
(2017) 03 DEL CK 0044

In the Delhi High Court

Case No : WP(C) 76 of 2015 and CM Nos. 119 of 2015 and 4891 of 2015

Ashoka Buildcon Limited

APPELLANT

Vs

National Highways Authority of India

RESPONDENT

Date of Decision : 06-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 3 ADDelhi 501 : (2017) 239 DLT 290

Hon'ble Judges : Mr. Badar Durrez Ahmed and Mr. Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : Mr. Rajiv Nayar, Sr. Advocate with Mr. Abhishek Sharma and Mr. Yash Srivastava, Advocates, for the Petitioner; Mr. Pradeep K. Bakshi, Ms. Prachi V. Sharma and Mr. Ritvick Navel, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Sanjeev Sachdeva, J.—WP(C) 76/2015 and CM Nos. 119/2015 (for stay) and 4891/2015 (for return of amount)

The Petitioner by the present petition seeks quashing of the letter dated 01.01.2015, whereby the Respondent No. 1 has informed the petitioner that its bid is non-responsive and further seeks a direction thereby restraining the Respondents from encashing the two bank guarantees submitted by the petitioner as bid security.

2. The case of the Petitioner is that the Respondent No.1 on 28.01.2014 issued a Request For Qualification ("RFQ") for Development and Up gradation of Bijapur-Gulbarga-Homnabad Section of NH-218 (New NH- 50) to 2-Lane with Paved Shoulders from KM. 195.000 to KM. 418.000 in the State of Karnataka under NHDP Phase-IV to be executed on Engineering, Procurement and Construction (EPC) Mode ("Project").

3. As per the Petitioners, in order to participate in the RFQ as members of a Joint Venture, they executed a Joint Bidding Agreement for Joint Venture dated

11.03.2014. The Petitioners thereafter participated in the RFQ process as a Joint Venture and were declared as Pre-qualified/Shortlisted Bidders for the Project. In response to the RFQ, the Petitioners submitted various documents to the Respondent No. 1 including the original JV Agreement dated 11.03.2014 in physical form. After the process of Pre-qualification/Short-listing of bidders had been completed, the Respondent No.1 issued a Request For Proposal ("RFP") dated 28.10.2014 inviting bids from the Pre-qualified/Shortlisted Bidders.

4. As per the RFP there was a single stage two part system for selection of the bidder for award of the Project. The bid was invited under two parts-Technical Bid and Financial Bid. First eligibility and qualification of the Bidder was to be examined based on the Technical Bid and the Financial Bid of only those bidders was to be opened whose Technical Bids were found to be responsive to eligibility and qualifications requirements laid down in the RFP.

5. As per the Petitioners, only those documents which were mentioned in Clause 2 (ii) of the "Procedure for E-tendering" were to be filed with the Respondent No.1 in both soft copy as well as in physical form and not the documents mentioned in Clause 2.11 of the RFP. It is submitted that, Clause 2.11 of the RFP mandated submission of the Joint Bidding Agreement, if any, along with the bid and that Clause 2 of the "Procedure for E-tendering" superseded this requirement and did not mandate the filing of the Joint Bidding Agreement (Electronically or physically) along with the bid. It is further contended that the Petitioners had, as far back as when they filed their response to the RFQ, filed the original JV Agreement dated 11.03.2014 with the Respondent No. 1.

6. Clause D of Section 2 titled "Instructions to Bidders" which deals with submission of Bid Security by the Bidders mandates that a Bidder shall be required to submit along with its bid, a Bid Security in favour of the Respondent No.1. Clause 2.20.1 provides that the Bid Security shall be provided in terms of Clauses 2.1.6 and 2.1.7 of the Instructions to Bidders. Clause 2.1.6 in turn mandates a bidder to deposit a bid security of Rs. 7.09 crores.

7. As per the Petitioners in addition to making the deposit of Bid Security, each bidder was required to pay Rs. 80,000/- towards cost of the bid document and submit proof of the online payment of this amount. In compliance with the said term of the Instruction to Bidders, the Petitioners paid Rs. 80,000/- to the Respondent No.1 as cost of RFP documents and RFP Processing Fee. Further, even at the time when the Petitioners JV submitted its response to the RFQ, it was mandated to pay an amount of Rs. 80,000/- distinct and separate from the identical amount which had to be paid at the RFP stage. It is contended that the said amounts cannot be the cost of the documents but is in reality a pre-estimate of the cost of the processing the RFP or RFQ, as the case may be.

