

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 15369 of 2023

**Texmaco Rail and Engineering Limited
and another**

Vs.

Union of India and others

With

WPA No. 15370 of 2023

**Texmaco Rail and Engineering Limited
and another**

Vs.

Union of India and others

For the petitioners	:	Mr. Jishnu Saha, Mr. Rajarshi Dutta, Mr. Soorjya Ganguli, Mr. Somdutta Bhattacharyya, Mr. Shaunak Mukhopadhyay, Ms. Devanshi Prasad
For the respondent nos.1, 2 & 4	:	Mr. Atarup Banerjee, Ms. Sarada Sha
For the respondent no.3	:	Ms. Rajshree Kajaria, Mr. Sarvapriya Mukherjee, Mr. Uttam Sharma
Hearing concluded on	:	30.05.2023
Judgment on	:	07.07.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioners have filed the present writ petitions in respect of a tender floated by the respondent no.2 in respect of design, supply, installation, testing and commissioning of Automatic Block Signalling System in a particular section of the Chakradharpur Division of the South-Eastern Railway. The petitioner no.1, with which one Kalindee Rail Nirman (Engineers) Limited has been amalgamated, participated as Kalindee in the said tender. However, the Techno Commercial Bid of the petitioner was rejected on the ground of technical and financial ineligibility, bid capacity and improper information. Immediately thereafter, the financial bids were opened and only the bids of two of the private respondents were accepted.
2. As per the tender agreement, unless there were at least three successful participants at this techno commercial stage, there would not be any reverse auction. It is argued on behalf of the petitioners that, in order to avoid reverse auction and restrict the tender only to chosen competitors, it was tailor-made to suit the purpose of the said competitors. It is argued that the technical rejection was arbitrary and *mala fide*.
3. It is argued that in terms of the Tender Document, one of the technical eligibility criteria was, *inter alia*, that the tenderer must have substantially completed any of the three categories of works stipulated therein. Under sub-clause (1)(iii) of Clause 2 of the Eligibility Criteria, such work included one similar work costing not less than the amount

equal to 60 per cent of the advertised value of tender. The advertised value of the tender was Rs.106,70,01,466.30p.

4. Learned senior counsel for the petitioner argues that the petitioner duly produced previous work experience in a similar work undertaken by Kalindee in respect of a job awarded by the RVNL (Rail Vikas Nigam Limited) on behalf of the North Central Railways in the State of Uttar Pradesh, India. Kalindee was one of the members of a joint venture, by the name of M/s. GMR-Kalindee-TPL (JV). The other member was one M/s. GMR Infrastructure Limited.
5. By placing reliance on the relevant Annexures to the writ petitions, it is submitted that a Final Works Certificate was issued by the RVNL to the Joint Venture, where it was clearly indicated that the value of Signalling and Telecommunication (S&T) Works executed, and payment made till that date, was Rs.102.084cr. By a subsequent Corrigendum dated March 10, 2022, it was modified to the extent that the value of the S&T Works executed, and payment made till that date, was Rs.68.460cr., which is above the minimum stipulation of 60 per cent of the present advertised value.
6. By placing reliance on the relevant Corrigendum dated March 10, 2022, learned senior counsel for the petitioner argues that in a note given in Item No.10 thereof, it was clarified that as per the joint venture agreement, the entire Indoor S&T in the concerned section and Outdoor Signalling for a different section were within the scope of work of M/s. Kalindee and the Indoor and Outdoor Works physically completed and commissioned by GMR-Kalindee-TPL (JV) were

enumerated therein. It is argued that since the entire Indoor S&T work was done by Kalindee, for which the value of the works executed was more than 60 per cent of the advertised value of the present disputed tender, the petitioner could not be said to be ineligible to participate in the present contract, on a technical score.

- 7.** It is argued that in the present case, the tender was floated on February 16, 2023 and the petitioner submitted its bid on March 24, 2023. On June 16, 2023, there was a request to the bidders to extend the bid validity till July 31, 2023.
- 8.** It is contended that on June 22, 2023, the person in charge of conducting the tender process was transferred to some other office. Immediately thereafter, the technical bid of the petitioner was rejected on June 24, 2023. It is submitted that a nexus between the two events, on some extraneous count, cannot be ruled out.
- 9.** It is submitted that elimination of the petitioner and another participant was merely to avoid the reverse auction and to award the contract to the successful participant among the two remaining participants.
- 10.** It is argued by the petitioner that there is a Clarification Clause in the tender document, being Clause 7E, which clearly stipulates that, to assist in the examination, evaluation and comparison and pre-qualification of the tender, the Railway may, at its discretion, ask any bidder for clarification of its bid. Such clarification had to be in writing.

- 11.** In the present case, however, the said provision was not invoked at all by the respondent-Authorities, despite a similar clarification having been sought in the tender floated by the RVNL, which has been cited by the petitioner as its past experience.
- 12.** It is, thus, submitted that the sudden rejection, after three months from the submission of the bid of the petitioner, was patently arbitrary and tainted by *mala fides*.
- 13.** Learned counsel appearing for the respondent/successful tenderer controverts such contentions and submits that the relevant Notice Inviting Tender (NIT) Clause, pertaining to the eligibility conditions, contemplated 60 per cent of the advertised value to be satisfied individually by the petitioner. However, the document relied on by the petitioner to show past experience clearly indicates that the petitioner was only a minor shareholder of 29 per cent in the profits of a joint venture, which had done the work. Hence, it is not established by the said document that the petitioner, individually, had undertaken the said work to the extent of 60 per cent of the present advertised value.
- 14.** Since there was no scope of doubt, it is argued, there was no question of any clarification being sought by the Railway-Authorities. Moreover, the Railway-Authorities cannot be compelled to seek such clarification, since it is the discretion of the said Authority as per the tender document.
- 15.** It is argued by the private respondents that other Railways' action in seeking clarification in different tenders with different terms from the present one are not a comparable yardstick for the adjudication of the

present case. Since the conditions of the said 'other tenders' were different and the contexts were different, the actions of the respondent-Authorities in the present tender cannot be equated with those.

