(2009) 07 DEL CK 0124

In the Delhi High Court

Case No : Writ Petition (C) 7826 of 2009 and CM No. 4117 of 2009

Aadhar Stumbh Township Pvt. Ltd. APPELLANT

Vs

Delhi Development Authority and Others RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Citation : (2009) 07 DEL CK 0124

Hon'ble Judges : Veena Birbal, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Vivekanand, for the Appellant; Ajay Verma, for the Respondent Nos. 1 to 3 and Kamlesh Mahajan, for the Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—The grievance of the petitioner is that although its price bid was the lowest, the tender has been awarded to the respondent No. 4, whose bid, according to the petitioner, was higher than that of the petitioner. The central point involved in this writ petition is the determination of whether, upon a consideration of the tender conditions, the petitioner is the lowest bidder or the respondent No. 4 is the lowest bidder.

2. Sealed tenders were invited on a turnkey basis in two parts, that is, a technical bid and a financial bid. The work was for the construction of LIG houses as a turnkey project at Sector-14, Dwarka, Phase-II, New Delhi. Tenders were invited in respect of the balance work which had been left unfinished by the previous contractor. As per the invitation for tenders, the estimated cost of the project was Rs 12,18,15,106/- and the period of completion was stipulated to be 20 months. The petitioner and the respondent No. 4 responded to the said Notice Inviting Tender. The technical bids were opened on 17.11.2008. Both the petitioner and the respondent No. 4 were found to be qualified and eligible for the next stage of consideration. The financial bids were opened on 09.01.2009. The work was awarded to respondent No. 4 by the respondent No. 1 [Delhi Development Authority (DDA)]. According to the petitioner, the said work has

been wrongly awarded to respondent No. 4 inasmuch as it was the petitioner who was L-1 (lowest bidder) and not the respondent No. 4.

3. The learned Counsel for the petitioner submitted that the form of the financial bid required a lumpsum figure to be quoted for the entire work. The relevant portion of the form of the financial bid reads as under:

.I/We hereby tender to the Vice-Chairman, DDA for the execution of the work specified in the tender written memorandum. We undertake to execute the work within the specified time for the total sum of Rs. _________ (Rupees____________) and we further undertake that the work shall be executed entirely and in all respects in accordance with the specifications, drawings to be approved at later stage and instructions in writing, which may be issued by the Engineer-in- Charge from time to time for the proper and timely execution / completion of the work..

The learned Counsel for the petitioner submitted that the figure entered by the petitioner in the said financial bid form was Rs 22,85,11,376/-, whereas the figure given by the respondent No. 4 in the financial bid form submitted by it, was Rs 22,86,00,000/-. Consequently, it was submitted that the petitioner''s financial bid was lower than that of the Respondent No. 4 and the work ought to have been awarded to the petitioner.

4. The learned Counsel for the petitioner further submitted that the purported reason why the respondent No. 4''s bid was being considered as lower than that of the petitioner was on account of a wrong interpretation being placed by the respondent/DDA on the Additional Tender Conditions which form part of the tender documents. The learned Counsel submitted that Section-I of the bid documents, which gave the brief facts of the work, contained Clause 8, which clearly stipulated that the work would be awarded on lumpsum cost basis and payment would be made at various stages of construction as specified in the tender papers. He also drew our attention to the additional conditions of the said tender. Clause 3 of the additional conditions was as under:

3. The agency should examine the various items in Schedule =B'' at page 158 (Annexure-.D.) & quote the rates accordingly.

Our attention was also invited to Clause 4.1 of the said additional conditions which, inter alia, provided:

4.1 ...This scope of work given in the NIT is only indicative and not exhaustive. The agency shall be responsible for execution of all items required for completing these houses in all respects to make these units habitable and ready for occupation as well as functioning of all services, making environment fit for habitation without any additional cost, complete as per direction of Engineer-in-Charge....

5. At this juncture, we may also make a reference to Schedule-B which is referred to in Clause 3 of the Additional Conditions mentioned above. The said

Schedule-B reads as under:

SCHEDULE-.B.

Name of work: Construction of LIG Houses on Turnkey Basis at Sector-14, Dwarka Phase-II (2.40 Hect.)

