

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 133/2015, MP Nos. 01/2015, 176/2015

Date of Order:-28.12.2016

Katra Mata Vaishno Devi Hotels, Katra

Verses

UOI and ors.

Coram:-

Hon'ble Mr. Justice Alok Aradhe, Judge.

Appearing Counsel:

For the Petitioner(s): Mr. Sunil Sethi, Senior Advocate with
Mr. Sumit Nayyar, Advocate.

For the Respondent(s): Mr. Ajay Sharma, Central Government Standing
Counsel for R-1 to 4.
Mr. Pranav Kohli, Advocate for Res. No. 5.

(i)	Whether to be reported in Press, Journal/Media:	Yes/No
(ii)	Whether to be reported in Journal/Digest:	Yes/No

In this writ petition, the petitioner seeks quashment of Bid Notice issued for allotment of license for catering services at major static unit refreshment room at Shri Mata Vaishno Devi Katra Railway Station and to carry out process of selection of licensee strictly in accordance with law. The petitioner has also prayed for a direction to the respondents to disclose the result of techno-commercial bids of all participating bidders as well as writ of prohibition, commanding respondents not to award the license in question in favour of respondent No. 5 or any person. In order to appreciate the petitioner's grievance, few facts need mention, which are stated infra.

- The petitioner is a company incorporated under the provision of Companies Act 1956. The petitioner company has vast experience in the field of running hotel and restaurant. The petitioner is operating food station on the first floor of Shri Mata Vaishno Devi Katra

Railway Station. The respondent No. 3 floated the notice on 26th June, 2014 for allotment of contract for catering services at Major Static Unit Refreshment Room at Shri Mata Vaishno Katra, Railway Station for a period of five years from the date of commencement of license. As per the NIT, the last date of submission of bids was 20th August, 2014 and the bids which were to be submitted in two parts, namely, Techno-commercial bid and Financial bid. In response to the aforesaid NIT, 19 bidders including petitioner and respondent No. 5 submitted their bids. The Techno-commercial bid was to be opened on 20th August, 2014 itself at 3:30 P.M. The financial bids of only those bidders were required to be opened whose Techno-commercial bids were found to be responsive. It is the case of the petitioner that respondent No. 3 acted in breach of Clauses-2.2.1, 2.7.1, 2.7.3 and 2.7.4. The Techno-commercial bids of the bidders were opened on 20th August, 2014, however, it is the case of the petitioner that he was not apprised about the status of his bid and later on learnt that out of 19 bids, 17 bids were rejected and out of two bidders, bid of respondent No. 5 was finalized. In the aforesaid factual background, the petitioner has approached this Court seeking the reliefs stated supra.

3. Learned Senior counsel for the petitioner has submitted that the Techno-commercial bid as well as the Price Bid was signed by Managing Director of the petitioner company, namely, Mr. Rakesh Wazir on the basis of Resolution dated 19th August, 2014 passed in his favour by Board of Directors. In addition, a Power of Attorney was executed by aforesaid Rakesh Wazir in favour of

one-Rajinder Singh, Manager Accounts of the Company to remain present at the time of opening of the Techno-commercial bid. It is further submitted that since the Principal himself had signed the bid documents, therefore, the Techno-commercial bid of the petitioner could not have been rejected with reference to alleged defects in the Power of Attorney. It is further submitted that action of the Bid Evaluation Committee in holding that the Techno-commercial bid of the petitioner is not responsive is illegal and is arbitrary. It is also argued that the validity of the bid which was for a period of 180 days as per terms and conditions of the NIT has already expired, therefore, nothing survives for adjudication in this petition as an interim order was granted by a Bench of this Court on 11th February, 2015 directing the parties to maintain status-quo with regard to grant of license in question.

