(2015) 09 P&H CK 0031

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 21950 of 2014 (O&M)

Ashutosh Enterprises APPELLANT

Vs

Haryana State Roads and Bridges Development Corporation Limited RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Citation : (2015) 180 PLR 748

Hon'ble Judges : S.J. Vazifdar, A.C.J;Tejinder Singh Dhindsa, J

Bench : Division Bench

Advocate : Ashwinie Kumar Chopra, Senior Advocate and Rupa Pathania, for the Appellant; Amar Vivek and Anshul Jain, Advocates for the Respondent

Judgement

S.J. Vazifdar, Acting C.J—The petitioner is the constituted attorney of one Sandeep Shukla, who carries on business in the firm name and style of Ashutosh Enterprises as a sole proprietor thereof. The petitioner seeks a writ of certiorari to quash the respondent''s Memo dated 07.05.2013 forfeiting the bid security of Rs. 98 lacs deposited by him while submitting his tender and a writ of mandamus directing the respondent to refund the same with interest.

2. The respondent issued a Detail Notice Inviting Tenders (DNIT) online for collecting toll on a highway for a period of one year. One of the conditions required the bidders to deposit a sum of Rs. 98 lacs with the respondent towards bid security. The petitioner accordingly submitted a tender with the security deposit of Rs. 98 lacs.

3. The bids were invited under a two envelope system, the first containing the technical bid and the second the financial bid. The respondent, admittedly, found the petitioner''s bid to be non-responsive. Finding that the petitioner''s bid was not technically qualified, his price/financial bid was not opened. It is not necessary to set out the reasons for this decision. The decision has not been challenged and the matter proceeded before us on the basis that it stands. The only question is whether the petitioner is entitled to a refund of the security

deposit.

4. The petitioner relies upon Clauses 9.2 and 10 of the Instructions to Bidders which formed a part of the DNIT in support of his contention that he is entitled to a refund of the security deposit. The respondent relied upon Clause 9.3 read with Clause 7 to justify their having forfeited the security deposit.

5(A). The relevant clauses of the Instructions to Bidders are as follows:--

"SECTION-2 INSTRUCTION TO BIDDERS ....

7. Validity of Bid

The bids shall be valid for 90 days from the last date of manual/physical submission of EMD.

9. Bid Security

9.1 The bidder shall furnish, as a part of his bid, a bid Security amounting to Rs. 98.00 Lac in the form of one of the form mentioned in clause 8.1 The EMD should be pledged in favour of Managing Director, HSRDC along with the certificate of the concerned Bank Manager that the EMD can be encashed at any time by the Managing Director, HSRDC which shall be valid up to the validity of bid.

9.2 The bid security of un-successful bidders shall be released by the HSRDC without any interest with in 15 days of expiry of the validity of bids or after the highest bidder enters into Agreement with the HSRDC which ever is earlier.

9.3 The bid security shall be forfeited

(a) If the bidder withdraws or modifies his bid/offer after the last date and time for the receipt of bids during the period of bid validity or extended validity period; or

....

10. Clarification of Bids

To assist in examination and evaluation of bids, HSRDC may at its discretion, ask the Bidder for any clarification of his bids, but no downward change in the Bid price shall be sought, offered or permitted.

....

12.2 Opening of the price bid

The Financial Bids shall be opened at the time and date prescribed in Key dates of Detail Notice Inviting Tender, Section-1 (ii)

However, the technical Evaluation Committee shall convey the result of evaluation to the bidders through e-mail/telegraphically also intimating the date of opening of financial bid, which would be after 7 days from the date of intimation.

Under no circumstance, Financial Bid of non-responsive agencies would be opened."

(B) Section-3 of the bid document contains the definitions. Clause-1 thereof is as follows:--

SECTION-3 Definitions

1. Bidder/Entrepreneur/Agent: Means individual or firm or Company or Joint Venture. Who bids for collection of toll from the toll facility."

6. A pre-bid meeting was held on 29.01.2013. On 14.02.2013, the technical bids were opened. The petitioner''s financial bid was not opened as the Tender Opening Committee and the Technical Evaluation Committee at a meeting held on 14.02.2013 found that the petitioner was not technically qualified as the information/documents supplied by him were not as per the eligibility criteria mentioned in the bid document. The petitioner was so informed by a letter dated 21.02.2013. A copy of this letter was tendered along with the compilation of documents which included the minutes of the meeting held on 14.02.2013. On 26.02.2013, the financial bids of the bidders found technically qualified were opened.

7. On 02.03.2013, the petitioner offered to increase his bid. This, according to respondent, was contrary to Clause 9.3(a) as it constituted a modification of the bid submitted by the petitioner. Accordingly, it was contended that the respondent was entitled to forfeit the bid security in exercise of powers under Clause 9.3(a).

8. The respondent rejected the petitioner''s bid by the said letter dated 21.02.2013 informing him that his bid was not technically qualified. The petitioner''s bid was, therefore, no longer valid. The validity of the petitioner''s bid expired in view of the respondent having rejected as technically unqualified. This is clearer still from the concluding words of Clause 12.2 of the Instructions to Bidders which states that "Under no circumstance, Financial Bid of non-responsive agencies would be opened" It can hardly be suggested that a bid remains valid even after it is rejected by the party inviting the bids. The words "expiry of the validity of the bids" in Clause 9.2 are clear. They refer to a point of time when the bids are no longer valid for any reason including the rejection thereof by the respondent.