S. No.

Description of Item

Qty.

Unit

Rate

Amount

1.

2.

3.

4.

5.

6.

1.

Deduct for not casting RCC roofs slabs at third floor including reinforcement, centring and shuttering, conduits etc. complete as per approved drawing & design.

8 Nos.

Each LIG Unit

2.

Deduct for not providing and fixing steel glazed Windows at all floors & height as per approved drawing.

a) For over all portion treated as fixed.

b) Extra for side-hung portion (Windows)

2320.99 Sqm. 1557.92 Sqm.

Sqm. Sqm.

3.

Add for demolishing RCC work including stacking of steel bars and disposal of serviceable / unserviceable material within 50 metres lead.

55.00 Cum.

Cum.

4.

Add for dismantling doors, windows and clerestory windows (steel or wood) shutter including chowkhats, architrave, holdfasts etc. complete and stacking within 50 metres lead.

a) Of area 3 sqm. and below

2460 Nos.

Each

NOTE: Col. No. 5 & 6 not to be Published.

6. The learned Counsel for the petitioner referred to the general specifications and conditions. In particular, he referred to Clause 4 thereof, which stipulated that the amount quoted by the tenderer shall be deemed to include any minor details / items of work and / or construction, which were obviously and fairly intended and which may not have been included in the documents, but were essential for the execution and completion of the work. A further condition had been imposed and added in the Notice Inviting Tender for the balance work alongwith the original conditions. The same required the successful tenderer to inspect the site before quoting the rates. It was also indicated that it would be the responsibility of the successful tenderer to complete the work in continuation of the work left by the other agency. It was specifically provided in the said additional condition that in case any deficiency / discrepancy was observed, the same would have to be made good within the quoted rates.

7. The sum and substance of the arguments of the learned Counsel for the petitioner was that upon a reading of the tender documents and the terms and conditions stipulated therein, the parties were to quote a lumpsum figure and it was that figure alone which was to be considered for the purposes of awarding the work, nothing more, nothing less. The learned Counsel submitted that, although this was the clear intention that could be discerned from the tender documents, the DDA computed the financial bids after considering the figures provided by the bidders in the said Schedule .B., which was required to be filled in terms of Clause 3 of the Additional Tender Conditions mentioned above.

8. The Schedule .B. submitted by the petitioner was as under:

SCHEDULE-.B.

Name of work: Construction of LIG Houses on Turnkey Basis at Sector-14, Dwarka Phase-II (2.40 Hect.)

S. No.

Description of Item

Qty.

Unit

Rate

Amount

1.

2.

3.

4.

5.

6.

1.

Deduct for not casting RCC roofs slabs at third floor including reinforcement, centring and shuttering, conduits etc. complete as per approved drawing & design.

8 Nos.

Each LIG Unit

41,250/- (Rs. Forty one thousand two hundred fifty only)

2.

Deduct for not providing and fixing steel glazed Windows at all floors & height as per approved drawing.

a)For over all portion treated as fixed.

b)Extra for side-hung portion (Windows)

2320.99 Sqm.1557.92 Sqm.

Sqm. Sqm.

500/- (Rs. Five hundred only) 100/- (Rs. One hundred only)

3.

Add for demolishing RCC work including stacking of steel bars and disposal of serviceable / unserviceable material within 50 metres lead.

55.00 Cum.

Cum.

6000/- (Rs. Six thousand only)

4.

Add for dismantling doors, windows and clerestory windows (steel or wood) shutter including chowkhats, architrave, holdfasts etc. complete and stacking within 50 metres lead.

a) Of area 3 sqm. and below

2460 Nos.

Each

535/- (Rs. Five hundred thirty five only)

(Rate to be filled in by the Agency).

NOTE: Col. No. 5 & 6 not to be published

The Schedule .B. completed and submitted by the respondent No. 4 was as under:

SCHEDULE-.B.

Name of work: Construction of LIG Houses on Turnkey Basis at Sector-14, Dwarka Phase-II (2.40 Hect.)

(Rate to be filled in by the Agency).

S. No.

Description of Item

Qty.

Unit

Rate

Amount

1.

2.

