(2019) 08 CAL CK 0089

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 16213 (W) Of 2018

Sonali Bose APPELLANT

Vs

Union Of India & Ors RESPONDENT

Date of Decision : 01-08-2019

Acts Referred:
Constitution Of India, 1950 — Article 14

Citation : (2019) 08 CAL CK 0089

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Kamal Kumar Chattopadhyay, Debasish Karmakar, Debajyoti Basu, Vivekananda Bose, Abhra Mukherjee

Final Decision : Dismissed

Judgement

Shampa Sarkar, J

The Chittaranjan Locomotive Works published a Notice Inviting Tender (NIT) E-Tender inviting applications from the interested tenderer for providing 53 Nos. High Speed (4Mbps SME)) Rail Tel, Rail Wire Connections in Chittaranjan Locomotive works for one year. The approximate value of work was Rs.43,52,034/-. The closing date for submission of the tender document was February 21, 2018 at 13-00 Hrs. The NIT contained elaborate provisions to be fulfilled by the intending tenderer. All documents were to be uploaded on-line by the tenderer as indicated in the NIT. Clause 17 of the said NIT deals with the testimonials required to be uploaded by the tenderer.

Clause 21 deals with the quotation of rates. Clause 21.2 states that the railways reserved the right to modify any or all items of the schedules including deletion of any of the item. Therefore, the tenderer is required to quote reasonable workable rate for each of the items.

Clause 22 deals with the rebate clause. Clause 22.1 provides that if a tenderer wishes to give rebate on the rate quoted by him the same shall be quoted by him on-line in the tender schedule in the Website. Such quotation of rebate was to be made in a separate column.

The petitioner no.1 applied on-line and participated in the tender and the rebate quoted by the petitioner was 10% below the approximate value of the tender whereas, the respondent no.6 quoted the rate as provided in the NIT. Although, the application of the petitioner was successfully accepted by the concerned authorities, the petitioner was not favoured with the work order and the application of the respondent no.6 was accepted. The respondent no.6 became the successful bidder in the said tender process. The main contention of the petitioner in this writ petition is that the rebate clause allowed the petitioner to quote at the rate 10% lower than the tender value and the petitioner being the lowest tenderer ought to have been awarded work order, inasmuch as the petitioner has fulfilled all other technical and financial eligibility conditions prescribed in the NIT.

It is further contended by the petitioner that the application of the petitioner was arbitrarily rejected in order to favour the respondent no.6. The petitioner expresses her frustration stating that the respondent no.2 has continuously deprived the petitioner from being awarded the tender in connection with the works of the respondent no.2. According to the petitioner, there was no ground for rejection of the petitioner's application for quoting at 10% lower rate, when the tender document itself provided that the tenderer could give rebates on the rates quoted by the tenderer. According to the petitioner, in order to give best services at the minimum price by curtailing a portion of his profit, the amount was quoted by the petitioner with 10% rebate.

The petitioner draws the attention of this Court to a document issued by the Deputy Secretary to the Government of India, Central Vigilance Commission, which makes its mandatory for authorities to prescribe transparent and unambiguous Clauses in the NIT. According to the petitioner, when the rebate clause was given in the NIT, equity and fairness demanded that the petitioner's quotation of rate at 10% lower than the approximate value of the tender should be accepted.

The petitioner has relied on a decision of the Hon'ble Apex Court in support of his contention, namely, Noble Resources Ltd. Vs. State of Orissa & Anr. reported in (2006) 10 SCC 236.

The respondent nos. 1 to 5 in their affidavit in opposition have stated that the petitioner failed to upload the documents as mentioned in Clause 17 of the NIT and that the Service provider, that is, Rail Tel informed the said respondents that the rate quoted by the petitioner was below the prescribed tariff of the connection of the Broad Band Services of the Rail Wire.

It is the specific contention of the said respondents, that the service provider, namely, Rail Tel, with whom the petitioner works as a facilitator, clarified by a communication to the respondent no.2 that the rate below the prescribed tariff, was not accepted. The respondent no.2 has no other alternative but to award the contract in favour of the respondent no.6. The document has been produced before this Court which is taken on record and it is also admitted by all the parties that the concerned work was for a period of one year from April 2, 2018 to April 1, 2019 and the respondent no.6 has completed the work in connection with the tender process.

It is submitted on behalf of the respondent no.6 that the only ground for which the petitioner was not entitled to be awarded the contract was because the petitioner had quoted a rate which the petitioner could not have done in view of the provisions of Support Service Work Agreement, entered between by the facilitator and Rail Tel Corporation of India Limited, that is, the service provider.

According to the respondent no.6, the facilitator was required to maintain the package of tariff plan published in Railway Website while serving the Rail wire customers and any deviation from the said rate would result in immediate disconnection of the customer.

The learned Advocate for the respondent no.6 has drawn the attention of this Court to the rates contained in page 32 of their affidavit-in-opposition in support of such contention. The respondent No.6 quoted the rate in terms of the tariff plan, that is, 5799 X 52 X 12 + 18% G.S.T. which amounted to Rs.43,52,033.52. The amount thus calculated would be for supply of 53 Broad Band Connection of Rail Wire under Unlimited SME plans 4 Mbps, at the rate of Rs.5,799/-per connection per month for one year including 18% of G.S.T. It is contended that the writ petition suffers from suppression of facts as the petitioner had knowingly suppressed the e-mail dated March 21, 2018 written by the petitioner to Rail Tel and reply thereto received by the petitioner from the Railway Broad Band Services, that is, Rail Wire. It is further contended that the said e-mail would clearly reflect that, way back in March, 2018, the petitioner was aware of the reasons for non consideration of her application as she failed as a facilitator to maintain the tariff plan published in Rail Wire Website.