4. On the other hand, learned counsel for respondent Nos. 1 to 4 submitted that the responsiveness of Techno-commercial bids was examined by the Committee on the touchstone of the criteria laid down in the NIT and the bid of the petitioner was found to be non-responsive on the ground that as per Clause 2.1.3 read with Chapter-I of Section B, the Power of Attorney was not furnished by the petitioner as per the format and the bid documents were signed by one-Rakesh Wazir but no Power of Attorney was executed in his favour by the Company. It is further submitted that the Techno-commercial of the petitioner was evaluated as per the criteria laid down in Clause 3.2 of the NIT and since the Techno-commercial bid of the petitioner was not found to be responsive,

therefore, the financial bid was not opened in view of Clause 3.3 of the NIT. It is further submitted that the scope of judicial review with regard to decision of Technical Committee is available only to extent of decision making process and not the decision itself. It is further submitted that since the decision of the Committee is neither arbitrary nor irrational, therefore, no case for interference is made out by the petitioner. Lastly, it is urged that contention of the petitioner that the validity of the bids has expired is mis-conceived as in pursuance of interim order dated 04th November, 2015 which was passed with consent of the petitioner, the period of validity of the bid has been extended. Thereafter, the Railways by Communication dated 05th February, 2015 as well as 15th May, 2015 has asked the bidders to extend the period of validity of the bid to which they have agreed. In support of aforesaid submissions, reliance has been place on the decision of Supreme Court in the cases of *M/S Siemens Aktiengesellschaft and S. Ltd. Versus DMRC Ltd., AIR 2014, (SCW) 1249, Jagdish Mandal Versus State of Orrisa and others, 2007 (14) SCC 517, Ekta Shakti Foundation Versus Government of NCT of Delhi, AIR 2006 (SC) 2609, M/S G.M. Trading Corporation and Another Versus State of J&K and ors., 2016 (1) SLJ DB and Rishi Kiran Logistics Pvt. Ltd. Versus Board of Trustees of Kandla Port Trust and others, AIR 2014 SC 3358.*

5. Learned counsel for respondent No. 5 submitted that Clause of the NIT, which provides that in case Techno-commercial bid of the bidder is not found to be responsive, the financial bid of the bidder shall not be

opened, has not been challenged by the petitioner, therefore, he is not entitled to any relief. It is further submitted that Board of Directors of the Company had authorized Rakesh Wazir by a Resolution to sign the bid document, however, aforesaid Rakesh Wazir executed Power of Attorney in favour of Rajinder Singh, who has signed the bid document. It is argued that bid documents have not been signed by the person, who has been authorized to do so. It is also argued that there is no power of relaxation of the condition in the bidding document and Clause 3.2 and 3.3 are mandatory in nature. In support of aforesaid submissions, learned counsel has placed reliance on the decisions of Supreme Court in the cases of *M/s Siemens Aktiengesellschaft and S. Ltd. V. DMRC Ltd. reported at AIR 2014 SCW 1249* and *Jagdish Mandal Versus State of Orrisa and Others, AIR (2007) 14 Supreme Court Cases 517*.

6. I have considered the submissions made by learned counsel for the parties and have perused the record produced by Central Government Standing Counsel. Twin issues arise for consideration of this court in the obtaining factual matrix of the case, firstly, whether the Techno-commercial bid of the petitioner has rightly been found to be non-responsive and whether Clauses 3.2 and 3.3 of the notice inviting tenders are mandatory.
7. Before proceeding further, it is apposite to take note of well settled legal position. It is a well settled rule of administrative law that an executive authority must be rigorously held that the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an Act in

violation of them. The aforesaid rule laid down by *Mr. Justice Frankfurter* in *Vitarelli Versus Seaton*, (1959) 359 US 535 was noticed by Supreme Court in the case of *G. J. Fernandez Versus State of Karnataka*, 1990(2) SCC 488 and it was held that NIT may contain conditions of two categories, namely, Essential conditions and Ancillary conditions and in case, a party fails to comply with essential conditions, the principle of strict compliance of the tender conditions would be applied. Similar view was taken in the cases of *Monarch Infrastructure (P) Ltd. Versus Commissioner, Ulhasnagar Municipal Corporation and others*, 2000 (5) SCC 287 and *W.B. State Electricity Board Versus Patel Engineering Co. Ltd. and Others*, (2001) 2 SCC 451 and in the case of *B.S.N. Joshi and sons Versus Nair Coal Services Ltd. and Others*, 2006 11 SCC 548. It is equally well settled legal proposition that the courts can interfere with the decision of an authority if the same is arbitrary, discriminatory or is actuated by malice *Director of Education Versus Educomp Data Matics Ltd.*, (2004) 4 SCC 19. The Supreme Court while taking note of the law laid down in *Association of Registration Plates Versus Union of India* (2005) 1 SCC 679, reiterated that State Government has the right to get the right and most competent person and in the matter of formulating conditions of tender documents, unless the action of tendering authority is found to be malicious and is a misuse of statutory powers, the tender conditions are unassailable. In the case of *Siemens Aktiengesellschaft and Seimens Limited Versus Delhi Metro Rail Corporation Limited and others*, (2014) 11

