

(2024) 03 GAU CK 0054
In the Gauhati High Court
Case No : Writ Appeal No. 347 Of 2023

JLD Construction Private Ltd

APPELLANT

Vs

Union Of India And 5 Ors.

RESPONDENT

Date of Decision : 20-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2024) 03 GAU CK 0054

Hon'ble Judges : Vijay Bishnoi, CJ; Sanjay Kumar Medhi, J

Bench : Division Bench

Advocate : K.N. Choudhury, R.K.D. Choudhury, D.J. Das, P.K. Tiwari, R.J. Das, B.D. Deka

Final Decision : Dismissed

Judgement

Vijay Bishnoi, CJ

1. This intra-Court appeal is filed by the appellant being aggrieved with the judgment dated 07.09.2023 passed by the learned Single Judge in WP(C) 118/2023 whereby the writ petition filed by the appellant has been dismissed and the interim order passed by this Court in the said writ petition has been vacated.

2. The facts, which are not in dispute, are that the respondent NHPCL issued Notice Inviting e-Tender on 05.08.2022 and invited bids for the work of River Bank Protection/Erosion Control Measures on the Left Bank of River Subansiri adjacent to village Geriki 2 (RD 29 km. – 30 km.) and the last date of submission of bid was 30.08.2022. In response to the NIT dated 05.08.2022, as many as ten bidders had submitted their bids which include the appellant as well as the respondent No.6 herein. It appears that the respondent NHPCL vide e-mail dated 13.10.2022 had asked as many as six bidders, including the appellant as well as the respondent No.6 herein, out of the ten bidders to furnish certain documents and in response to that, the appellant and the respondent No.6 had furnished

certain documents. Thereafter, the Tender Evaluation Committee ('TEC' for short) in its meeting dated 29.11.2022 found the bids submitted by the appellant and one M/s SIPL Infracon as responsive while declaring the bids of other eight bidders, including the bid of the respondent No.6 herein as non-responsive. Later on, the TEC in its subsequent meeting dated 10.12.2022 declared the bids submitted by the appellant and the respondent No.6 as responsive while treating the bids of other bidders as non-responsive.

3. Being aggrieved with the said action of the respondent NHPCL, the appellant had filed the writ petition, being, WP(C) 118/2023 with the prayer to cancel/ revoke/rescind/set aside the impugned TEC report dated 10.12.2022 and to set aside the Work Order dated 28.12.2022 issued by the NHPCL in favour of the respondent No.6 herein and sought a declaration that the bid of the appellant was the only responsive bid with a further prayer to the respondent NHPCL authorities to allot the work to the appellant in respect of the NIT in question.

4. The learned Single Judge after taking into consideration the submissions of the rival parties and after considering the material available on record, has dismissed the writ petition with the following observations;-

"14. It is noted at the outset that in this writ petition the petitioner had not disclosed that pursuant to the e-mail dated 13.10.2022 by the respondent no.4, the petitioner had produced (i) Power-of-Attorney, (ii) Copy of Board Resolution for the tender in question, and (iii) Contractor Registration Certificate (Class-1 or Class-A) on 20.10.2022.

15. On the basis of the projection made in this writ petition that the TEC had granted opportunity to the respondent no.6 to submit additional documents which had made the bid of respondent no.6 qualified, and that those documents were considered though they were filed beyond the prescribed last date of submission of bid, this Court had stayed the operation of the TEC Report dated 10.12.2022 as well as the evaluation of price bid dated 28.12.2022. Therefore, the non-disclosure of material facts, specifically that it was after the last date of submission of bid that the petitioner too was granted an opportunity to furnish deficient documents amounts to a clear cut case of suppression of material facts by the petitioner. It was the duty of the petitioner to disclose all material facts, which was not done and thus, the petitioner had not come to this Court with clean hands. Accordingly, the Court is inclined to hold that on the ground of suppression of material facts, in this case the petitioner has become disentitled for any relief in this writ petition.

