(2021) 04 TEL CK 0004

In the Telangana High Court

Case No : Writ Petition No. 22100 Of 2020

Avexa – Railone JV	APPELLANT
Vs	
Union Of India And Ors	RESPONDENT

Date of Decision : 20-04-2021

Acts Referred:

Citation : (2021) 04 TEL CK 0004

Hon'ble Judges : Abhinand Kumar Shavili, J

Bench : Single Bench

Advocate : Kailash Nath, C.V.Rajeevs Reddy

Final Decision : Allowed

Judgement

Abhinand Kumar Shavili, J

1. This Writ Petition is filed seeking a Writ of Mandamus declaring the action of the respondents in disqualifying the bid placed by the petitioner in Tender No.52-CAO-C-SC-2020 as illegal and arbitrary and violative of Indian Railway Standard General Conditions of Contract (IRSGCC) July 2020 and consequently set aside the disqualification of the petitioner.

2. Heard Sri Kailash Nath P.S.S., learned counsel for the petitioner and Sri C.V.Rajeeva Reddy, learned Standing Counsel for the respondents.

3. It has been contended by the petitioner that it is a Joint Venture (JV) between M/s.Railone Projects Pvt. Ltd and M/s. Avexa Corporation Pvt. Ltd., and both the companies have entered into a Memorandum Of Understanding (MOU) on 25-07-2020 to apply jointly in pursuance to the tender notification issued by the respondents. Both the companies are in the construction of projects and the respondents have issued a tender notification on 01-07-2020 for the proposed Third Line between Balharshah - Kazipet Station in Secunderabad Division for the proposed construction of RUR box (cast in situ). The last date for submission of filled in tenders was 28-07-2020. The petitioner participated in pursuance to the

said tender as a joint venture and submitted its technical bids. The respondents had rejected the technical bid on the ground that the authorized signatory has not submitted the tender forms. The petitioner had further contended that as per General Instructions in the tender documents, it is abundantly made clear that the General Conditions of Contract governing the performance of the works are covered by the Indian Railways Standard General Conditions of Contract (herein after referred to as "IRSGCC" for short). The relevant clause which reads as follows:

"The General conditions of Contract governing the performance of the works covered by this tender are the Indian Railway Standard General Conditions of Contract (IRSGCC) as amended from time to time up to date. A soft copy of the IRSGCC is uploaded in the attached documents to the tender for reference. Hard coy of IRSGCC (with up-to-date correction slip) may be perused in the office of the Chief Administrative Officer/Construction/South Central Railway/ Secunderabad-500071. The tenderer/s is/are deemed to have kept himself/ themselves fully informed of the provisions of the IRSGCC including all corrections and Amendments issued up to date while submission of offer and any claim that he/they is/are not aware of any amendment of correction slip to the IRSGCC shall not be entertained."

4. The petitioner had contended that as per the joint venture of the petitioner's consortium, the Power of Attorney was given to one K.Kotireddy to submit tender documents and all the documents were accordingly signed by the said Kotireddy but however while submitting the tender application form, one Jogeswara Rao, one of the partners, has signed. The petitioner had further contended that the IRSGCC was further amended on 16-07-2020 and as per Clause 17.4 of the amended IRSGCC, the tender form shall be purchased and submitted only in the name of the Joint Venture not in the name of any constituent member. The tender form can however be submitted by JV or any of its constituent member or any person authorized by Joint venture through Power of Attorney to submit the tender. General Clause No.1 of the IRSGCC makes it clear that the tenderers are deemed to have kept themselves fully informed of the provisions of IRSGCC including all corrections and amendments issued up to date while submission of offer and any claim that he/they is/are not aware of any amendment or correction slip to the IRSGCC shall not be entertained, which should mean that any amendment made till the submission of tenders are issued, the new amendments are also to be acted upon. Though the tender notice was issued on 01-07-2020 and the last date for submission of the tender was 28-07-2020, there was an amendment on 16-07-2020 wherein as per Clause 17.4, any of its constituent member can also submit the tender. Accordingly, one of the constituent member i.e. Jogeswara Rao has submitted the tender though the authorized person K.Kotireddy has signed all the documents in the tender.