9. Clause 9.3 does not support the respondent''s action in forfeiting the bid security. It entitles the respondent to forfeit the bid security only where the bidder withdraws or modifies his bid/offer after the last date and time for the receipt of the bids "during the period of bid validity or extended validity period". The period of the bid validity is the period when the bid remains valid. If the bid ceases to be valid for any reason whatsoever and the bidder/tenderer withdraws

or modifies his bid thereafter, the respondent is not entitled to forfeit the bid security. The ambit of the words "during the period of bid validity" in Clause 9.3(a) is the same as the ambit of words "validity of bids" in Clause 9.2.

10. Mr. Amar Vivek, however, contended on behalf of the respondent that the words "period of bid validity" in Clause 9.3 (a) must be read in the context of the definition of the words "validity of bids" in Clause 7 of the Instructions to Bidders which read: "The bids shall be valid for 90 days from the last date of manual/ physical submission of EMD." So read, he contended, the period of bid validity of the petitioner''s bid extended beyond 02.03.2013 when the petitioner offered to increase his bid.

11. The submission is not well founded. Clause-7 is for an entirely different purpose. It provides that the bids shall be valid for 90 days from the last date of manual/physical submission of EMD. Clause-7 is for the benefit of the respondent who invited the tenders. The respondent required time to evaluate and assess the tenders as regards their eligibility as well as the relative merits and suitability of the bids inter se. The purport of Clause-7 is to prevent a bidder from withdrawing the bid for the period of time contemplated to be required by the party inviting the bids to carry out this exercise. If a party is permitted to withdraw the bid at will and at any time, it would be difficult for the party inviting the bids to implement the project in respect whereof the bids are invited. In any event and whatever be the reason, such a clause is permissible and is, in fact, almost always included by the party inviting the bids. As between the petitioner and the respondent the petitioner''s bid was valid for a period of ninety days from the last date of the manual/physical submission of the EMD. The respondent was entitled to accept the petitioner''s bid during this ninety day period. Had it done so, it would not have been open to the petitioner to contend that it was not bound by the offer as his bid was not valid even though the respondent had not rejected the same as being not technically qualified. The respondent, however, did not do so. The respondent was entitled to reject the bid even during this period of ninety days which is what it did. It declared the bid invalid and rejected the petitioner''s bid even before the expiry of the ninety day period. Thereupon, the petitioner''s bid no longer remained valid.

12. Clause-7, as we mentioned, is for the benefit of the respondent. It does not, however, prevent the respondent from rejecting a bid even before the expiry of the period stipulated therein. If the party inviting the bids invalidates a bid before the expiry of such period, the bid ceases to remain valid. It can hardly be suggested that the party inviting the bids is entitled to reject the bid and at the same time keep it valid. Once a bid is rejected by the respondent, the bid ceases to be valid by virtue of the party inviting the tenders having expressed its desire not to accept the bid. Once a party refuses the offer, the other party is not bound by the same. The offer then ceases to remain valid. A view to the contrary is not only unsustainable but would be unfair to a bidder.

13. This is even more so in this case in view of the concluding words of Clause

12.2 of the Instructions to Bidders: "Under no circumstance, Financial Bid of non-responsive agencies would be opened.

14. Clause 9.3(a) entitles the respondent to forfeit the bid security inter alia if the bidder modifies the bid "during the period of bid validity". The respondent would have been entitled to forfeit the bid security if the petitioner had modified his bid during the bid validity. However, the modification suggested or offered by the petitioner''s letter dated 02.03.2013 was not during the validity of the bid. Mr. Chopra, the learned senior counsel appearing on behalf of the petitioner, therefore, rightly submitted that Clause 9.3(a) would not operate in this case as the modification was suggested by the petitioner on 02.03.2013, i.e., after the rejection of his tender by the letter dated 21.02.2013 on the ground that it was not technically qualified. In view of Clause 9.2 of the instructions to tenderers the respondent was bound to refund the bid security to the petitioner upon its having rejected the petitioner''s bid.

15. The petition ought to succeed on this ground alone. There is, however, yet another reason why the petition ought to succeed. Clause 9.3(a) refers to a modification which has the effect of reducing the bid/offer and not one which enhances the bid/offer. Clause 9.3(a) read by itself may support the respondent''s contention that any modification of the bid/offer would entitle the respondent to forfeit the bid security. However, the clause must be read in the context of the other clauses as well. Clause-10 supports the petitioner''s contention that the modification referred to in Clause 9.3(a) is not one which enhances or improves upon the bid/offer. Clause-10 prohibits a bidder from offering a downward change. It does not prohibit an upward change in the offer. In other words, it does not prohibit the tenderer/bidder from making a better or higher offer.

16. There is obviously, therefore, no bar to a bidder modifying his bid/offer by enhancing the same. If a party withdraws an offer, it suffers the consequence of forfeiture of its bid security for the withdrawal works to the detriment of the respondent who invited the tender. Similarly, a modification that reduces the value of the offer also affects the respondent adversely. It is reasonable and rational, therefore, to introduce a clause that provides for the consequence of forfeiture of the bid security in such cases.

17. We do not suggest that a term or provision providing for forfeiture of bid security is not reasonable even if the offer is modified by an enhanced offer. However, in that event, the clause must be clear and unequivocal for a forfeiture entails a serious consequence. If such a serious consequence is to follow, it ought to be stipulated in clear terms. The notice inviting tenders, read as a whole especially keeping Clause-10 in mind, indicates that the modification contemplated in Clause 9.3(a) was one which results in reducing the value of the offer and not one where the value of the offer is enhanced.

18. In the circumstances, the respondent''s decision forfeiting the petitioner''s

bid security is quashed and set aside. The respondent is directed to refund the bid security with interest @ 10% per annum from 08.03.2013 i.e. fifteen days of the expiry of the validity of the petitioner''s bid as provided in Clause 9.2 till payment and/or realisation.