16. The categorical stand of the respondent nos.2 to 5 in their affidavit-in-opposition is to the effect that opportunity was to 6 (six) bidders including the petitioner and the respondent nos.6 to meet the deficiencies in the document. The learned senior counsel for the respondent nos.2 to 5 has been able to demonstrate from clause-5.4.5 of the GoI Manual 2022, which is quoted herein before, that it was permissible for the TEC to seek clarification for shortfall

information and shortfall documents only in respect of pre-existing documents. It has not been disputed at the Bar that the EPF challan was a document which came into existence after the last date of submission of bids. The learned senior counsel for the respondent nos. 2 to 5 has also successfully demonstrated that the EPF Establishment Code DL/35337, which is a five digit serial number in the name of Brahmaputra Consortium Ltd. was similar to the ten digit EPF Establishment Code of the respondent no.6, which was DLCPM0035337000 (10 digit code) in the name of Brahmaputra Infrastructure Ltd., as appearing in the EPF challan. From the documents appended to the affidavit-in-opposition filed by the respondent nos.2 to 5, the said respondents have also demonstrated that a letter dated 13.10.2022 was issued by NHPC Ltd. to the respondent no.6 to provide the EPF certificate in the name of respondent no.6 and in para-14 of the said affidavit-in-opposition, it has been stated that by email dated 14.10.2022, the respondent no.6 had submitted an EPF challan. The correctness of the said statement has not been disputed by the petitioner in its affidavit-in-reply filed on 16.03.2023. It is noted that the petitioner had not made any reply against the statement made in para-14 of the affidavit-in opposition filed by the respondent nos. 2 to 5. Accordingly, in view of the discussions above, the Court is inclined to hold that the acceptance of documents after the last date was not in contravention to any clause of the ITB or the NHPC Manual 2020 because under clause-16.4 of the ITB read with clause-5.4.5 of the GoI Manual 2022, the TEC had the power and authority to call for shortfall but pre-existing documents, which was also done in the case of the petitioner. Therefore, from the discussions above, the Court would be inclined to hold that the tendering authorities/TEC of the respondent nos. 2 to 5 had given equal opportunity not only to the petitioner, but to respondent no.6 to submit their respective shortfall documents, which amounts to provide level playing field to the petitioner, respondent no. 6 and 4 (four) other bidders.

17. In view of the categorical finding of the Court that the respondent nos.2 to 4 had the power to call for shortfall but pre-existing documents, the furnishing of such documents by the bidders including the petitioner and the respondent no. 6 beyond the last date of submission of bid would not disqualify their bids to be non-responsive, because the request for furnishing the shortfall documents was made by the respondent no.4 official of the NHPC Ltd. after the last date of submission of bid. Therefore, the Court is inclined to hold that the petitioner, who had availed a similar opportunity to furnish documents after last date of submission of bid, cannot be allowed to question the same opportunity being extended to any other bidder including the respondent no.6. Therefore, the Court is unable to hold that the decision of the TEC of NHPC Ltd. to ask for additional/deficient documents from the respondent no.6 is in anyway arbitrary, unfair, unauthorized, impermissible or without jurisdiction. In the said regard, reference has already been made to clause-16.4 of the ITB and clause-5.4.5 of the GoI Manual 2022.

18. The petitioner has utterly failed to demonstrate that by granting opportunity

to six out of ten bidders to provide clarification/documents, there was any intention of the tendering authorities of NHPC Ltd. to favour any particular bidder. The decision taken by the TEC, thus, cannot be held to be bad in law.

19. In view of the hereinbefore referred clause-16.4 of the ITB and clause-5.4.5 of the GoI Manual 2022, which permits the tendering authority i.e. the TEC to seek additional information, clarification and shortfall documents, the Court repels the contention of the petitioner that by such action, a nonresponsive bid of the respondent no.6 was made responsive after the deadline. The Court is inclined to hold that the act of the TEC/tendering authorities of considering the additional documents produced by the respondent no.6 was not in violation of clause-16, 17, 18 and 20 of the ITB.