SCC 288, it was held that tenders floated by the Government are amenable to judicial review only in order to prevent arbitrariness and favoritism and protect the financial interest of the State and the public interest. Thus, the scope of judicial review is confined as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authority. It has further been held that the court cannot sit in appeal over the soundness of the decision made by the Competent authority and the court can only examine whether the decision making process was fair, reasonable, transparent and bonafide with no perceptible injury to public interest.

8. At this stage, it is pertinent to take note of the relevant Clauses of the NIT, which are reproduced below:-

2.1.2 The Bid should be furnished in the format at Section-B (Chapter 1 and Chapter 2) with the documents specified in the Bidding Document.

2.1.3 The Bidder should submit a Power of Attorney as per the format at Chapter 1 of Section B, authorizing the signatory of the Bid to commit the Bidder.

2.1.8 Any condition or qualification of any other stipulation contained in the bidding documents shall render the Bid liable to rejection as a non-responsive Bid.

2.3.2 Packet-A, shall contain all documents specified Chapter-1 of Section B, including:

- (i) Bid in the prescribed format (Clause 2.2) alongwith Annexes and supporting documents;*
- (ii) Power of Attorney for signing the Bid as per the format at Annexure A/5 (Section B).*
- (iii) Copy of Memorandum and Articles of Association, if the Bidder is a body corporate,*

and if a partnership then a copy of its Partnership Deed;

- (iv) Copies of Bidder's balance sheet and profit and loss account for the preceding 5 years duly audited by Chartered Accountant.*
- (v) Demand draft for Rs. 2,19,000/- (Rupees Two Lakh Nineteen thousand only) as Earnes Money in favour of Sr. Divisional Finance Manager, Northern Railway, Firozpur Cantt. Payable at Firozpur should accompany the Bid.*
- (vi) Proof of having deposited the cost of Bid Document, either deposit slip issued by Railway or a separate envelope containing demand draft of Rs. 5000/-(Rupees Five Thousand only) superscribed as "Cost of Bid Document", in case the Bid Document has been downloaded from internet.*

2.6.1 The Bid including the Earnest Money shall remain valid for acceptance by Railway for a period of 180 days from the date of bid opening as specified as per para 6 of the bid notice. In case of any need, Railway may request the Bidders to extend the period of validity of their bids on the same terms and conditions.

3.2 Test of responsiveness

3.2.1 Prior to evaluation of Bids, Railway shall determine whether each Bid is responsive to the requirements of the Document. A Bid shall be considered responsive only if:

- (a) It is received as per formats at Chapter-1 (Packet-A) and Chapter-2 (Packet-B) of Section-B.*
- (b) It is received by the Bid Opening Date including any extension thereof.*
- (c) It is signed, sealed, bound together, and market as stipulated in Section A para 2.2 and 2.3.*
- (d) It is accompanied by the Power of Attorney as specified in Chapter-1 of Section B, as the case may be;*

- (e) *It contains all the information and documents (complete in all respects) as requested in this Documents and/or Bidding Documents (in the formats same as those specified);*
- (f) *It contains an attested copy of the receipt for payment towards the cost of this Document of Rs. 5000/- (Rupees Five Thousand only) (Non refundable) to Railway;*
- (g) *It is accompanied by the receipt of Earnest Money of Rs. 2,19,000/- (Rupees Two Lakhs Nineteen Thousand only) in the form of Bank Demand Draft drawn on any Schedules Bank in India*
- (h) *It does not contain any condition of qualification; and*

3.2.2 Railway reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by Railway in respect of such Bid.

3.3 Evaluation

Such bids which clear the 'test of responsiveness' at para 3.2 above, will be called 'responsive bids' and only 'responsive bids' shall be considered for evaluation. Evaluation of Bids shall be done by Railway through a Committee comprising of members as per the delegation of powers decided by Railway. No Bidder shall have the right to challenge the decision of the Committee.

