

(2018) 10 RAJ CK 0083

In the Rajasthan High Court

Case No : Special Appeal Writ No. 1362 of 2018

GIEPL-HSEPL (JV) @APPELLANT@Hash Additional Chief Engineer

Date of Decision : 31-10-2018

Acts Referred:

Citation : (2018) 10 RAJ CK 0083

Hon'ble Judges : Pradeep Nandrajog,CJ;G R Moolchandani, J

Bench : Division Bench

Advocate : R.N. Mathur, Prateek Singh, Shovit Jhajharia, Nikhil Saini, J.M. Saxena

Final Decision : Dismissed

Judgement

1. The only issue which arises for consideration in the appeal is whether the decision taken by the Water Resource Department of the State of

Rajasthan that bid by the appellant was non-responsive is correct.

2. We note that the decision dated 05.01.2018 was challenged by the appellant before the First Appellate Authority. The appeal was dismissed on

29.01.2018. Second appeal was dismissed by the Second Appellate Authority vide order dated 13.04.2018.

3. The said decisions were challenged by way a writ petition before the learned Single Judge and the writ petition has been dismissed vide impugned

order 26.10.2018.

4. Learned counsel for the parties do not dispute that the issue centres around interpretation of clause 3.10.14 of Section 1 of the tender documents,

containing Instructions to Bidders. The agreement dated 30.11.2017 purporting to be a Joint Venture Agreement between M/s Ghanaram Infra

Engineers Pvt. Ltd. and M/s Hoisto Structures & Equipment Pvt. Ltd. The bank guarantee furnished.

5. Clause 3.10.14 reads as under:-

“The Bid Security of a Joint Venture, Consortium or Association must be in the name of the Joint Venture, Consortium or Association that submits the Bid. If the Joint Venture, Consortium or Association has not been legally constituted at the time of Bidding, the members of the proposed consortium or JV shall enter in to an Agreement that they shall form a legally constituted JV after the issue of Letter of Acceptance/Letter of Intent to them and shall also declare a partner as the lead partner in whose name the Bid Security may be submitted.”

6. The Joint Venture Agreement dated 30.11.2017 reads as under:-

JOINT VENTURE AGREEMENT

This Joint Venture Agreement (hereinafter referred to as “JV”) is made and entered into this 30/11/2017 (effective date) BETWEEN M/s

Ghanaram Infra Engineer Pvt Ltd a company incorporated, and having its registered office at 8/18, West Patel Nagar New Delhi 110008. (Hereinafter

referred to as the “First Party” And M/s Hoisto Structures & Equipment Pvt Ltd, A company incorporated, and having Registered Office at 21

D, D1 Kalipared Industrial Area Berasia Road Bhopal (hereinafter referred to as the “Second Party”) Hereinafter jointly referred to as the

“Parties” and individually as “Each Party” or “a Party” as the case may be. WHEREAS, A) The Governor of Rajasthan, Water

Resources Department (hereinafter referred in as the WRD) invited bid for “Planning,

Investigation, Design, Drawing and Construction of Isarda Dam across Banas river for Drinking Water near Village Baneth, District Tonk, Rajasthan

on Engineering, Procurement and Construction Basis (Single Responsibility Turn-Key Project) including its Operation & Maintenance for Five

Years”, on Engineering, procurement and construction basis (Single Responsibility turn-key project and its operation & maintenance (O&M) for 5

years. Vide NIT No.07/2017-18 dated 10/10/2017”

B) The Parties hereto formed a Joint Venture or will form a Joint Venture (hereinafter referred to as the “JV”) to jointly execute the above

project in all respect NOW THEREFORE IT IS HEREBY AGREED as follows:

ARTICLE 1: JOINT VENTURE

1.1 The parties hereto agree to form the Joint Venture with M/s.Ghanaram Infra Engineers Pvt Ltd, designated as the Lead Partner.

1.2 M/s. Hoisto Structures & Equipment Pvt Ltd shall be other Partner.

ARTICLE 2: JOINT VENTURE NAME:

2. The JV shall do business in the name of "GIEPL-HSEPL(JV)"

ARTICLE 3: JOINT AND SEVERAL LIABILITIES:

3. The Parties hereto shall, for the above referred Projects, be jointly and severally liable to the WRD for the execution of the Projects in accordance

with the Contract till the actual completion of Contract including defect liability period and operation & maintenance as per bid conditions.