20. As the learned senior counsel for the respondent nos. 2 to 5 has been able to successfully establish that the petitioner was also granted an opportunity to furnish as many as three deficient documents, which are morefully referred herein before, the absence of which would have made the bid of the petitioner as non-responsive, it cannot be acceptable that the similar decision taken in respect of the respondent no.6, allowing it to produce and/or provide deficient documents as well as to four other bidders was not a transparent action of the respondent nos. 2 to 5. Therefore, the Court repels the submission advanced by the learned senior counsel for the petitioner that there was a flaw in the decision making process of the respondent nos. 2 to 5.

21. Therefore, the Court is inclined to hold that this is not a fit and proper case to embark on an enquiry about the soundness of the decision which is within the realm and jurisdiction of the TEC/ tendering authorities.

22. In this case, clause-16.4 of the ITB and clause-5.4.5 of the GoI Manual 2022 is found to empower the TEC to ask for shortfall documents. Therefore, the respondent nos. 2 to 5 are the best judge to interpret the said provision of the ITB. In this regard, the Court finds support from paragraph-20 of the case of Silppi Constructions Contractors (supra) , which is quoted below:

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

23. In the case of Jagdish Mandal (supra) , the Supreme Court of India had laid down that a Court, before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: (i) whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or (ii) whether the process adopted or decision made is so arbitrary and irrational that the Court can say "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" ; and (iii) whether public interest is affected? It was held that if the answers are in the negative, there should be no interference under Article 226 of the Constitution of India. In the present case in hand, the answer to the said three questions, as formulated by the Supreme Court of India, in the light of the discussions above, must be answered in the negative and against the petitioner.

24. Accordingly, in light of the discussions above, the Court is of the considered opinion that the petitioner has failed to make out a case for interference with the Tender Evaluation Committee report dated 10.12.2022 as well as Work Order dated 28.12.2022, issued in favour of respondent no.6 in respect of the tender titled "River Bank Protection/ Erosion Control Measures on the Left Bank of River Subansiri adjacent to Village Gerki-2 (RD 29KM-30KM)" bearing Tender ID: 2022_NHPC_705866_1.

25. Hence, this writ petition fails and is dismissed. Moreover, this writ petition is also dismissed on the ground of suppression of material facts, which is dealt herein before.

26. The interim stay order passed by this Court on 09.01.2023, is vacated.

27. The parties are left to bear their own cost."

5. Assailing the impugned judgment passed by the learned Single Judge, Mr. K.N. Choudhury, learned senior counsel for the appellant has vehemently submitted that the action of the TEC of declaring the bid of the respondent No.6 herein as responsive vide its decision dated 10.12.2022, is absolutely without jurisdiction and illegal. Mr. Choudhury has invited our attention towards the clause nos.16.4, 18.1 and 18.4 of Instruction to Bidders and has argued that as per the said mandatory clauses of the NIT, any alteration/modification in the Bid or additional information supplied subsequently to the Bid after period of bid submission, cannot be taken into consideration. It is contended that no bidder can be allowed to re-submit revised bid after the deadline for submission of bid. It is also contended that no bidder was allowed to modify or revise between the bid submission deadline and the expiry of the Bid validity period and in that eventuality the bid of that bidder is liable to be considered as non-responsive.

It is contended that in the present case, the TEC in its meeting dated 29.11.2022 has declared the bid submitted by the respondent No.6 herein as non-responsive as it has failed to furnish the EPF certificate in its name. Later on, the TEC has treated the bid of the respondent No.6 herein as responsive solely on the basis of

EPF payment challan bearing the name of Brahmaputra Infrastructure Ltd. It is submitted that the EPF registration certificate in the name of Brahmaputra Infrastructure Ltd. has never been submitted by the respondent No.6 and in such circumstances, the bid submitted by the respondent No.6 herein was liable to be treated as non-responsive but the TEC in its report dated 10.12.2022 has illegally treated the bid of the respondent No.6 herein as responsive solely on the basis of the EPF challan.