8. The Joint Venture formed by the Petitioners submitted its Technical and Financial Bids in response to the RFP on 19.12.2014. Along with their bids, the Joint Venture also submitted Bid Security in the form of two Bank Guarantees in

terms of Clause 2.20.1 read with Clauses 2.1.6 and 2.1.7 of the Instructions to Bidders. The details of the two Bank Guarantees submitted by the Petitioners are as follows :

(i) Bank Guarantee bearing No. 0001414BG0000351 dated 16.12.2014 for an amount of Rs.

3,54,50,000.00 issued by Respondent No.2-Bank of Maharashtra; and

(ii) Bank Guarantee bearing No.1403 80IBGB00631 dated 16.12.2014 for an amount of Rs. 3,54,50,000.00 issued by Respondent No.3-IDBI Bank.

9. By letter dated 24.12.2014 Respondent No.1 sought clarifications from the petitioners in relation to (i) submission of Joint Bidding Agreement and (ii) Bid capacity i.e. relevant experience of the bidders. The Petitioners in response thereto clarified and submitted that since the RFP stood modified by the "Procedure for E-tendering", there was no requirement of submission of Joint Bidding Agreements in the RFP any longer and further that it had already submitted the original JV Agreement dated 11.03.2014 in physical form along with their submission in response to the RFQ but additionally re-submitted the JV Agreement dated 18.12.2014 as well as the JV Agreement dated 11.03.2014.

10. By the impugned communication dated 01.01.2015, the Respondent No. 1 has informed the Petitioners that their Technical bid has been found to be non-responsive and has been rejected. By letters dated 02.01.2015, the Respondent No. 1 has invoked the two bank guarantees. Despite a query by the Petitioner, the Respondent No. 1 did not communicate the reason for declaring the bid of the Petitioners as non responsive.

11. The Petitioners have thus approached this court seeking quashing of the letter dated 01.01.2015 informing the petitioners about their bid being rejected as being non-responsive and for restraining the respondents from encashing the bank guarantees. By the time the petition was listed before this court on 05.01.2015, the Bank Guarantee issued by IDBI was encashed. This court by its order dated 05.01.2015, restrained the encashment of the other Bank Guarantee.

12. In its counter affidavit, the Respondent No. 1 stated the ground for declaring the bid of the petitioners as non-responsive as :

"7. That since the Petitioner had not submitted the critical and important document, i.e. original Joint Bid Agreement physically in terms of Clause 2.11.2 of RFP, its bid was found non-responsive after detailed deliberation by Evaluation Committee. It is not out of place to mention here that even the soft copy of the Joint Bid Agreement had not been submitted along with its bid online, especially, when the Joint Venture Agreement dated 18.12.2014, on the basis of which, the bid had been made was entered into between the Petitioner allegedly on 18.12.2014, a date before submission of the bid. Further it is only thereafter that on unanimous decision of the Evaluation Committee to the effect that bid of the Petitioner was non-responsive that same was not opened and it had been

decided to encash the bank guarantee submitted by Petitioner in this regard....."

13. The Respondent No. 1 has sought to justify its action for declaring the bid of the Petitioner as non responsive and that the forfeiture was in terms of the Bid document.

14. It is further contended in the counter affidavit that M/s. L and T Ltd. Mumbai, whose bid was found to be the lowest has been awarded a Letter of Intent dated 02.01.2015 for execution of the project.

15. Though it is contended by the Counsel for the Petitioners that the declaration of the bid of the petitioners as non responsive was illegal, however the focus of the submissions were around the forfeiture of the Bid Security and the invocation of the Bank Guarantee. It is contended, though not admitted by the petitioners, that even if the bid of the petitioners was considered as non responsive, the respondent No. 1 could not have forfeited the bid security as no loss or damage was suffered by the respondent No. 1 on that count. It is contended that the petitioner paid an amount of Rs. 80,000/- to the Respondent No.1 as cost of RFP documents and RFP Processing Fee, further, even at the time when the Petitioners JV submitted its response to the RFQ, it paid an additional amount of Rs. 80,000/- and as such the said amount covered the cost of the tender document and the processing fee. It is contended that the loss and damage could by no stretch of imagination be Rs. 7.09 crores. It is further contended that at no point of time has the Respondent No. 1 stated as to what is the loss or damage suffered by it on account of the bid of the petitioner being non-responsive.

