

(2024) 05 CAL CK 0016

In the Calcutta High Court

Case No : MAT No. 2492 Of 2023, IA NO. CAN 1 Of 2024

Sandip Halder

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 14-05-2024

Acts Referred:

Citation : (2024) 05 CAL CK 0016

Hon'ble Judges : T. S. Sivagnanam, CJ;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Saptangshu Basu, Swarup Pal, Surya Maity, Surusaday Dutta, Anish Roy, T.M. Siddiqui, Tanay Chakraborty, Abhratosh Majumder, Arjun Roy Mukherjee, Joydev Medhi

Final Decision : Dismissed

Judgement

1. This intra court appeal by the unsuccessful writ petitioner is directed against the order dated 22.11.2023 in WPA No. 26163 of 2023. The said writ petition was filed by the appellant to direct the official respondents particularly respondent No. 3 to cancel the technical evaluation and evaluate the technical bid submitted by the appellant afresh by following the order passed in WPA No. 19281 of 2023 dated 19.10.2023.

2. The said writ petition was filed by the appellant for a direction upon the official respondents to consider his complaint dated 28.06.2023 against those bidders who have submitted insufficient documents in the tender invited by the respondent for supply of cooked diet for the indoor patients of the ESI Hospital, Manicktala and to cancel their bids during the technical evaluation prior to opening of the financial bid. The said writ petition was disposed of by directing the respondent authorities to consider the representation within a time frame by giving an opportunity of representation/hearing to the appellant as well as all the entities against whom allegations have been made in the representation. There was also a direction upon the respondent authorities to ensure that the tender process shall be finalised as expeditiously as possible, positively by 17.11.2023.

It is not in dispute that the appellant and the other bidders were given up opportunity of hearing and the respondent authority uploaded its decision on 11.11.2023 in respect of 23 bidders and the bid submitted by the appellant was technically rejected on the ground that the terms and conditions are not signed and sealed as per tender clause in Memo dated 11.05.2023. In the present writ petition, the appellant sought for setting aside the order of rejection of the appellant's bid on a technical ground and to cause fresh evaluation of the bid so that the financial bid of the appellant can be opened.

3. Before the learned Single Bench, it was argued on behalf of the appellant that the technical bid has been rejected on a frivolous ground namely that the tender document was not signed and sealed. It was submitted that the tender documents which are downloaded from the website of the West Bengal Government E-Procurement System "may" be signed and submitted as per e-tender procedure mentioned therein. The expression "may" lends a discretionary colour to the said requirement and therefore the bid submitted by the appellant could not have been rejected altogether as the appellant did not sign the downloaded documents. It was argued that the respondent authorities failed to intimate individually the outcome of the consideration to each of the participants which would amount to violation of the direction issued by the learned Single Bench in the earlier writ petition.

4. Further it was submitted that all the documents have been signed and sealed and so far as the tender documents which was downloaded was digitally signed by the appellant. Therefore, the bid document submitted by the appellant could not have been rejected. The rejection was uploaded on 11.11.2023 and on the same date a representation was given to the respondent authority alleging non-compliance of the order passed in the earlier writ petition dated 10.10.2023 and that the rejection of the technical bid of the appellant was unlawful. The learned Single Bench opined that the direction issued in the earlier writ petition has been complied with in as much as the appellant and other bidders were given an opportunity of hearing and thereafter the bids were evaluated and reasons have been assigned as to why a bid document was found to be technically qualified or technically unqualified. Further the learned Single Bench observed that it is not possible to physically communicate the outcome of the consideration to each of the participants and since the outcome of the technical evaluation was uploaded on the official website, containing the reasons of rejection and acceptance in the "remarks" column for each of the bidders, the direction of the court was substantially complied with.