From close scrutiny of the terms and conditions contained in the notice inviting tenders, it is evident that the authority inviting the NIT has no power to relax the conditions and only the responsive bids are to be considered for evaluation and in respect of no-responsive bid, no request for alteration, modification, substitution or withdrawal shall be entertained by the Railway.

9. In the backdrop of aforesaid well settled legal position and bearing in mind the relevant terms and conditions of the NIT referred to supra, the facts of the case in hand may be examined. As per the terms and conditions of the NIT, a tenderer is required to submit Power of Attorney in the prescribed format. Clause 2.3.2 provides that Packet-A, i.e., Techno-Commercial bid shall inter alia contain Power of Attorney for signing the bid in the prescribed format. Clause 3.2.1 which deals with test of responsiveness also provides that the bid must be accompanied by a Power of Attorney and in view of Clause 3.3, only responsive bids shall be considered for evaluation. In the instant case, one-Mr. Rakesh Wazir was authorized by the Board of Directors by a resolution dated 19th August, 2014 to sign all the documents on behalf of the company in respect of tender in question. Admittedly, the bid documents had been signed by Mr. Rakesh Wazir, however, aforesaid Mr. Wazir has executed a Power of Attorney on 20th August, 2014 in favour of one-Rajinder Singh-Manager of the Company in connection with the tender in question, which empowers him to sign and submit the bids and other documents and to participate in the bidders and other conferences and to provide information/response to the Railway. Thus, it is evident that Attorney has not signed the bid document as required under Clause 2.1.3 read with 3.2.1 of the NIT. Therefore, the Techno-commercial bid of the petitioner has not been found to be responsive under Clause 3.2.1 of the NIT and the same has rightly not been considered under Clause 3.3 of the NIT. A Committee of Experts has taken a decision in this regard, which is fair, reasonable and bonafide and with no perceptible injury to

public interest. This Court cannot sit in appeal over the decision taken by the Committee of Experts with regard to non-responsiveness of the Techno-commercial bid of the petitioner. For yet another reason, no relief can be granted to the petitioner, as the petitioner has not challenged Clause 3.3 of the NIT.

10. So far as the submission made by the learned Senior counsel for the petitioner that nothing survives for adjudication in the writ petition, as the period of validity of the bid has already expired, is concerned, the same is required to be stated, to be rejected. It is pertinent to mention that initially the validity of the bid was 180 days, thereafter, by an *ad interim order* dated 04th November, 2015 passed by this Court with the consent of the petitioner, the validity of the bid was extended, which was subject to outcome of the writ petition. Besides that, it is also pertinent to mention that respondent Nos. 1 to 4 by Communications dated 05th February, 2015 and 15th May, 2015 had asked the bidders to extend the bid, pursuant to which the bidders extended the period of validity of their bids. It is also noteworthy that since the aforesaid *ad interim order* was passed with the consent of the petitioner, therefore, it is not open to him to take such a plea.
11. Clause 3.2 and 3.3 of the NIT are mandatory in nature as the consequences of non-compliance of the stipulations contained in the aforesaid Clauses entail rejection of the bid. In the other words, the bid shall be treated as non-responsive. Besides that, it is noteworthy that respondent Nos. 1 to 4 have no power to relax the terms and conditions of the NIT. Therefore, the inevitable

conclusion is that the aforesaid conditions are mandatory in nature.

12. In view of preceding analysis, I do not find any merit in the writ petition. The same fails and is hereby dismissed.

(Alok Aradhe)
Judge

Jammu:-28.12.2016
Ram Krishan