16. To resolve the controversy, it would be expedient to refer to the relevant clauses of the Instructions to Bidder. Clause 2.20.1, 2.20.4 and 2.20.5 read as under :

"2.20.1 The Bidder shall furnish as part of its BID Security referred to in Clauses 2.1.6 and 2.1.7 herein above in the form of a bank guarantee issued by nationalized bank, or a Scheduled Bank in India having a net work of at least Rs. 1,000 crore (Rs. one thousand crore), in favour of the Authority in the format at Appendix-II (the "Bank Guarantee") and having a validity period of not less than 180 (one hundred eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalized bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.

2.20.4 The Authority shall be entitled to forfeit and appropriate the BID Security as Damages inter alia in any of the events specified in Clause 2.20.5 herein below. The Bidder, by submitting its BID pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage

on account of withdrawal of its BID or for any other default by the Bidder during the period of BID validity as specified in this RFP. No relaxation of any kind on BID Security shall be given to any Bidder.

2.20.5 The BID Security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and I or under the Agreement, or otherwise, under the following conditions :

- (a) If a Bidder submits a non-responsive BID as defined in 3.1.6 ;
- (b) If a Bidder engages in a corrupt practise, fraudulent practise, coercive practise, undesirable practise or restrictive practise as specified in Section 4 of this RFP;
- (c) If a Bidder withdraws its BID during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;
- (d) In the case of Selected Bidder, if it fails within the specified time limit-
 - (i) to sign and return the duplicate copy of LOA;
 - (ii) to sign the Agreement;
 - (iii) or to furnish the Performance Security within the period prescribed there for in the Agreement; or
- (e) In case the Selected Bidder, having signed the Agreement, commits breach thereof prior to furnishing the Performance Security."

17. Clause 2.20.4 provides that the Respondent No.1 shall be entitled to forfeit the Bid Security as damages on occurrence of any of the events specified in Clause 2.20.5 wherein one of the events contained in sub-clause (a) is "if a Bidder submits a non-responsive bid as defined in Clause 3.1.6."

18. Clause 3.1.6 reads as under :

"3.1.6 Tests of responsiveness 3.1.6.1 As a first step towards evaluation of Technical BIDs, the Authority shall determine whether each Technical BID is responsive to the requirements of this RFP. A Technical BID shall be considered responsive only if :

- (a) Technical BID is received online as per the format at Appendix-IA including Annexure I to VI; However, those bidders, whose RFAQ eligibility limit assessed by Ministry is not less than the estimated cost of the Project, are not required to submit Annexure II to V of Appendix-IA;
- (b) Documents listed at clause 2.11.2 are received physically;
- (c) Technical Bid is accompanied by the BID Security as specified in Clause 2.1.6

and 2.1.7;

(d) Technical Bid is accompanied by the Power of Attorney as specified in Clauses 2.1.8;

(e) Technical Bid is accompanied by Power of Attorney for Lead Member of Joint Venture and the Joint Bidding Agreement as specified in Clause 2.1.9, if so required;

(f) Technical Bid contain all the information (complete in all respects);

(g) Technical Bid does not contain any condition or qualification; and

(h) proof of online payment of Rs. 80,000/-

(Rupees Eighty Thousand only) towards cost of Bid document."

19. As per the Petitioner, Clause 3.1.6.1 (b) stipulates that a bid shall be considered to be responsive only if the documents listed at Clause 2.11.2 are received physically by the Respondent No.1.

20. We may also note that subsequently, the Ministry of Road Transport, Government of India by its communication dated 11.09.2015 has directed the amendment of the Model Documents for RFQ and RFP and has deleted the clause 2.20.5(a) of RFP that provided for forfeiture of Bid Security if the Bid submitted was non responsive as defined in clause 3.1.6.

21. A Division Bench of this court by order dated 10.03.2011 in WP (C) 8418 of 2010 titled Madhucon Projects Ltd. v. National Highways Authority of India and Ors., wherein the clause for forfeiture of Bid Security was virtually in identical terms as in the present case, permitted forfeiture of only 5% of the Bid Security amount. This court while holding that the bid was required to be treated as responsive, with regard to the clause of forfeiture held as under :

"50. Learned counsel for respondent No. 1 submitted that the bid security amount was a specific term of the RFP clause 2.1.7. Respondent No. 1 was entitled to forfeit and appropriate damages inter alia in the event specified in Clause 2.20.7 in view of what is set out in clause 2.20.6. The said clause also provides that the bidder is deemed to have acknowledged and confirmed that the authority will suffer loss and damage on account of withdrawal of its bid or for any other default by the bidder during the period of bid validity as specified in the RFP. Clause 2.20.7 states that the amount is mutually agreed genuine pre-estimated compensation and damages payable to the authority for inter alia time cost and effort of the Authority. The conditions under which it applies includes where a bid is a non-responsive bid. However, as per the latter part of sub-clause

(a) of clause 2.20.7 if the bid is a non-responsive bid, the damages are restricted to 5 per cent of the value of the bid security. The question, thus, arises whether in case of a non-responsive bid could it be said that 5 per cent of the value of the bid security was the genuine pre-estimate of damages ?

