. The instruction provided in the tender notice, in our view, does not suffer from any vagueness and the conditions were made known to the tenderers in pre-bid conference in which Petitioner admittedly participated and; therefore, he now cannot be permitted to say that its bid, which was not in conformity with Clause 4 of the N.I.T., ought to have been evaluated. As noticed above, Petitioner''s bid was not evaluated because it did not give unconditional rates and quoted discounted rates, hence, it was not possible to evaluate the financial bid of the Petitioner. We, therefore, under the circumstances, do not find any element of arbitrariness in the action of the Respondents in not evaluating the financial bid of the Petitioner.

Contention of the Petitioner that since Respondents No. 1 and 2 evaluated the tender which was submitted by him on earlier occasion and, therefore, they cannot be permitted to take a stand that the bid submitted by the Petitioner was unresponsive, also cannot be accepted as from perusal of the return it is apparent that Respondents No. 1 and 2 have taken a stand that earlier tender which was invited was for a different work and terms and conditions of the said tender were also different. Therefore, the submission is misplaced and cannot be accepted for the reason that each tender notice is governed by a particular set of conditions and the criteria or the principle applied for evaluation of a bid in one tender cannot be applied in another and on that ground parity cannot be claimed. Petitioner has not brought on record the terms and conditions of the earlier notice inviting tender to demonstrate that the same were identical and, therefore, the contention raised by the Petitioner in this regard cannot be accepted.

The arguments advanced on behalf of the Petitioner that the Petitioner offered a composite cost of Rs. 3,93,26,000/- as design and project supervision/ management cost for 9 different types of coaches and therefore the Respondents could have applied a simple mathematical calculation and divided the aforesaid amount by 9 i.e. total design cost equally apportioned into 9 types of coaches, the design cost of each coaches comes to Rs. 43,69,556/- which added to the material cost would have given the landed cost of coach. If this would have been worked out the Petitioner''s bid would have been lowest in four out of nine types of coaches as shown in the table given in para 8 of the rejoinder. The aforesaid submissions could also not be accepted because the same is based on the assumption that 9 items are identical and the Respondents could have assumed any figure on behalf of the Petitioner. It has rightly been pointed out by the learned Counsel for the Railways that such assumption after opening of bids would be against the norms and Central Vigilance Commission guidelines as this would defeat sanctity of tender and result in undue favour to a particular tenderer and will change the inter se ranking of the bidders prepared at the time of opening of bids. The inter se position as provided in Clause 4.0 of Part II of Important Instructions to Tenderers was to be determined item wise and therefore if it would have been worked out by dividing by 9 it would have defeated the sanctity of the tender and had financial implication. Besides the same is not permissible as per the guidelines issued by the Ministry of Railways as stated in para 6.7 of the return and a copy of the Railway Board''s letter is also enclosed as Annexure R-1/9. It has been contended on behalf of the Respondents that the cost of Rs. 3,93,26,000/- quoted on behalf of the Petitioner consist of 18 cost element of the tender and not the design cost, for 9 different types of coaches marked as (b) in Format ''D'' and the supervision cost of 111 coaches of 9 different types marked as (e) in Format ''D''.

In view of the aforementioned reasons and in view of the law laid down by the Supreme Court in Poddar Steel Corporation (supra) and Kanhaiya Lal Agrawal (supra), Clause 4 of the "Important Instructions to Tenderers" in Part II booklet of tender document is held to be a mandatory condition. Any deviation from the requirement of Clause 4 of the "Important Instructions to Tenderers" was not permissible. Since the Petitioner did not comply with Clause 4 of the "Important Instructions to Tenderers" therefore, commercial bid submitted by the Petitioner was rightly found to be unresponsive and was not considered.

We, therefore, do not find any merit in the instant writ petition. The same deserves to and is hereby dismissed. However, there shall be no order as to costs.