5. Further it was held that in view of the paucity of time due to the specific direction in the order dated 19.10.2023 that the tender process was to be finalised positively by 17.11.2023, it might not have been possible for the respondent authorities to communicate the outcome of the consideration of the representation of the appellant individually to each of the 23 bidders. Further it was held that it is a cardinal principle of law and well settled by several courts

including this court and the Hon'ble Supreme Court, that it is the employer whose reasonable interpretation of the clauses of a tender document are to be given effective and it is not for the court to sit in thread bear judgment over such interpretation given by the employer. The court found that there is a sufficient justification given by the respondent in so far as the eligibility is considered. With regard to the contention that the expression "may" in the tender document whether confers a discretion on the bidder was considered by the learned Single Bench and it was held that the expression "may" has to be read as "shall" since the tender document also contains all the relevant clauses of the terms and conditions on the contract and had to be signed by the bidder.

6. Further it was held that it is not the question of the bidder entering into the terms and conditions of a contract, which naturally cannot happen before a contract is ultimately entered into, but it is a question as to whether the bidder who is participating in a tender process submits to the condition that he is agreeable to accept the terms and conditions of the contract when entered into and such consent of the bidder is an implicit and integral part of the bid. Further it was held that a bidder when participating in the tender by submitting his bid has mandatorily to agree that if and when a contract is awarded to him, he will agree to the terms and conditions thereof as indicated in the tender document. Hence, there are two layers to the bidders submitting to the terms and conditions, one at the initial stage of the submission of the bid and the other at the later juncture when the contract is actually entered into between the bidder and the employer. The court held that it was an incorrigible error on the part of the appellant not to sign the document, which not only was the tender document but also contained the prospective terms and conditions of the contract which the bidder would have to agree to enter into once a contract is awarded to him. The court concluded by holding that there was no irregularity on the part of the tender issuing authorities in rejecting the appellant's bid and accepting that of the respondent No. 5.

7. The learned Senior Advocate appearing for the appellant reiterated the contention which were advanced before the court and strenuously contended that the expression "may" in the tender document cannot be read to as "shall" as the tender document has given a discretion to the bidder. Furthermore, the appellant digitally signed the tender document and therefore it is sufficient compliance. Further it is submitted that the rejection of the appellant's bid was devoid of reasons and on that ground the order ought to have been set aside by the learned Single Bench since even in the administrative decisions, reasons have to be recorded if such decision affects anyone prejudicially. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in *Oryx Fisheries Private Limited Versus Union of India and Others* (2010) 13 SCC 427.

8. Mr. T.M. Siddique, learned Government Counsel assisted by Mr. Tanay Chakraborty referred to the earlier order passed by the court and the directions

issued therein and the respondent authority had scrupulously followed the said direction and an opportunity of hearing was given to the appellant as well as to all the other bidders, 23 in all and given the paucity of time as the court had fixed a final date to complete the entire tender process by 17.11.2023 and the direction to consider the representation of the appellant was done during the puja vacation and the authority after considering all the aspects has technically evaluated all the 23 bids and after assigning reasons in respect of each of the bidders had uploaded its decision which is well within the knowledge of the appellant. In support of his contentions, the learned Government Counsel referred to the findings rendered by the learned Single Bench in the impugned order.

9. Further it is submitted that in the representation given by the appellant dated 28.06.2023 which was directed to be considered, the appellant had made a complaint in respect of as many as 20 bidders and one of the objections raised was that some of the bidders have not signed the tender document nor it has been stamped. Therefore, the appellant himself having pointed out the same, the respondent authority evaluated all aspects and the bid was technically rejected as the tender document submitted by the appellant was not signed and sealed as required under the tender conditions. Further it is submitted that the appellant had filed a complaint only on 05.01.2023 and by then the matter had proceeded further and the 5th respondent has been declared as the successful bidder and the financial bid was to be opened on 07.05.2024 at 3:00 PM.

10. Mr. Abhratosh Majumdar, learned Senior Advocate assisted by Mr. Arjun Roy Mukherjee and Mr. Joydev Medhi submitted that in the representation given by the appellant, they had made allegations against 20 bidders out of the 23 bidders and all the allegations were considered, opportunity of hearing was granted to the appellant and other bidders and a decision has been taken which does not call for interference and the learned Single Bench rightly dismissed the writ petition.