The last contention of the respondent no.6 was that although, mala-fide, discrimination and collusion had been urged, there are no pleadings in that regard in the writ petition.

The respondent no.6 relies on the decisions of Jagdish Mondal Vs. State of Orissa & Ors. reported in (2007)14 SCC 517, Dilip Singh Vs. State of Uttar Pradesh & Ors. reported in (2010) 2 SCC 114 and Rayalseema Paper Mills Ltd. & Anr. Vs. Government of A.P. & Ors. reported in (2003)1 SCC 341.

Heard the parties.

With regard to the contention of the petitioner that the ground for rejection was arbitrary and mala-fide, it is necessary to consider the provisions of the NIT as also the provisions of the Support Service Work Agreement. The petitioner as a facilitator had entered into an agreement with Rail Tel as a facilitator to support the Company's initiative of providing retail broadband VPN and other value added services. The preamble to the said agreement provided that the role of the facilitator would be to roll out high speed broad band services for consideration as per Annexure 2 to the said agreement. In this case also, the tender document required the facilitator to provide high speed broad band services managed and supplied by the Company to the respondent no.2. The roles and responsibilities of facilitator is quoted below :

"3. Roles and responsibilities of Facilitator

3.1 Customer Acquisition Following are the responsibilities that facilitator has to perform with respect to Customer Acquisition.

a. Marketing of Rail Wire Services. Identification & enrolment of prospective Rail Wire

b. Collection of KYC Document (as per DOT guidelines) along signed customer acquisition from (CAF) by each of Rail Wire Customers and ensure submission, activation & continuation of Rail Wire Subscribers as per guidelines of Company.

c. Facilitator will verify the copies of document collected by the subscribers against the originals. Facilitator will get the document attested by the subscriber (self-attestation) will signatures and attest the CAF, related documents & affix the seal of facilitator with date and name of signatory.

d. Facilitator shall maintain the packages and tariff plans published in Rail Wire Website as it while serving the Rail Wire Customers. SME Connection should strictly be given to all commercial organizations such as cyber cafes, Pvt. Ltd. companies, other enterprise etc. Any deviation from same will result in immediate disconnection of customer.

e. For connectivity to Cyber Cafes, Facilitator shall adhere the rules & regulations laid down by law enforcement authorities from time to time and shall furnish all necessary documents as required while submission of CAF.

f. Facilitator will ensure the regular feedback mechanism with the customers to ensure that the problem faced (if any) get resolved immediately."

Going through the said documents, it appears that the petitioner as a facilitator was required to abide by the minimum rate prescribed by Rail Wire in their Website. It appears that the Manager of Rail Tel had informed the respondent no.2 that the rate quoted by the petitioner was below the advertised railway rate and was not acceptable by the service provider. The respondent No.2 has sought for a clarification from the Rail Tel.

Under such circumstances, it is argued by the respondent no.6 that if the service provider itself did not permit the low rate of tariff the same would amount to disconnection of the connection and the respondent no.2 could not take such a risk by allowing the petitioner to provide connection at a rate lower than the prescribed tariff, which was not acceptable to the service provider. It is also true that the petitioner has suppressed the e-mails dated March 20 & 21, 2018. The petitioner was well aware of the reasons as to why the rate quoted by the petitioner was not acceptable to Rail Tel as the same was below the rate specified by the Rail Wire. Thus, the argument of the petitioner that the tender was between the respondent no.2 and the tenderer and neither Rail Tel nor Rail Wire had a role to play in the matter cannot be accepted. The petitioner is only the facilitator of the Company for sale of high-speed broad band connection of Rail Wire. The petitioner was required to have an agreement with the service provider and also conform to the clauses in the said agreement. As the service provider itself did not accept rates of the petitioner, the respondent no.2 did not act arbitrarily or mala fide by not awarding the contract to the petitioner.

There is no reflection from the records of any discrimination or illegality in the decision making process in the instant case.

In Jagdish Mandal(Supra) the Hon'ble Apex Court has once again reiterated the scope of judicial review in matters relating to award of contracts.

"21. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review of award of contracts.

21.1. In Sterling Computers Ltd. v. M & N Publications Ltd. [(1993) 1 SCC 445] this Court observed: (SCC p. 458, para 18)

"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. ... the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

21.2. In Tata Cellular v. Union of India [(1994) 6 SCC 651 : AIR 1996 SC 11] this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus: (SCC pp. 687-88, para 94)

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ... More often than not, such decisions are made qualitatively by experts."

It is also not for the Court to assess whether the rebate clause was correctly included in the NIT although, the interpretation of the same shall in effect, in this case be that, if a facilitator quoted at a rate higher than the prescribed rate of rail wire then the facilitator could grant rebate.

However, it is made clear that if the petitioner feels that the inclusion of the said clause was ambiguous and misleading, the petitioner is at liberty to approach the appropriate authorities including the Central Vigilance Commission in this regard. In this case, the decision relating to award of contract is found to be bona fide and the authorities have acted reasonably and in accordance with law.

The respondent no.2 was the best judge to decide which of the facilitator would be able to maintain the service required by the said respondents.

The interest of the petitioner cannot be protected by this Court in the instant proceeding, by assessing whether the petitioner suffered any loss or injustice due to delayed replies given by the petitioner under the Right to Information Act, 2005 and also due to misinterpretation of the clause with regard to rebate. The remedy of the petitioner lies elsewhere.

With the above observations, this writ petition is dismissed.

The respondent nos. 1 to 5 are directed to return the earnest money deposited by the petitioner within a week from date.

There will be however no order as to costs.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.