
(2016) 03 RAJ CK 0025

In the Rajasthan High Court

Case No : DB Civil Special Appeal (Writ) Nos. 128 and 129/2016

GVPR DARA J.V.

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Partnership Act, 1932 — Section 8
Rajasthan Transparency in Public Procurement Act, 2012 — Section 19, Section 2,
Section 2(ii), Section 2(xix), Section 7

Citation : (2016) 3 WLN 83

Hon'ble Judges : Govind Mathur and Nirmaljit Kaur, JJ.

Bench : Division Bench

Advocate : P.P. Choudhary, Senior Advocate, assisted by Sunil Joshi and Ankur Mathur, for the Appellant; S.P. Joshi, P.S. Bhati, Additional Advocate General, assisted by Sajjan Singh Rathore, for the Respondent

Final Decision : Dismissed

Judgement

Govind Mathur, J.—1. These appeals are before us to examine correctness of the judgment dated 2.2.2016 passed by learned Single Bench in SB Civil Writ Petition Nos. 9188/2015 and 9186/2015. By the judgment aforesaid learned Single Bench dismissed the writ petitions challenging the decision of respondent Public Health and Engineering Department to reject the petitioners bid from consideration for tendering works referred in the notice inviting tender dated 21.4.2015.

2. The factual matrix necessary to be noticed for adjudication of present appeals is that under a memorandum of understanding dated 2.7.2015 M/s. GVPR Engineers Ltd. and M/s. DARA Construction Company Ltd., both the companies incorporated agreed to form a Joint Venture to do business in the name of "GVPREL-DARA Joint Venture" (hereinafter referred as the "Joint Venture"). Suffice to mention that both the partners of the Joint Venture are registered contractors with respondent department in "AA" class. The office of the Chief

Engineer, Public Health and Engineering Department, Jodhpur acting on behalf of the Governor of Rajasthan invited tenders from "AA" class contractors for execution of following works:--

(1) NIT No. 1/15-16-

"BLWSP Ph. II Part "C" : KKD Sheo Bhadakhia Barmer - Drinking Water Supply Project in Barmer District on Single Responsibility Lump Sum based contract, which includes providing laying, jointing, testing and commissioning of Transmission and Cluster Distribution mains, RCC ground level/elevated reservoirs, pumping arrangements, control of flow with Meters, FCVs. PLC & SCADA, Electric Transformers, IEC activities etc. and allied activities District-Barmer.

(2) NIT No. 2/15-16-

"BLWSP Ph. II Part "D" : BKG Devikot Sangar Fatehgarh - Drinking Water Supply Project in Barmer District on Single Responsibility Lump Sum based contract, which includes providing laying, jointing, testing and commissioning of Transmission and Cluster Distribution mains, RCC ground level/elevated reservoirs, pumping arrangements, control of flow with Meters, FCVs. PLC & SCADA, Electric Transformers, IEC activities etc. and allied activities District-Jaisalmer.

3. The estimated cost of work under NIT No. 1/15-16 and NIT No. 2/15-16 is Rs. 567 crores and Rs. 395 crores respectively. The earnest money deposit (hereinafter referred as "EMD") to bid for the work tenders invited is Rs. 1134 lacs and Rs. 790 lacs for NIT No. 1/15-16 and NIT No. 2/15-16 respectively. Respondent Public Health and Engineering Department under the notice inviting tenders dated 21.4.2015 permitted the Joint Venture to participate in tender process and to have work, if tendered subject to comprising not more than two Indian firms/companies. The participation of such Joint Venture would be regulated as per Rule 39 of "The Rajasthan Transparency in Public Procurement Rules, 2013" (hereinafter referred to as "the Rules of 2013").