51. It must be borne in mind that the stage for submission of the RFP is the second stage in the tendering process. There is an earlier scrutiny in pursuance of the RFQ submitted by the parties in terms whereof certain parties are enlisted for submitting the RFP. At the stage of the RFP a sum of Rs. 3.00 lakh is paid to procure the documents. This amount cannot be the cost of the form but is really a pre-estimated cost of processing the RFP. A non-responsive bid is one where at the threshold on the opening of the bid it is found to be defective on one account or the other and is, thus, shut out from the process of scrutiny. This can have no co-relation with the value of the bid which would be the eventuality even if 5 per cent of the bid amount is encashed.

52. Learned counsel for respondent No. 1 sought to canvass that the objective is to prevent non-serious persons from submitting the bids. This, in our considered view, is taken care of by charging an amount for purchase of RFP documents and in other eventualities of say a party backing out, the bid security amount being forfeited. The occasion for non-responsive bid would only be a defect in submission of the RFP.

53. Learned counsel for respondent No. 1 could not seriously dispute that the amount really is in the nature of a penalty. If it is so it cannot be said to be a reasonable pre-estimate of damages and the parties suffering losses must prove that it is suffering damages to that extent. We are of the view that there is hardly any quibble over the settled legal position in this behalf. Suffice it to say that in *Maula Bux v. Union of India* AIR 1970 SC 1955 the scope and ambit of Section 74 of the Contract Act, 1872 (hereinafter referred to as the "Contract Act") was discussed. It was observed that if the forfeiture of earnest money is in the nature of penalty Section 74 of the Contract Act would apply. In such a case proof of actual loss or damage would be essential. However, if the forfeiture amount is reasonable pre-estimate, it would not fall within Section 74 of the Contract Act. The legal position in this behalf has not changed. Section 74 of the Contract Act reads as under :

"74-Compensation for breach of contract where penalty stipulated for-[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

54. The 5 per cent of the bid security amount would be Rs. 73.95 lakh approx. This cannot be said to be the charges for processing the bids. That charge, in fact, already stands recovered which had been pre-estimated at Rs. 3.00 lakh for purchase of the RFP document.

55. We have no hesitation to hold that the aforementioned clause permitting 5 per cent bid security amount to be forfeited in case of a non-responsive bid is

clearly penal in nature and thus provisions of Section 74 of the Contract Act would apply. It cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid and thus the bank guarantee for 5 per cent of the bid amount cannot be encashed in such an eventuality.

56. Thus, even on the second issue we are of the view that even if the bid was non-responsive, the 5 per cent of the bid security amount could not have been forfeited."

(underlining supplied)

22. The appeal against the Judgment of the Division Bench in Madhucon (Supra) was dismissed by the Supreme Court in Civil Appeal No. 3055 of 2015 by Judgment dated 17.03.2015. The Supreme Court held :

"In the facts of this case, admittedly the Respondents have performed the contract. Initially there appears to have been a dispute as to whether the Respondent's bid was responsive or not, bringing into play the legal capacity of the Appellant to forfeit 5% of the bid security. Inasmuch as there has been no challenge to the Award" of the contract to the Respondents in terms of the Impugned Judgment, the entire issue has been rendered academic. Furthermore since the Division Bench has applied Fateh Chand v. Balkishan Dass AIR 1963 SC 1405 and thus had found no legal propriety in the deduction of 5% of the Bid Security, this Appeal does not call any further consideration."