11. Further it is submitted that all the bids which were found to be technically qualified have been signed and sealed as required under the tender conditions which is a mandatory condition since the tender document has to be signed, sealed and then uploaded. Further it is submitted that the 5th respondent had downloaded from the official website, the tender document submitted by the appellant which clearly shows that it has not been signed and sealed as required under the tender conditions. It is therefore submitted that the appellant having not fulfilled the mandatory condition, the technical bid submitted by the appellant was rightly rejected.

12. We have elaborately heard the learned advocates for the parties and carefully perused the materials placed on record.

13. We fully agree with the conclusion arrived at by the learned Single Bench that the interpretation of a clause in a tender document should be the

interpretation as interpreted by the tender issuing authority and it is not for the court to sit in judgment over such interpretation given by the tender issuing authority. In the tender document dated 11.05.2023, it has been stated that the tender documents can be downloaded from the official website of the West Bengal Government E-Procurement System and in such case, the same may be signed and submitted as per e-tender procedures mentioned in the tender document. In the terms and conditions for supply and service in clause 2, it has been stated that e-tender must be submitted by filing of bid schedule enclosed along with the document, wherein full signature and name with complete postal address and phone number, mobile number of the bidder must be provided. Thus, reading the tender document as a whole, the expression "may" has to be read as "shall" as otherwise the purpose for which the conditions have been imposed in the bid document becomes otios.

14. As rightly held by the learned Single Bench a bidder intending to participate in the tender has at the threshold agree to the terms and conditions of the tender and the bidder cannot be heard to say that only when the contract is awarded and agreement is signed, the successful tenderer would be bound over by the terms and conditions. The learned Single Bench was right in holding that there are two layers to the bidders submitting to the terms and conditions one at the initial stage of submission of the bid and the other at the later juncture when the contract is entered into between the successful bidder and employer. Equally the findings of the learned Single Bench that viewed from such perspective, it was an incorrigible error on the part of the appellant not to sign the document is well founded.

15. We also agree with the conclusion arrived at by the learned Single Judge that the direction issued in the earlier writ petition had been substantially complied with in as much as the appellant and the other bidders were given an opportunity of hearing and a decision was taken which was uploaded on 11.11.2023. The appellant cannot make out a case by contending that individual communication was not sent to the appellant which was next to impossible since there were 23 bidders and the respondent authorities were bound by the time schedule fixed by the court in its order dated 19.10.2023. The decision to hold that the appellant's bid was technically not qualified is not devoid of reasons. The respondent authority namely the tender evaluating authority cannot be expected to write an order or a judgment and the precise reason for rejection has been set out in the "remarks" column of the decision of the authority which was uploaded on 11.11.2023.

16. We find that the bid document of each of the bidders had been examined and as against each such bid document reason had been given for acceptance or rejection. This court had an occasion to deal with the very same tender process in MAT No. 2368 of 2023. The said appeal was directed against an order passed in WPA No. 26204 of 2023 by which the technical bid of the bidders were rejected for the reason "MPO cum Superintendent is not mentioned as per pre

bid minutes as memo no. EH/MN/2373 clause no. 8 in Annexure B". The court considered as to whether the said reason for rejection was valid and proper and after setting out reasons in its judgment dated 30.04.2024 held that the reasons was wholly unjustified. Accordingly, a direction was issued to re-evaluate the tenders not only of the appellant therein but other bidder as well whose tenders were also rejected for the self- same reason. Pursuant to that revaluation has been done and the technical bids were processed and the 5th respondent has been found to be the successful bidder whose the financial bid was to be opened.

17. As noted above, the appellant in their complaint/representation dated 28.06.2023 stated that the bid document of other bidders which have not been signed and stamped has to be rejected. Having contended so, it will not lie in the mouth of the appellant to now contend that the bid document submitted by the appellant though not signed and sealed should be accepted. Furthermore, the downloaded copy of the tender document as placed before this court would show that the appellant had not signed and sealed the tender document which is a serious error since unless and until a bidder accepts the terms and conditions, the question of allowing him to participate in the tender process does not arise.

18. Thus, for all the above reasons, we find that the learned Single Bench was fully justified in dismissing the writ petition and the order does not call for any interference.

19. For all the above reasons, the appeal is dismissed.