4. As per the notice inviting tender, a bidder should have experience of the work related to water supply schemes/projects during the last seven years upto the date of submission of tenders. For NIT No. 1/15-16, the experience as above should have been for execution and successful completion of (a) three similar completed works costing not less than Rs. 226.80 crores or (b) two similar completed work costing not less than Rs. 283.80 crores or one similar completed work costing not less than Rs. 453.60 crores. For the Joint Venture such experience should have to be available with lead partner. The experience required must be certified by an officer not below the rank of Executive Engineer or equivalent for the work awarded by the State Governments/Central Governments or other undertakings and autonomous bodies. It was also made clear that the works which have been completed and commissioned during the seven years, though may have commenced earlier, shall be considered for

experience purpose, if single NIT for a work has been invited and work order has been given in two separate orders, both splitted orders are to be considered jointly for computing experience.

5. The work, if given, is supposed to be finished as per satisfaction of the Engineer Incharge within a period of 36 months from 10th day of granting the order to commence work from the date of written/E-mailed order.

6. For consideration of bid an important condition including relaxation is provided as under:--

"10. An Earnest money of Rs. 1134 Lacs shall be deposited through banker's cheque or demand draft of nationalized/scheduled bank in the name of Chief Engineer Project, PHED, Jodhpur. However, tenderer may not be deposit Rs. 10.00 lacs (as part earnest money) in cash/DD, as defined above and remaining part of earnest money in the form of Bank Guarantee of any nationalized/Scheduled bank in prescribed form in the name of Chief Engineer Project, PHED, Jodhpur. Tenders received without earnest money or with part earnest money, shall be rejected out-rightly. The enlisted contractors in class "AA" shall be required to deposit Rs. 283.50 Lacs (0.5% of estimated cost of NIT) as earnest money, while tendering within their enlistment zone. For tendering out side of their zone, 2% earnest money shall be required to be deposited."

7. The appellant petitioner Joint Venture considering itself eligible submitted its tenders in the prescribed proforma and uploaded the same at the authorised website of the respondent department. The Chief Engineer, Public Health and Engineering Department, Jodhpur by an order dated 21.8.2015 considered the bids given by respondent M/s. L & T Ltd., Chennai and Megha Engineers & Infrastructure responsive for opening of their price offer and by the same order rejected the bid given by the appellant Joint Venture being not meeting eligibility requirement. Aggrieved by the same the appellant petitioners preferred a petition for writ that came to be rejected under the judgment impugned.

8. Learned Single Bench after examining entire issue threadbare arrived at the conclusion that the appellant petitioners are neither having requisite experience nor have furnished the EMD as required, hence, its rejection from bidding process is justified. The finding arrived by learned Single Bench in relation to inadequacy of EMD, reads as under:--

"As per the Rules of 2013 and the tender documents, eligibility of a JV to participate in tender process is unquestionable, however, how to determine its status to avail benefit of concessional EMD requires judicial scrutiny on the touchstone of relevant law on the subject and the terms of NIT. There cannot be two opinions that although rival parties have made sincere endeavour to bring home the points which they have urged but then arguments of both sides are more alluring and less substantive. The arguments in general are lacking the requisite sting to clarify the position as to whether a JV consisting of two partners who are enlisted "AA" class contractors is entitled for concessional EMD

or not. Be that as it may, the fact remains that petitioner has participated in the bidding process as JV and has staked claim for concessional bid, therefore, onus lies on it to substantiate that it is entitled for the benefit of concessional EMD with cogent material. Having made sincere endeavour to examine the relevant law on the subject in conjunction with the tender documents, I am afraid, I have not been able to find any specific provision which can be construed by the petitioner to its advantage to avail the benefit of concessional EMD. The Instructions to Bidders in this behalf are also relevant to thrash out the matter. Instruction No. 14.1 which deals with earnest money is significant wherein there is no inkling about concessional earnest money for a JV. Instruction No. 14.1 reads as under:--

"14.1 An earnest money of Rs. 1134 lacs in Indian Rupees must accompany each bid in sealed cover out of total E.M. Rs. 10.00 lacs must be in cash or Banker's Cheque/D.D. in the name of "Executive Engineer (M) to Chief Engineer Project, PHED, Jodhpur" and the remaining may be either in 63 form of Bank Guarantee of any Nationalized/Scheduled Bank in prescribed form (As per Annexure-2) should be deposited in physical form with the cashier or authorised clerk prior to opening of Technical Bids. Enlisted contractor in Class "AA" shall required to deposit 1/2% (Rs. 278.50 Lacs) of estimated cost of work as Earnest Money while bidding within their enlistment zone. For outside their zone 2% Earnest Money shall be required to be deposited.

