(2017) 03 P&H CK 0150

In the Punjab And Haryana At Chandigarh

Case No : 7083-2016 (O&M)

NARINDER KUMAR APPELLANT

Vs

FOOD CORPORATION OF INDIA AND ORS RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Citation : (2017) 03 P&H CK 0150

Hon'ble Judges : S.J. Vazifdar, Anupinder Singh Grewal

Bench : DIVISION BENCH

Advocate : Anurag Chopra, J.S. Puri, Bhupinder Ghai

Judgement

1. The petitioner has challenged the action of the respondents in disqualifying his technical bid. He has also sought a direction to respondent No.2 for declaring the technical bids submitted by respondents No.3 and 4 as non-responsive.

2. The respondent No.2 had invited tenders for handling and transport contract at Bareta on 04.02.2016. The petitioner as well as others including respondents No.3 and 4 submitted their technical bids on 25.02.2016. After scrutiny, the petitioner''s technical bid was disqualified on the ground that the experience certificate furnished by him was not satisfactory. The bids of respondents No.3 and 4 were found responsive. The tender was allocated to respondent No.4.

3. Learned counsel for the petitioner has contended that the action of the respondent No.2 in rejecting the technical bid of the petitioner is arbitrary and unreasonable as the experience certificate furnished by him could not have been rejected as it was duly issued by the Manager, FCI upon satisfactory completion of work. The experience certificate has been rejected without any opportunity of hearing to the petitioner in this regard. He further contended that there were several omissions in the technical bids submitted by the respondents No.3 and 4 and hence they should have been rejected. For instance, in the price bid, tender number has not been mentioned by respondents No.3 and 4, while respondent

No.4 has wrongly mentioned the date as 23.04.2016.

4. Per contra, learned counsel appearing for the respondents have contended that the experience certificate of the petitioner was not found to be satisfactory as the petitioner did not complete the earlier work in time. The work allotted to the petitioner had been abandoned by him and as a consequence thereto, the respondent No.2 had to float another tender at the risk and responsibility of the petitioner. The respondent No.2 has also issued show cause notice to the Manager for issuing the certificate. He further contended that there were minor omissions in the tender documents including not mentioning the tender numbers by respondents No.3 and 4 as well as the date had been wrongly mentioned on one document by respondent No.4 and therefore, these lapses were ignored.

5. The relevant conditions of the tender read as under:- "8. Submission of Tender

(g) Tenders not accompanied by all the Schedules/Annexures intact and duly filled in and signed may be ignored."

"3. Qualification conditions for Tender:

(I) Tenderer should have experience of Rake Handling and/or Transportation duly obtained from Manufacturer/PSU/Govt. Dept./Public Ltd. Company/Private Limited Company dealing in the field of Fertilizer, Food grains, Cement, Sugar, Coarse grains or any other commodity. Tenderer should have executed in any of the immediate preceding five years the work of value:

(a) At least 25% of the estimated value of the contract to be awarded, in one single contract:

OR

(b) 50% of the estimated value of the contract to be awarded, in different contracts.

(II) Experience certificate in the proforma prescribed at Appendix VI shall be produced from customers stating proof of satisfactory execution and completion of the contract(s) besides duly certifying nature, period of contract, and value of work handled.

(III) Where the estimated contract value of Handling & Transport Contract is less than Rupees Five Crores, Tenderer without the requisite experience as mentioned above may also participate subject to providing an undertaking that an additional Performance Guarantee in the form of Bank Guarantee of 10% of the contract value from SBI Bank or Its Associate Banks or the other Public Sector Banks will be given, if selected. The format of the Bank Guarantee to be provided in such cases is at Appendix-V of Annexure-I.

(IV) If the Tenderer is a partnership firm, there shall not be any reconstitution of the partnership without the prior written consent of the Corporation till the satisfactory completion of the contract."

Note: The year for the purpose of experience will be taken as Financial Year (Ist April to 31st March) excluding the financial year in which tender enquiry is floated."

6. In terms of condition No.3, experience certificate had to be furnished by the applicant for having successfully executed the previous work. The certificate issued to the petitioner by the Manager, FCI, Ludhiana on 27.07.2015 (Annexure P-7) states that the performance of the petitioner in the contract awarded to him for the period 01.05.2013 to 30.04.2015 was satisfactory and it had been issued with the approval of the competent authority. The argument of the respondent No.2 that the experience certificate was erroneously issued and the performance of the petitioner was found to be unsatisfactory as a fresh tender had to be floated, is not worthy of acceptance as it has been stated by the respondent No.2 in its reply that the petitioner had offered explanation for the difficulty in executing the work and had referred to FIR registered for the theft of bags from trucks due to which he faced difficulty in transporting the goods. The explanation was found to be reasonable by respondent No.2 and the petitioner was permitted to finish the incomplete work.