- 16.** Hence, it is argued that the writ court may not interfere with the lawful exercise of discretion by the Tender Issuing Authority. It is submitted that the well-settled legal proposition is that the discretion vests exclusively with the Tender Issuing Authority to decide as to the nature of eligibility criteria and the participants sought by the said Authority for a particular work. Such terms cannot be dictated by the participants, that too after participating in the tender process.
- 17.** Upon hearing learned counsel for the parties, the argument of the petitioner regarding the clarification clause not being resorted to by the respondent-Authorities has to be ruled out, since the same, *ex facie*, is a discretionary provision. The provision of seeking a clarification to assist in the examination, evaluation and comparison and pre-qualification of the tender leaves the discretion entirely with the Railway authority and it is not a mandate on the said authority as such.
- 18.** However, insofar as the rejection of the technical bid of the petitioners is concerned, the same is an arguable question, to be decided on the basis of the materials-on-record. In the present case, since no facts have been argued which require adjudication upon taking detailed evidence, the writ court is competent enough to decide whether there was any patent arbitrariness in such rejection. The relevant

document in this context is the document produced by the petitioners with regard to their previous work experience. The Corrigendum dated March 10, 2022 is the document which is to be looked into in this regard, as per both sides.

- 19.** A salient feature of the same is Serial No. 10 thereof, which contains a 'Note' indicating that, as per the Joint Venture Agreement, the entire Indoor S&T regarding the section involved therein was in the scope of M/s. Kalindee. Serial No.6 of the Corrigendum shows that the value of S&T Works (which is similar to the work envisaged in the present contract-in-dispute) executed and payment made was to the tune of Rs.68.460cr.,which was clearly above 60 per cent of the advertised value of the present tender.
- 20.** A cloud has been sought to be cast by the private respondents to the effect that, as per the Joint Venture Agreement between the petitioner and the other members of the said Joint Venture, the petitioner's share was only to the tune of 29 per cent.
- 21.** However, what is relevant is not the share of profits of the petitioner in the said Joint Venture but whether the work done by the petitioner as a member of the said Joint Venture measures up to the eligibility criteria of the present contract. As per the eligibility condition in Clause 2, sub-clause (1)(iii) of the present contract, the bidder had to do one similar work costing not less than the amount equal to 60 per cent of advertised value of the tender.
- 22.** There is no doubt that the present work is similar in nature to the work done by the Joint Venture for RVNL. The petitioner was one of

the members of the joint venture. The scope of the present work is design, supply, installation, testing and commissioning of Automatic Block Signalling System, which is exactly similar to the S&T (Signalling and Telecommunication) Work done for the RVNL.

- 23.** The relevant consideration is reflected in Serial No.6 of the Final Work Certificate issued by the RVNL in that regard, which clearly shows that the value of the S&T Works executed and the payments therefor, made till that date, was Rs.68.460cr. Read in conjunction with Serial No.10 thereof, it is *ex facie* clear that the entire Indoor S&T Work for the whole section was done exclusively by M/s. Kalindee Rail Nirman, which has amalgamated with the petitioner no.1. Hence, there can be no manner of doubt regarding the petitioner individually, albeit as one of the members of a joint venture, having completed the previous work of a value more than 60 per cent of the total advertised value for the present contract. The work was also of a similar nature. Hence, there cannot be any shade of doubt regarding the petitioner having complied with the eligibility condition. The rejection, it is relevant to mention, was on the ground that the technical and financial eligibility criteria and bid capacity were not met and the information furnished by the petitioner was improper.
- 24.** There was no basis for such rejection, as apparent *ex facie* from the materials furnished by the petitioner. The same was arbitrary and *de hors* the tender terms.
- 25.** More importantly, the impugned rejection would imply that the reverse auction contemplated under the tender would be avoided

altogether, which bodes ill for the tender process, by curtailing wider participation, fair competition and transparency.

- 26.** In order to ensure that the best competitor is chosen, the process of selection adopted by a public undertaking is required to be transparent. As such, the impugned rejection cannot be sustained.
- 27.** Insofar as the Clarification Clause not being invoked by the respondent no.2 is concerned, it was the option of the Railway Authorities either to invoke or not to invoke the same. Exercising such discretion, the Railway Authorities did not invoke the said provision and, as such, there is no further scope of invoking the same at this juncture. In any event, in view of the above findings, the said issue becomes otiose.
- 28.** The impugned rejections, being arbitrary and *mala fide*, ought to be set aside.
- 29.** Accordingly, WPA No.15369 of 2023 and WPA No.15370 of 2023 are allowed, thereby setting aside the impugned rejections of the petitioner's technical bids.
- 30.** The respondent no.2 shall conduct the tender processes afresh from the stage of holding reverse auction, treating the petitioner to have succeeded at the techno-commercial stage by acceptance of its bids. In view of the quashing of the rejection order by the present order, the respondent no.2 shall now hold reverse auction and proceed to select the successful bidder accordingly. For such purpose, a fresh schedule of dates shall be published by the respondent no.2, starting from the stage of reverse auction as per the tender terms. In view of the public

nature of the project, it is expected that the respondent-Authorities shall take immediate steps to comply with this order.

- 31.** There will be no order as to costs.
- 32.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