Class "AA" Enlisted Tenderer, will be required to pay Earnest money @ 1/2% of the estimated cost of work) (Rs. 283.50 Lacs), in case of work for which they are authorized to tender under Rules for enlistment of Tenderer, but the amount to the extent of full Earnest money shall be liable to be forfeited in the event of circumstances explained in ITB clause below."

A conjoint reading of Rule 42(2) and Rule 59(5) of the Rules of 2013 with Note-10 appended to Clause 6(C) of the tender documents as well as above quoted Instruction No. 14.1 makes it amply clear that a bidder who has furnished inadequate EMD is not entitled to participate in the procurement proceedings and his tender can be rejected outrightly on this count alone.

Well it is true that inadequacy of EMD is not set out a reason in the impugned order for declaring petitioner's technical bid non responsive but in the backdrop of facts and circumstances of the instant case, the petitioner has miserably failed to clear the decks on this issue. The procuring entity duly recognises right of JV to participate in the bidding process but after formation of JV, I am at loss to say that even if both the partners are enlisted "AA" class contractors, the new entity which has come into offing i.e. JV is not entitled to avail the benefits which are available to individual partners as enlisted "AA" class contractors. Thus, this vital question i.e. inadequacy of EMD is answered in affirmative i.e. against the petitioner."

9. In appeals, learned counsel appearing on behalf of the appellants challenged

the findings arrived by learned Single Bench in relation to the experience cited by the appellant petitioners and inadequacy of EMD, but we are confining ourselves only in relation to the arguments advanced about EMD, as this single ineligibility, if exists, is sufficient to throw the appellant petitioners out from the tender process.

10. Pertinent to mention here that after concluding hearing of the case on 25.2.2016 Shri Sunil Joshi, learned counsel appearing on behalf of the appellants moved an application on 29.2.2016 seeking permission to list the matter again under the category of "To Be Mentioned" on the count of failure to address/canvass certain provisions contained under the Rajasthan Transparency in Public Procurement Act, 2012 (hereinafter referred to as "the Act of 2012") and the rules framed thereunder. We did not permit to get the matter listed under the category of "To Be Mentioned" but advised him to point out the provisions while mentioning the case itself. Shri Joshi pointed out the provisions and also stated that the application itself is a speaking one, therefore, that may be treated as supplementary argument in writing.

11. In supplementary argument emphasis of the appellants is that the definitions of the terms "bid", "bidder", "bidder registration documents", "bid security", "invitation of bid", "pre-qualification", "registered bidder" and the provisions contained under Section 19 of the Act of 2012 are required to be read conjointly with the provisions of Rule 42 of the Rules of 2013. and on such reading Rule 39 of the Rules of 2013 acquires significant importance so far as the registration of Joint Venture is concerned, according to which the only inescapable conclusion is that the appellants are entitled to the EMD @ 0.5% and not @ 2%. The appellants have also emphasised the concept of Joint Venture as introduced under the Act of 2012. To be more specific, we deem it appropriate to quote the written argument as mentioned in the application and that is:--

"It is most respectfully submitted that no law on the statute book of India or the State defines "JV" though under Section 8 of the Partnership Act, 1932, a person may become a partner with another person in particular adventures or undertakings. In case of such particular partnership it has its existence only till the purpose for which said partnership or adventure or undertaking came into being. It gets dissolved the moment the purpose for which the partners joined is accomplished or liabilities of persons joined in a particular partnership for the purpose of particular adventure would only last till such undertaking completes the purpose for which it is formed. Such particular partners are restricted to a single project in which the number of group act jointly both at the stage of tendering and at the stage of awarding. Thus, being common incorporate Associations, common law does not recognize the relationship of co-adventures, with the passage of time the judicial decisions recognize what is known as JV. Thus, by no stretch of imagination a JV can be held to be a legal entity or a juristic person and therefore, the registration of JV by itself as a separate entity is literally impossible simply for the reason that no law on the statute book of

India or the State defines a "JV" or requires its registration as a separate entity. On the contrary, it is thus a temporary arrangement for a particular purpose and is over the moment the purpose is over for which it came into being.