3.

4.

5.

6.

1.

Deduct for not casting RCC roofs slabs at third floor including reinforcement, centring and shuttering, conduits etc. complete as per approved drawing & design.

8 Nos.

Each LIG Unit

57000/- (Rs. Fifty Seven Thousand only)

Rs.4,56,000/-

2.

Deduct for not providing and fixing steel glazed Windows at all floors & height as per approved drawing.

a) For over all portion treated as fixed.

b)Extra for side-hung portion

2320.99 Sqm.1557.92 Sqm.

Sqm. Sqm.

550/- (Rs. Five hundred Fifty only)275/- (Rs. Two hundred seventy five only)

Rs.12,76,544.50 Rs.4,28,428/-

(Windows)

3.

Add for demolishing RCC work including stacking of steel bars and disposal of serviceable / unserviceable material within 50 metres lead.

55.00 Cum.

2000/- (Rs.Two thousand only)

Rs.1,10,000/-

4.

Add for dismantling doors, windows and clerestory windows (steel or wood) shutter including chowkhats, architrave, holdfasts etc. complete and stacking within 50 metres lead.

c) Of area 3 sqm. and below

2460 Nos.

Each

330/- (Rs. Three hundred thirty only)

Rs.8,11,800/-

NOTE: Col. No. 5 & 6 not to be published.

9. According to the learned Counsel for the petitioner, what the DDA has done by adding and deducting the figures given in the schedule =B'' form submitted by the petitioner is contrary to the tender conditions, which required a lumpsum bid amount. According to the petitioner, the figures mentioned in Schedule =B'' referred to above were not to be considered at all for the purposes of determining the lowest bidder and those figures were to be subsumed in the lumpsum price quoted by each bidder. The learned Counsel for the petitioner also placed reliance on the Supreme Court decision in the case of West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, for the proposition that it is essential to maintain the sanctity and integrity of the process of tender / bids and also for the award of a contract. In the said Supreme Court decision, which, of course, related to international competitive bidding, which is not the case here, the Supreme Court observed that the degree of care required in such bidding is greater than in ordinary local bids for small works. At this stage itself, we may point out that the said Supreme Court decision would not strictly apply to the case at hand. However, there is no shying away from the general proposition that the sanctity and integrity of the process of tenders / bids must be maintained. It cannot also be denied that the tender conditions are to be followed and relaxing any condition or altering any condition to the detriment of one or more parties is not permissible and would impair the rule of transparency and fairness.

10. The learned Counsel for the DDA submitted that the work has been correctly awarded to the respondent No. 4 inasmuch as the respondent No. 4, in view of the tender conditions, was the lowest bidder. According to the said counsel, Clause 3 of the additional conditions, referred to above, clearly required the tenderer to examine the items in Schedule .B. and to quote the rates accordingly. Schedule .B. comprised of four items. The first two items required deductions and the next two items, namely, item Nos. 3 and 4 required additions. The bidders were to quote their rates and amounts against each of these items. The question that clearly arises is - From what were the deductions in respect of items 1 and 2 to be made and to what were the amounts in items 3 and 4 to be added? It is obvious that the deductions and the additions had to be with respect to the figures quoted by the bidders in the lumpsum financial bids submitted by them. Thus, according to the learned Counsel for the DDA, the lumpsum figure quoted by the bidders had to be adjusted by the figures quoted in the Schedule .B. forms and it is only after they were considered together that the lowest bidder could be found out. In the counter-affidavit, the respondent DDA has stated that the contract was for the balance work as left incomplete by the earlier contractor. As part of the work already executed by the previous contractor, there were two specific items:

-8 Nos. roofs / slabs already laid;

-steel glazed doors / windows already fixed.

The scope of work in the present tender included these items also. However, Schedule-B clarified that there could be a possibility of the roofs / slabs being retained as also the doors / windows being retained. It was submitted that the main schedule for the balance work under the tender included the construction of 8 roofs / slabs and doors / window frames which had been executed by the earlier contractor. The cost of construction of such roofs / slabs and doors / window frames had been taken in the scope of work of the present tender under the main schedule. Thus, based on the report of a testing agency appointed for the purpose, the DDA was to take a decision as to whether those items were to be retained or dismantled. If the said roofs / slabs and doors / windows were to be retained, it is obvious that the cost of such works quoted by the bidder would be deducted from the lumpsum rates quoted in the main schedule / scope of work. It was further explained by the DDA that on the other hand if the concerned items were to be dismantled, then the cost of dismantling would have to be added to the rates quoted in the main schedule / scope of work.