7. Therefore, once the respondent No.2 has accepted the explanation about the difficulty faced by the petitioner in executing the work and granting the work once again to the petitioner although fresh tenders had been invited, it is not open to respondent No.2 to contend at this stage that the experience certificate of the petitioner had to be discarded. Even otherwise, in the event of respondent No.2 having harboured any doubts on the reliability of the experience certificate, it was necessary for it to have issued a show cause notice to the petitioner. No notice in this regard, has been issued to the petitioner although respondent No.2 has issued show cause notice to the Manager who issued the certificate.

8. There does not appear to be any merit in the contention of the counsel for the respondents that the petitioner could have even applied without the experience certificate by submitting double bank guarantee and the revocation of experience certificate does not amount to blacklisting or any adverse consequence to the petitioner in future. The experience certificate which had been issued by the Manager of respondent No.2 could not have been unilaterally disregarded by the respondent No.2 without any opportunity of hearing to the petitioner in this regard, especially, in the light of the aforementioned facts and circumstances including the completion of work by the petitioner even after floating of fresh tenders. Experience certificate which is one of the parameters of qualification of the technical bid is an important document. It is an indicator for the track record of the contractor and has a vital bearing on the allocation of work in future. Withdrawal or revocation of such a certificate which has been issued by an officer of the Department without any notice or opportunity of hearing to the contractor would result in visiting him with adverse civil consequences in flagrant violation of the principles of natural justice. Therefore, we do not approve the action of the respondents in disregarding the experience certificate without any opportunity of

hearing to the petitioner. We, however, refrain from expressing any opinion on the authenticity of the experience certificate at this stage and direct respondent No.2 to afford an opportunity of hearing to the petitioner regarding its reliability. The respondent No.2 would be at liberty to take action in accordance with law only after considering the reply of the petitioner in this regard.

9. Further, upon perusal of condition No.8(g), it is clear that those tenders which are not accompanied by all the documents, not duly filled in and signed, may be ignored. The use of the word ?may'' in this regard is of vital significance. It is not necessary that in all cases where the scheduled documents have not been duly annexed the tenders have to be rejected. It can, thus, be reasonably presumed that the respondent No.2 would exercise its discretion in rejecting or ignoring only those tenders which are not accompanied by all the schedules/annexures and there are glaring errors therein. A minor omission or error in the documents can be ignored as the ultimate object of the tender process is to widen the competition and provide a level playing field to all the parties.

10. The omission to mention the tender number at the top would not be such a glaring omission so as to disqualify the respondents No.3 and 4, especially, when all other material particulars of the tender documents were complete and the tender had been uploaded and processed in this regard. Thus, non-mentioning of the tender number at the top of the forwarding letter has rightly not been found to be such a lapse which would warrant rejection of the tender. Similarly, the incorrect mention of the tender by respondent No.4 at one place would not materially affect the submission of the tender as all other documents including those which had been uploaded on the website were found to be in order.

11. It is well-settled that interference in the tender process by this Court while exercising its jurisdiction under Article 226 of the Constitution of India would be called for only in case the action of the authorities is arbitrary, unreasonable, mala fide or in violation of the law. Even if, in the given facts and circumstances, we were to take another view in the matter, interference in the tender process would be unwarranted. Reference can be made to the judgment of the Supreme Court in the case of Central Coalfields Limited and another v. SLLSML (Joint Venture Consortium) and others reported as 2016 (8) SCC 622 wherein it was held as under:- "47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in

accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

12. However, when the respondent No.4 is stated to have completed nearly 50% of the allocated work and in the light of the aforementioned discussion, the tender of respondent No.4 having been found to be in order, we do not intend to interfere at this stage. It is also well settled that even if we find any illegality in the action of the authorities, we may refrain from interfering if it is not warranted in the facts and circumstances.

13. Therefore, while we do not interfere with the allocation of tender to respondent No.4, we direct respondent No.2 to take a final decision with regard to the experience certificate issued to the petitioner in accordance with law after affording him an opportunity of hearing.

14. The petition stands disposed of accordingly.