It is further contended that the learned Single Judge without taking into consideration the said facts of the case in right perspective has illegally held that the action of the respondent NHPCL to treat the bid of the respondent No.6 herein as responsive is legal and is not liable to be interfered with.

6. In support of his arguments, learned senior counsel for the appellant has placed reliance on the decision of the Hon'ble Supreme Court rendered in the case of Sorath Builders vs. Shreejirupa Buildcon Limited and another, reported in (2009) 11 SCC 9 and has argued that the Hon'ble Supreme Court has clearly held that the rules/instructions cannot be given a go-by and the same are required to be followed religiously. It is further submitted that the Hon'ble Supreme Court in TATA Cellular vs. Union of India, reported in (1994) 6 SCC 651 has held that the Court is to confine itself to the question of legality of the action of the decision making authority to ascertain that the decision making authority has not exceeded its power, committed a breach of rules of natural justice, abused its power or took a decision which no reasonable person would have reached on.

It is submitted that the in the present case, certainly the decision making authority has exceeded its powers by taking into consideration a document submitted by the respondent No.6 herein as a valid document though it fails to meet the conditions of the tender document. It is further contended that the impugned judgment passed by the learned Single Judge is liable to be interfered with as the same is against the settled principles of law.

7. Per contra, Mr. P.K. Tiwari, learned senior counsel for the respondent NHPCL and Mr. B.D. Deka, learned counsel for the respondent No.6 herein have vehemently opposed the submissions made on behalf of the appellant and have argued that the learned Single Judge has not committed any illegality in passing the impugned judgment. Hence, no case for interference is made out.

8. Mr. P.K. Tiwari, learned senior counsel for the respondent NHPCL has submitted that the TEC initially found the bid submitted by the respondent No.6 herein as non-responsive in its meeting dated 29.11.2022. However, when the matter was placed before the authorities concerned, the Manager (Finance) took note of the fact that the EPF challan, submitted by the respondent No.6 herein contains the establishment code and the name of the respondent No.6 herein and therefore, suggested that the bid submitted by the respondent No.6 herein is to be reviewed. The Manager (Finance) has also suggested that the registration

certificate submitted by one M/s SIPL Infracon, which is a partnership firm, is in the name of a proprietorship firm and therefore, its bid cannot be treated as responsive and the same is also required to be reviewed.

It is submitted by the learned senior counsel for the respondent NHPCL that pursuant to the suggestion given by the Manager (Finance) the matter was again reviewed and it was found that the respondent No.6 is registered with EPF and a registration certification has also been issued in its name and therefore, its bid was treated as responsive in the meeting of the TEC dated 10.12.2022. It is further submitted that in the very same meeting the bid of one M/s SIPL Infracon was declared as non-responsive though it was treated as responsive in its meeting dated 29.11.2022.

Learned senior counsel for the respondent NHPCL further submitted that vide email dated 13.10.2022 the appellant was also granted opportunity to submit certificate/documents and its bid was treated as responsive only after taking note of the said documents submitted by it. It is further submitted that in absence of the said documents, the bid of the appellant was liable to be treated as non-responsive. It is submitted that equal opportunity was granted to the appellant as well as the respondent No.6 herein, and, therefore, it cannot be said that the action of the respondent NHPCL of treating the bid of the respondent No.6 herein as responsive in its meeting dated 10.12.2022 amounts to give preferential treatment to respondent No.6 herein. It is also submitted by the learned senior counsel for the NHPCL that the respondent NHPCL has the jurisdiction to seek clarification from the bidders as per clause 5.4.5 of Manual for Procurement of Works published by Government of India, Ministry of Finance, Department of Expenditure.

Learned senior counsel for the respondent NHPCL has, therefore, submitted that the challenge to the impugned judgment on behalf of appellant is without any merit. Hence, the appeal is liable to be dismissed.

9. Heard learned counsel for the parties and perused the material available on record as well the copy of the note sheet produced by the learned counsel for the respondent Nos.2 to 5 in respect of the proceedings carried in relation to the submission of bid in response to the NIT in question.