11. It is on this basis that the lowest tenderer, according to the DDA, was to be determined after examining the lumpsum amount and the amounts quoted in Schedule-B.

12. It was further stated in the counter-affidavit that the comparative statement of the bids of the petitioner and the respondent No. 1, after considering the lumpsum amount quoted by each as also the amounts quoted by them under Schedule-B, was as under:

STATEMENT SHOWING THE POSITION OF BIDS IN FOUR (4Nos.) OF SITUATIONS.

I. IF BOTH 8 Nos. OF ROOFS / SLABS AND THE WINDOWS ETC. ARE TO BE RETAINED.

M/s Aadhar Stumbh Township (P) Ltd.

M/s. N.D.R. Israni & Co. Pvt. Ltd.

Lump-sum Quoted rates:-Page 43 of tender

22,85,11,376.00

22,86,00,000.00

Deduct for not casting 8 Nos. of roofs slabs & not providing windows etc.

(-) 16,46,287.00

(-) 21,60,972.50

NET AMOUNT OF BID.

22,68,65,089.00

22,64,39,027.50

II. IF BOTH 8 Nos. OF ROOFS / SLABS & WINDOWS ARE TO BE DISMENTALLED.

M/s Aadhar Stumbh Township (P) Ltd.

M/s. N.D.R. Israni & Co. Pvt. Ltd.

Lump-sum Quoted rates:-Page 43 of tender

22,85,11,376.00

22,86,00,000.00

Add for dismentalling 8 Nos. of slabs and windows etc.(Item No.3 & 4)

(+) 16,46,100.00

(+) 9,21,800.00

NET AMOUNT OF BID.

23,01,57,476.00

22,95,21,800.00

III. IF 8 ROOFS RETAINED & WINDOWS ARE TO BE DISMENTALLED.

M/s Aadhar Stumbh Township (P) Ltd.

M/s. N.D.R. Israni & Co. Pvt. Ltd.

Lump-sum Quoted rates:-Page 43 of tender

22,85,11,376.00

22,86,00,000.00

Add for dismentalling windows & doors (Item No. 4)

(+) 13,16,100.00

(+) 8,11,800.00

Deduct for not casting RCC roofs 8 Nos. (Item No.1)

(-) 3,30,000.00

(-) 4,56,000.00

NET AMOUNT OF BID.

22,94,97,476.00

22,89,55,800.00

IV. IF 8 Nos. ROOFS / SLABS GOT DISMENTALLED AND WINDOWS RETAINED.

M/s Aadhar Stumbh Township (P) Ltd.

M/s. N.D.R. Israni & Co. Pvt. Ltd.

Lump-sum Quoted rates:-Page 43 of tender

22,85,11,376.00

22,86,00,000.00

Add for dismentalling 8 Nos. of slabs (Item No. 3)

(+) 3,30,000.00

(+) 1,10,000.00

Deduct for not providing & fixing steel glazed windows .. 2(a) & (b)

(-) 13,16,287.00

(-) 17,04,972.50

NET AMOUNT OF BID.

22,75,25,089.00

22,70,05,027.50

Thus, according to the learned Counsel for the DDA, whichever eventuality is considered, the respondent No. 4 was the lowest bidder and, therefore, the work has been correctly awarded to the respondent No. 4 and the petitioner cannot have any grievance whatsoever.

13. The learned Counsel for the respondent No. 4 supported the contentions of the learned Counsel for the DDA. In addition, he submitted that it must be noted that the rates and amounts in Schedule-B had to be filled in by the tenderers. If those rates and amounts were not to be considered, then what was the need for requiring the tenderers / bidders to quote the same? It was pointed out that the tender conditions were clear and had been understood by each of the parties and that is the reason why, although the respondent No. 4 was the lowest bidder, the bids of both the parties are closely matched.