ARTICLE 4: PROPORTIONATE SHARE:

4.1 Each member of the Joint Venture agrees to place at the disposal of the Joint Venture, the benefit of all its experience, technical knowledge and

skill, and shall in all respects bear its share of responsibility and burden of completing the contract. The parties herein shall be responsible for physical

and financial distribution of work as under:-

Lead Partner: Financial & Physical responsibility: 84% of the Contract Value.

Other Partner: Financial & Physical responsibility: 16% of the Contract Value.

ARTICLE 5: JOINT EFFORT AND MANAGEMENT:

5.1 The Parties shall participate as a JV in the submission of bids and further negotiations with the WRD and shall cooperate and contribute their

respective expertise and resources to secure and execute the Projects.

ARTICLE 7: Joint Venture Agreement

7.1 This Joint Venture Agreement shall be terminated:

a. If the Parties mutually confirm that the JV's bid proposal has not been finally accepted by the WRD and all rights and obligations of the Parties

under or in connection with this Joint Venture Agreement have ceased, or

b. after successful completion of the project including commissioning and operation and defect liability period from the date of this Joint Venture

Agreement unless extended for a further period on demand of WRD & mutual consent of the parties, or

7.2 The Joint Venture Agreement can be modified by mutual consent of the parties to suit the efficient and expeditious execution of Projects including

commissioning & operation of Plant or to make this agreement more meaningfully to suit the requirement of WRD after the consent of the WRD.

ARTICLE 11: address of consortium:

Any and all correspondence from the Employee to the JV shall be addressed to M/s.GIEPL-HSEPL (JV) Branch Office: 650, CIC Campus

JhokanBagh Jhansi, at the address stated herein below. The address of the Joint Venture office of the partner companies will be deemed to be the

address for the purpose of communication. The notice, if any required to be served on the party by the other party, will be deemed to be served. If the

said notice/communication is delivered by Registered Post at the respective address M/s.GIEPL-HSEPL (JV) Branch Office: 650, CIC Campus

JhokanBagh Jhansi, (UP), PIN:284001

ARTICLE 12: AUTHORISED REPRESENTATIVE

The JV shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the parties of the JV

during the bidding process and, in the event the JV is awarded the Contract, during contract execution.

Authorized Representative of JV : Mr.Bishan Singh, Director, of M/s.Ghanaram Infra Engineer Pvt Ltd.

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed by each of the duly authorized representatives as appearing

below:

Signed by Signed by For and on behalf of For an on behalf of M/s Ghanaram Infra Engineers Pvt Ltd. M/s Hoisto Structures & Equipment Pvt Ltd

Name: BISHAN SINGH NAME: B N SHARMA

Designation: Director Designation:Managing Director in the presence of in the presence of 1.Mr. P K Pandey 1.Mr.T Ashok Kumar??

7. The Bank guarantee reads as under:-

??Bid Security (Bank Guarantee unconditional) Bank??s name, and Address:

Canara Bank

SME Branch Kachechari Chouraha,

JHANSI

Beneficiary:

The Executive Engineer
Isarda Project Division,
Tonk, Rajasthan Procuring Entity Additional Chief Engineer,
Water Resources Zone, JLN Marg,
JAIPUR

BID GUARANTEE NO.06/2017 Date: 05.12.2017

We have been informed that Ghanaram Infraengineer Private Limited, having Registered office at 8/18 West Patel Nagar New Delhi, 110008. Corp.

Office 650, CIC Campus, Jhokan Bagh, Jhansi (hereinafter called "the Bidder") has submitted to you its bid dated 06-12-2017 (hereinafter called

"the Bid") for the execution of "Planning, Investigation, Design, Drawing and Construction of Isarda Dam across Banas river for Drinking

Water near Village Banetha, District Tonk, Rajasthan on Engineering, Procurement and Construction Basis (Single Responsibility Turn -Key Project)

including Its Operation & Maintenance for Five Years" (Name of Contract) under Notice Inviting Bids No.NIT NO.07/2017-18 (The NIB")

Furthermore, we understand that, according to your conditions, bids must be supported by a bid guarantee.