It is for this reason only that the legislature in its wisdom while enacting the Act of 2012 and framing the Rules, 2013 being alive of the situation consciously incorporated the provisions by way of framing Rule 39 of the Rules, 2013 specifically with regard to "Joint Venture" under the head "Eligibility of bidders" while treating JV an eligible bidder as a combination with a formal intent to enter into an agreement or an existing agreement only, which by necessary implication goes to show that the JV by itself cannot enlisted/registered in the form of a separate legal entity or a juristic person. Thus, keeping in view the aforesaid written submissions, it is most respectfully submitted that the findings arrived by the learned Single Judge with regard to the admissibility of the concessional E.M.D. to the appellant may kindly be declared to be erroneous and it may kindly be held that the appellant is entitled to the concessional E.M.D."

12. Per contra, the stand of the respondent is that though M/s. GVPR Engineers Ltd., Hyderabad is enlisted on temporary basis for one year as "AA" class contractor for civil works and M/s. DARA Construction Company Ltd. is enlisted on permanent basis as "AA" class contractor for civil works with the petitioners, but the appellant "Joint Venture" is not enlisted as a contractor for civil works in class "AA". It is asserted that as per sub-rule (2) of Rule 42 of the Rules of 2013, concessional bid security may be taken only from registered bidders and not otherwise. The appellant petitioners, as per the respondents are having right to participate in the bid proceedings, but its case for concessional bid security is not maintainable. The earnest money deposits given by the appellant petitioners is less than 2%, therefore, the decision as communicated under the order dated 21.8.2015 is justified and well founded.

13. Heard learned counsels.

14. The question under consideration is that - "whether the appellant petitioner, a Joint Venture, which is not a registered contractor of "AA" class, though its partners are "AA" class contractors, is entitled for concessional bid security as per sub-rule (2) of Rule 42 of the Rules of 2013?"

15. To adjudicate the issue, we consider it appropriate to introduce the Act of 2012, Rules framed thereunder and the provisions relevant in this regard. The object of the Act of 2012 is to regulate public procurement with transparency, fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy and safeguarding integrity in the procurement process and for matters connected therewith or incidental thereto. From perusal of the statement of the objects and reasons as well as scheme of the entire Act, it is apparent that it is an effort to have a fair and equitable treatment among the contractors to ensure transparency in procurement process and further to promote public confidence in such vital commercial transactions. The concept of

the Joint Venture is also introduced to enlarge participation of different levels of commercial stake holders in the process of procurement.

16. A Joint Venture like the appellant petitioner may be a bidder at par with any other natural person, private entity and Government-owned entity. The Joint Venture may be a registered company/firm or otherwise, but if it is not a company/firm registered, then all the parties to Joint Venture must sign the agreement, if tender is granted.

17. In the case in hand, the appellant petitioner, a "Joint Venture", is a "bidder", but the bid has not been opened on several counts including ineligibility occurred due to deficiency in EMD.

18. As per Section 2(ii) of the Act of 2012, "bidder" means any person participating in a procurement process with a procuring entity. As per clause (v) of Section 2 of the Act of 2012, "bid security" provided to the procuring entity by a bidder for securing the fulfillment of any obligation in terms of the provisions of the bidding documents. A "registered bidder" as per Section 2(xix) means any "bidder" who is on a list of registered bidders of the procuring entity maintained under Section 19.

19. Section 19 of the Act of 2012 pertains to registration of bidders and that is as follows:--

"19. Registration of bidders.--(1) With a view to establishing reliable sources for a subject matter of procurement or a class of procurement, which may be commonly required across procuring entities or repeatedly required by a procuring entity, a procuring entity may maintain a panel of registered bidders.

(2) For the purpose of sub-section (1), a procuring entity may invite offers from prospective bidders by giving wide publicity to the invitation to register and such registration shall be done in accordance with Section 7, this section and the criteria set out in the bidder registration documents.