23. Further the Supreme Court, in the case of National Highways Authority of India v. MEIL-EDB LLC (JV) Civil Appeal No. 3052 of 2015, by order dated 18.03.2015 held as under :

"We are confronted with a situation when there is a contract between the parties, duly Signed by the Respondent which restricts forfeiture of 5% of the value of the Bid security ostensibly not by way of a penalty. Of course, as is to be expected, the Respondent disagrees and on the contrary submits that the deduction/forfeiture is in terrorem and is punitive in nature. A writ court may at least as a temporary or preliminary view decide whether the damages imposed by an Authority amenable to writ jurisdiction such as NHAI indubitably are punitive or not, but it should abjure from going into the minute calculation. That controversy should be left to the Civil Court to decide, i.e. whether the deduction/forfeiture, in the present instance of 5% of the value of the Bid Security is punitive or otherwise. We think that the course that commends itself to us is to relegate the parties to the Civil Courts to determine whether any damages had been suffered by the National Highways Authority of India and if so whether the deduction of 5% was a fair pre-estimate or was punitive in nature."

24. In the present case, unlike in the cases of Madhucon and MEIL-EDB (Supra), wherein the forfeiture clause restricted the amount to 5% of the Bid security, in the present case, the clause stipulates forfeiture of 100% of the Bid Security which works out to Rs. 7.09 crores.

25. The reason for forfeiture is that the bid is non responsive. If a bid is non responsive, then the bid is ousted at the threshold and cannot be considered further. The subject tender is for Development and Up gradation of a section of the National Highway. The estimated cost of the tender was Rs. 709 crores and the completion period stipulated by the tender document is 2.5 years with maintenance period of 4 years.

26. Clause 2.20.4 stipulates that the Authority shall be entitled to forfeit and appropriate the bid Security as Damages inter alia in any of the events specified in Clause 2.20.5 it further stipulates that the Bidder, by submitting its bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its bid or for any other default by the Bidder during the period of bid validity as specified in the RFP. The clause postulates that the authority shall suffer a loss and damage if the bid is withdrawn or on account of any other default of by the bidder during the bid validity period. Both the conditions presuppose a valid bid. If the bid in the first instance itself is invalid on the ground of being non-responsive, then it does not qualify as a bid and thus there is no question of it being withdrawn or there being any default during the bid validity period.

27. Furthermore, Clause 2.20.5 stipulates that the bid Security shall be forfeited and appropriated by the Respondent No. 1 as damages payable for, inter-alia, time cost and effort of the said Respondent, if a Bidder submits a non-responsive BID. By no stretch of imagination, in a contract where the estimated cost of the entire contract is Rs. 709 crores and the completion period stipulated is 2.5 years with a maintenance period of 4 years, can the time, cost and effort for evaluation/processing of a bid document be Rs. 7.09 crores ! More so in view of the fact that the stand of the Respondent No. 1 is that the letter of intent has already been awarded to the lowest bidder on 02.01.2015.

28. Furthermore, it may be also pertinent to note that the Ministry of Road Transport, Government of India by its communication dated 11.09.2015 has now directed the amendment of the Model Documents for RFQ and RFP and has deleted the clause 2.20.5(a) of RFP that provided for forfeiture of Bid Security if the Bid submitted was non responsive as defined in clause 3.1.6.

29. The action of the Ministry of Road Transport in deleting the clause of forfeiture of bid security on account of submission of a non-responsive bid shows that even the Ministry felt that the said clause does not in reality represent the loss or damage suffered by the authorities for the cost and effort for evaluating/processing of a bid and is punitive in nature.

30. The decision of the Supreme Court in MEIL-EDB (Supra) would, in our view, not be applicable in the facts of the present case as in the said case the clause only stipulated forfeiture of 5% of the Bid security and in the present case stipulates forfeiture of 100% of the bid security amounting to Rs. 7.09 crores and in the present case the letter of intent has already been awarded to the

lowest bidder on 02.01.2015 and further in view of the subsequent decision of the Ministry of Road Transport in deleting the ground of submission of a non responsive bid.

31. In view of the above, we accordingly hold that the clause 2.20.5(a) is penal in nature and cannot be sustained. The Bid security submitted by the Petitioners cannot be forfeited. The Respondent No. 1 is thus not entitled to encash the Bank Guarantee bearing No. 0001414BG0000351 dated 16.12.2014 for an amount of Rs. 3,54,50,000.00 issued by Respondent No.2-Bank of Maharashtra and is liable to return the same. The respondent No. 1 is also liable to refund to the Petitioners the amount received by it from encashment of the Bank Guarantee bearing No.1403 80IBGB00631 dated 16.12.2014 for an amount of Rs. 3,54,50,000.00 issued by Respondent No.3- IDBI Bank.

32. The Respondent No. 1 shall return the said bank guarantee in original and refund the amount to the Petitioners within four weeks from today. The Petition is allowed in the above terms and the pending applications are disposed of accordingly. There shall be no orders as to costs.