5. Learned counsel for the petitioner has drawn attention to new IRSGCC proceedings dt.16-07-2020, wherein on receipt of such number of suggestions

from Railways, a few provisions of General Conditions of Contract have been reviewed to expedite finalizing of tenders and execution of works and approved new IRSGCC have been issued on 16-07-2020. The tender document can be submitted by Joint Venture or any of its constituent member or any person authorized by joint venture to power of attorney, and accordingly one Sri Jogeswara Rao, a constituent member, has submitted the tender and affixed the signature at the time of submission of tender and the rest of all other documents are concerned were signed by the authorized signatory K.Kotireddy. The respondents have rejected the tenders at the technical bid stage itself on 30-11-2020 on the ground that the tender was submitted by Jogeswara Rao who is not an authorized signatory and the tender application of the petitioner was rejected in terms of Clauses 6 (b) and 17.12 of IRSGCC-2019. Challenging the same, the present Writ Petition is filed.

6 Learned counsel for the petitioner had contended that Clause 6 (b) of the IRSGCC reads as follows:

"When work is tendered for by a firm or company, the tender shall be signed by the individual legally authorized to enter into commitments on their behalf."

Clause 17.12 reads as follows:

"Authorized Member - Joint Venture members in the JV MOU shall authorize one of the members of behalf of the Joint Venture to deal with the tender, sign the agreement or enter into contract in respect of the said tender, to receive payment, to witness joint measurement of work done, to sign measurement books and similar such action in respect of the said tender/contract. All notices/ correspondences with respect to the contract would be sent only to this authorized member of the JV."

7. Learned counsel for the petitioner had contended that in view of the above said Clauses, the case of the petitioner was rejected erroneously. The respondents have not taken the amendment to IRSGCC made on 16-07-2020 and as per amended Clause 17.4 of IRSGCC, the tender form however can be submitted by Joint Venture or any of its constituent member or any person authorized by Joint Venture through Power of Attorney to submit the tender. Had the respondents taken the amended IRSGCC, the respondents could not have rejected the tender application of the petitioner. The petitioner has quoted the lowest price but in spite of the same, the respondents have rejected the application of the petitioner at the technical bid stage itself. Therefore, the rejection of the tender application of the petitioner in terms of Clauses 6 (b) and 17.12 of the IRSGCC and without considering the case of the petitioner in terms of amended IRSGCC on 16-07-2020 is arbitrary, illegal and total non-application of mind. Therefore, the impugned order of rejecting the tender application of the petitioner be set aside and let the respondents be directed to reconsider the case of the petitioner strictly in accordance with Clause 17.4 of the amended IRSGCC dt.16-07-2020 and further direct the respondents to open the financial bid of the

petitioner and if the petitioner happens to be the lowest tenderer, then further direct the respondents to award the contract work in favour of the petitioner.

8. Learned counsel for the petitioner relied upon the judgment reported in ABC Beverages Private Limited v. Indian Railway Catering & Tourism Corporation (IRCTS) Ltd. & Another 2017 SCC Online Del 9426 and contended that the rejection of technical bid based on evidently curable defect of a missing notarial stamp on some of their tender documents is thereby untenable and bad in law. In the instant case also, the defect is too trivial and if only the amended IRSGCC dt.16-07-2020 are taken into account, as per Clause 17.4 of the amended IRSGCC, one of the constituent member of the joint venture can also submit the tenders. Looking from any angle, the impugned rejection order is liable to be asset aside and let the respondents be directed to reconsider the case of thee petitioner afresh in terms of the amended IRSGCC dt.16-07-2020.

9. Per contra, learned Standing Counsel for the respondents had contended that the petitioner had violated the IRSGCC and accordingly, the respondents have rejected the case of the petitioner rightly in terms of Clauses 6 (b) and 17.12 of IRSGCC-2019. He further contended that this Court cannot sit over the tender committee and further contended that in catena of judgments, it has been held that Courts should not sit over the decision taken by tender committee and to that effect, he has relied upon Silppi Constructions Contractors v. Union of India and another 2019 SCC Online SC 1133, wherein the Supreme Court held as under:

"In B.S.N. Joshi & Sons Ltd. V. Nair Coal Services Ltd (2006) 11 S.C.C. 548, it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefore; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

10. The learned Standing Counsel for the respondents has further relied upon the judgment of the erstwhile High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Vasudeva Infra, Hyderabad, rep. by its Authorized Signatory vs. Union of India, rep. by the General Manager, South Central Railway, Secunderabad and others 2018 (3) ALT 516, wherein it was held:

"It is also required to be noted that as per clause 65.15.3 of the Indian Railways Standard General Conditions of Contract issued by the Engineering Department of Indian Railways in 2014, which is placed on record by the learned Standing Counsel for Railways, the production of copy of Memorandum and Articles of Association of the Company is a mandatory requirement apart from the above mentioned conditions in the present tender notification. Though it is stated in the affidavit filed in support of W.P.No.43663 of 2017 that the petitioner herein was eliminated only to award the contract to only leftover bidder for extraneous reasons, in the considered opinion of this Court, is completely bereft of any foundation. The fact remains that the petitioners herein failed in enclosing the documents which are mandatory in nature and obviously the insistence on the production of the said documents is to evaluate the financial capabilities of the tenderers, as such, they are not entitled for any relief from this Court."