(3) The procuring entities shall update the list of registered bidders by allowing potential bidders to apply for registration on a continuous basis or by inviting offers for registration at least once a year.

(4) The State Government may prescribe the procedure and conditions for registration of bidders and the period for which such registration shall be valid.

(5) Where a procuring entity does not register bidders in respect of a subject matter of procurement, it may use the list of registered bidders of any other procuring entity, if any.

(6) The results of the registration process shall be intimated to the bidders and the list of registered bidders for the subject matter of procurement shall be published in the State Public Procurement Portal."

20. As per sub-section (1) of Section 19 of the Act of 2012, the procuring

authority is required to maintain a panel of registered bidders to have a pool of reliable sources for a subject matter of procurement. The purpose of Section 19 of the Act of 2012 is to have responsible and reliable entities as bidder and to ensure such reliability a complete procedure is given for empanelment. Pertinent to notice here that as per sub-section (5) of Section 19 of the Act of 2012 where a procuring entity does not register bidders in respect of a subject matter of procurement, it may use the list of registered bidders of any other procuring entity, if any. This provision indicates that the procuring agency must be satisfied about efficacy, efficiency and reliability of a bidder, may that even be on basis of the record of some other procuring agency.

21. Under the Rules of 2013, eligibility of bidders is given under Rule 39 and as per clause (b) of it, a Joint Venture may be a company/firm registered or otherwise. Relevant to mention here that this provision refers about registration of a company/firm, but not about enlistment or registration as bidder in light of Section 19 of the Act of 2012. Meaning thereby, registration of bidders under Section 19 is a different than the registration of a Joint Venture as company/firm.

22. Rule 42 of the Rules of 2013 pertains to bid security and according to it concessional bid security may be taken from registered bidders. In consonance to this provision, in the notice inviting tenders it was made clear that the enlisted contractors in class "AA" shall be liable to deposit 0.5% of estimated cost of NIT as earnest money, while tendering within their enlistment zone. For tendering outside of their zone, 2% earnest money shall be required to be deposited.

23. Sub-rule (2) of Rule 42 of the Rules of 2013 provides that the relaxation is available for "bid security" only to "registered bidders". The appellant petitioner, a Joint Venture, is having partners registered as "AA" class contractors, but the partners did not submit tenders in their personal capacity but in capacity of a Joint Venture, thus, the "bidder", in the case in hand is the Joint Venture and not its constituents. At the cost of repetition, it shall be appropriate to refer that as per clause (ii) of Section 2 of the Act of 2012 any person participating in a procurement process with procuring entity is a "bidder". The "bid security" is also required to be given by a "bidder" and not by its constituents. It is not the case of the appellant petitioners that it is a registered bidder as per Section 19 of the Act of 2012. The appellant petitioner, if would have been a bidder registered as per Section 19 of the Act of 2012, it would have been entitled to avail concessional bid security irrespective of the fact that it is a company/firm registered or not. Sub-rule (2) of Rule 42 of the Rules of 2013 clearly mentions the "registered bidders" and not the "registered company/firm". The case of the appellant is that as per Rule 39 a Joint Venture is not required to be a body registered mandatorily, therefore, on basis of the fact that its partners are "AA" class contractors, it is entitled for relaxation as per Rule 42(2). True it is, the Act of 2012, the Rules of 2013 and the notice inviting tenders permits a Joint Venture to participate in tender process irrespective of the fact that it is an entity registered or not, but Rule 42(2) allows concessional bid security to a "registered

bidder" only. In view of it, the appellant Joint Venture can very well participate in the process but cannot avail concession in bid security, being not a "registered bidder". The appellant petitioner as such is not entitled for any concession as per sub-rule (2) of Rule 42 of the Rules of 2013. The respondents, thus, rightly excluded it from the process of tender.

24. The decision of the respondents to exclude the appellant petitioners from tender process does not suffer with any wrong, hence, learned Single Bench rightly dismissed the petitions for writ. The appeals too are dismissed accordingly.