14. The issue that has to be determined is whether the approach adopted by the respondent No. 1/DDA or the arguments advanced by the petitioner with regard to who is the lowest bidder, is to be accepted. From the arguments noted above, it is clear that both the petitioner and the respondent No. 4 cleared the hurdle of technical qualification. It is also clear that both the petitioner and the respondent No. 4 filled in their respective Schedule-B forms and submitted the same alongwith their lumpsum financial bids. Thus, both the petitioner and the respondent No. 4 were clearly aware that they were required to fill in and give their quotations in respect of the items mentioned in Schedule-B. Both, the petitioner and the respondent No. 4 were also aware that the work entailed the balance work left by an earlier contractor. The roofs / slabs and doors / windows constituted part of the scope of the work of the present tender. But, that part had already been done by the earlier contractor. The DDA was unsure at the time

when the notice inviting tender was floated as to whether they were going to retain the said roofs / slabs and doors / windows. That would depend upon a consideration of the report of an expert. It is for this reason that the tenderers were required to submit their quotations for the said items also.

15. It is also clear that the items mentioned in Schedule-B could not all stand at the same time. This is so because items 1 and 2 of Schedule-B would come into play only if there was a decision to retain those items, namely, roofs/ slabs and doors / windows respectively. If these items were not to be retained, then they would require to be demolished and it is then that a consideration of items Nos. 3 and 4, which pertain to the cost of demolishing / dismantling would come into the picture. It is, therefore, clear that Item Nos. 1 and 3 were mutually exclusive and so were items 2 and 4 of Schedule-B. That leaves us with four eventualities:

a) Items 1 and 2;

b) Items 3 and 4;

c) Items 1 and 4; and

d) Items 2 and 3.

16. A comparative summary of the bids by the petitioner and the respondent No. 4, after taking into account these eventualities and the rates quoted by them in Schedule-B, is as follows:

S. No.

Item No.

Eventuality

Petitioner?s Bid (Rs.)

Respondent No.4?s Bid (Rs.)

(a)

1+2

If both the roofs/slabs and the doors/windows are to be retained

22,68,65,089/-

22,64,39,027.50

(b)

3+4

If both the roofs / slabs and the doors / windows are to be dismantled

23,01,57,476/-

22,95,21,800.00

(c)

1+4

If the roofs / slabs are to be retained and the doors / windows are to be dismantled

22,94,97,476/-

22,89,55,800/-

(d)

2+3

If the roofs / slabs are to be dismantled and the doors / windows are to be retained

22,75,25,089/-

22,70,05,027.50

If we were to consider any of the eventualities, the respondent No. 4''s bid is clearly lower than that of the petitioner. In other words, whatever the eventuality, the outgo on the part of the DDA would be the least if the work was awarded to the respondent No. 4.

17. It is also clear that since the roofs / slabs and the doors / windows had already been put in place by the earlier contractor, at least one of the aforesaid eventualities, referred to in the preceding paragraph, would have to be undertaken by the respondent / DDA. In other words, from the lumpsum figure mentioned by each party, the lowest price would have to be determined by either =adding or deducting'' or =adding and deducting'', depending on the particular eventuality chosen, the rates quoted for such eventuality in Schedule-B by each of the parties. A complication could have arisen where there was a cross-over of rates and consequently a cross-over of the ultimate price determined in each of the eventualities. Fortunately, that has not happened in the present case. This is so because in every eventuality, the respondent No. 4''s bid has worked out to be lower than that of the petitioner.

18. We are, therefore, of the view that the respondent No. 4 was clearly the lowest bidder and the work has been correctly awarded to the respondent No. 4 on the basis of the tender conditions. The reference by the petitioner to Clause 4 of the General Specifications and Conditions as also to the additional conditions with regard to inspection relates to minor details and discrepancies and is not connected with the specific items mentioned in Schedule-B. The end result is that no fault can be found with the award of the work in favour of the respondent No. 4. The respondent Nos. 1 to 3 can go ahead and finalise the award of the work in favour of the respondent No. 4. The writ petition is dismissed with costs which we quantify at Rs 20,000/-.