11. Learned Standing Counsel for the respondents had further contended that since the petitioner has violated the terms of IRSGCC clauses i.e. 6 (b) and 17.12, and the case of the petitioner was rightly rejected. He further contended that the amended IRSGCC guidelines dt.16-07-2020 are not applicable to the IRSGCC guidelines - 2019 and the question of considering the case of the petitioner in the amended IRSGCC guidelines would not arise. Therefore, there are no merits in the Writ Petition and therefore the same is liable to be dismissed.

12. Having regard to the rival submissions made by the parties, this Court is of the considered view that the respondents have rejected the tender technical bid of the petitioner vide orders dt.30-11-2020 without considering the case of the petitioner in terms of the amended IRSGCC guidelines dt.16-07-2020 and as per the amended IRSGCC Clauses, i.e. Clause 17.4, which reads as follows:

"The tender form shall be purchased and submitted only in the name of the Joint Venture and not in the name of any constituent member. The tender form can however be submitted by the Joint Venture or any of its constituent member or any person authorized by Joint Venture through Power of Attorney to submit the tender."

13. A perusal of the amended Clause 17.4 of the IRSGCC guidelines would make it clear that the tender form can however be submitted by Joint Venture or any of its constituent member or any person authorized by Joint Venture through Power of Attorney to submit the tender. When the amended Clause 17.4 makes it abundantly clear that the three eventualities are possible while submitting the tender form, which are as follows:

i) Tender form can be submitted by JV; or

ii) Any of its constituent member; or

iii) Any person authorized by JV through Power of Attorney to submit tenders.

One of the eventualities is that the tender can be submitted by any one of its constituent member, admittedly, in the instant case, the tender was submitted by Jogeswara Rao who is one of the constituent member of the Joint Venture, and the rejection of the petitioner's case on the ground that the tender was submitted by one of the constituent member would be contrary to the Amended IRSGCC Clause 17.4. Thereby rejecting technical Bid of the petitioner on 30-11-2020 is an arbitrary exercise.

14. Further, when the case was being heard, the learned Standing Counsel for the respondents has produced the decision of tender committee dt.24-11-2020. A perusal of the same would disclose that the case of the petitioner was considered in terms of Clause 17.4 of the amended IRSGCC guidelines. Whereas, the argument of the learned Standing Counsel that amended IRSGCC guidelines and Clause 17.4 is not applicable to the petitioner's case is contrary to the decision taken by the tenders committee and the decision of tender committee was not even communicated to the petitioner, and when the respondents have considered the case of the petitioner in terms of Clause 17.4 of the amended IRSGCC guidelines, the same ought to have been informed to the petitioner but the respondents had rejected the tender application of the petitioner in terms of Clause 6 (b) and 17.12 of the IRSGCC guidelines without quoting Clause 17.4 of the amended IRSGCC guidelines in the rejecting orders dt.30-11-2020. Therefore, the impugned order is liable to be set aside as the rejection of the technical bid of the petitioner is an arbitrary exercise and the same was rejected without applying the amended IRSGCC guidelines dt.16-07-2020 and that the case of the petitioner ought to have been considered by the respondents in terms of amended Clause 17.4 of the IRSGCC guidelines. The rejection of the tender form of the petitioner on the ground that it is not submitted by the authorized person is a curable defect and if only amended clause 17.4 is made applicable, the said defect would not even arise and the same issue was rightly considered by the Delhi High Court in ABC Beverages Private Limited (1 supra).

15. Accordingly, the Writ Petition is allowed setting aside the impugned order dt.30-11-2020 in disqualifying the petitioner's bid placed by it in Tender No.52-CAO-C-SC-2020 and the respondents are directed to consider the case of the petitioner strictly in accordance with the amended Clause 17.6 of the IRSGCC guidelines dt.16-07-2020. No costs.

16. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