At the request of the bidder, we "Canara Bank (a body corporate constituted under the Banking companies Acquisition & Transfer of

Undertakings) Act, 1970 having its Head Office at 112, J C Road, Bangalore-560002 amongst others a branch at Jhansi SME branch Jhansi" hereby

irrevocably undertake to pay you any sum or sums not exceeding in total an amount of Rs.3,27,00,000/- (Rs. Three Crores Twenty Seven Lakhs Only)

upon receipt by us of your first demand in writing accompanied by a written statement stating that the Bidder is in breach of its obligation(s) under the

bid conditions, because the Bidder:

a) has withdrawn or modified its Bid after deadline for submission of bids, during the period of bid validity specified by you in the Bid Date Sheet

(hereinafter "the BDS") or

b) having been notified during the period for bid validity specified in the BDS, about the acceptance of its Bid by you,

(i) Failed or refused to execute the Contract Agreement within the time period specified in the BDS, or

(ii) Failed or refused to furnish the performance security in according with the instructions to Bidders (hereinafter the ITB) within the time period

specified in the BDS, or

c) has not accepted the correction or arithmetical errors in accordance with the ITB, or

d) has breached a provision of the Code or Integrity specified in the RPPP Act, RPPP Rules and the ITB.

This guarantee will expire (a) if the Bidder is the successful Bidder, upon our receipt of copies of the contract signed by the bidder and the

performance security issued to you upon the instructions of the Bidder: and (b) if the Bidder is not the successful Bidder, upon the earlier of (i) our

receipt of a copy of your notification to the Bidder of the name of the successful Bidder: or (ii) thirty days after the expiration of the validity of the

Bidder's bid. Consequently, any demand for payment under this guarantee must be received by us at the office on or before that date.

NOT WITHSTANDING ANYTHING CONTAINED HEREIN:

a) Our Liability under this guarantee shall not exceed Rs.3,27,00,000/- (Rs. Three Crores Twenty Seven Lakhs Only)

b) This Bank Guarantee shall be valid upto 05.06.2018

c) We are liable to pay the Guaranteed Amount or any part thereof under this bank guarantee only and only if you serve upon us a written claim or

demand on or before 05.06.2018

d) Dated 05.12.2017

8. A bare perusal of clause 3.10.14 of the tender documents makes it ex-facie clear that if the bid is by a joint venture, the bid security has to be by

the Joint Venture. If the Joint Venture has not been legally constituted at the time of bidding, the members of the proposed Joint Venture shall enter

into an agreement binding themselves to form a legally constituted Joint Venture after the Letter of Intent is issued and additionally also declare a

partner as the lead partner in whose name the Bid Security could be submitted.

9. A perusal of the Joint Venture Agreement dated 30.11.2017 records in the Preamble that M/s Ghanaram Infra Engineers Pvt. Ltd. and M/s Hoisto

Structures & Equipment Pvt. Ltd. have entered into a Joint Venture Agreement. But, recital (B) records that the parties hereto formed a Joint

Venture or will form a Joint Venture. Now, the agreement has to be either that the two signatories have unequivocally bound themselves and have

constituted the Joint Venture or it has to be that they have agreed to form a Joint Venture in the future.

10. Learned Senior Counsel for the appellant urges that meaningfully read, the agreement is to bind the parties to form the Joint Venture.

11. If this is the argument then the appellant cannot even maintain the appeal because the appellant has yet to come into existence.

12. Be that as it may, clause 3.10.14 would then require that the members of the Joint Venture have to declare not only the lead partner but also that

the lead partner may submit the bid security.

13. The bank guarantee is the bid security and admittedly is in the name of the lead partner. There is no declaration in the agreement that the lead

partner is authorised to submit the bid security and the same would bind the minor partner as well.

14. The impugned order would show that the agreement in question has been treated to be a Joint Venture Agreement and not an agreement to enter

into a Joint Venture in the future.

15. If we read the agreement we find that in the Preamble the parties have unequivocally mentioned that the agreement was a Joint Venture

Agreement. In recital (B) the parties have recorded that they have formed a Joint Venture but in the same breath have recorded that they will form a

Joint Venture. However, clause 1.1 of the agreement clearly records that the parties have agreed to form the Joint Venture. The clause does not

record that the parties had agreed to form the Joint Venture in future. Clause

5.1 of the agreement categorically records that the parties shall participate as a JV in the submission of bids. Clause 7.1 records that the Joint Venture

Agreement shall be terminated if the Joint Venture's bid proposal is not finally accepted.

16. Thus we agree with the reasoning in the impugned orders that it is a case where the two partners had formed a Joint Venture. The agreement is

not an agreement to enter into a Joint Venture Agreement should the Letter of Intent be issued. Thus, the bid security had to be in the name of the

Joint Venture.

17. The appeal is dismissed in limine.