10. The TEC in its meeting dated 29.11.2022 declared the bid of the respondent No.6 as non-responsive on the ground that it had not submitted the EPF certificate in its name but had submitted the EPF certificate in the name of another company, i.e. Brahmaputra Consortium Ltd. When the matter was placed before the Manager (Finance), he noticed that in response to the email dated 13.10.2022, the respondent No.6 herein had submitted a EPF challan wherein the code number of the EPF registration certificate and the name of the Brahmaputra Infrastructure Ltd. were reflecting and, therefore, he had suggested for reviewing the case of the respondent No.6 herein. Pursuant to the suggestion of the Manager (Finance) of NHPC Ltd., the TEC in its meeting dated 10.12.2022

had reviewed the case of the respondent No.6 herein and decided to treat its bid as responsive while observing as under:-

"2. Brahmaputra Infrastructure Ltd., Brahmaputra Home, A-7, Mahipalpur (NH-8, Mahipalpur Crossing, New Delhi-110037. (T-5/7). The firm had not submitted EPF certificate in the name of the bidder i.e. Brahmaputra Infrastructure Ltd as required against the clause 3.2(B)(i). The firm was asked to submit the same. Against the same, the firm has submitted a copy of EPF challan (ECR) only wherein the and the same of the firm is mentioned as M/s Brahmaputra Infrastructure Ltd., i.e. the name of the bidder.

During the deliberations, the Committee was also informed that the bidder M/s Brahmaputra Infrastructure Ltd., has submitted a document issued by the EPFO, Regional Office, Delhi regarding the change in the name of the EPF registration from M/s Brahmaputra Consortium Ltd. to M/s Brahmaputra Infrastructure Ltd in the tender document for the work "River bank protection/erosion control measures on the left bank of River Subansiri upstream of village Tinsukia (RL23 km-24 km)" vide NIT no. NH/SLP/CONT/2021/C-51/NIT/597 dated 10.12.2021 (CP-2072). The Committee opines to consider the same towards qualification of the bidder in this tender. In view of the same, the firm qualifies the tender condition of the NIT. The TEC recommends to consider the bid of Brahmaputra Infrastructure Ltd. as responsive."

From the above referred observations, it appears that the earlier EPF Registration certificate issued in the name of one Brahmaputra Consortium Ltd. was changed to the name of M/s Brahmaputra Infrastructure Ltd. by the EPFO, Regional Office, Delhi and the same was available with the NHPCL in its record pertaining to the earlier NIT dated 10.12.2021. When the EPF Registration certificate in the name of respondent No.6 herein was already available with the NHPCL, which was issued prior to the last date of submission of bid, no error can be found in the decision of the TEC to take into consideration the same.

11. Otherwise also, as per Clause 21.2 of Instruction to Bidders, a responsive bid is one which conforms to all the terms, conditions, and specifications of the bidding documents, without material deviation or reservation.

A material deviation or reservation is one:

(a) which affects in any substantial way the scope, quality, or performance of the works;

(b) which limits in any substantial way, the Employer's rights or the Bidder's obligations under the Contract; or

(c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids; or

(d) which is inconsistent with the bidding documents.

12. The submission of EPF challan by the respondent No.6 herein in response to

the e-mail dated 13.10.2022 cannot be termed as material deviation or reservation in its bid as it is not covered under any of the abovementioned four eventualities.

Clause 21.4 also empowers the Employer to ask any bidder for clarification of its bid through e-mail and consider the same if there is no change in the price or substance of the bid. Admittedly by submitting the clarificatory documents, the respondent No.6 herein had not changed its price or substance of the bid. Apart from that, Clause 5.4.5 of the Manual of Procurement of Works, 2022 also authorises the NHPC to seek clarification from any of the bidders.

13. Having gone through the notes of the file in respect of NIT and other material available on record and also taking into consideration the relevant clauses of the NIT, we have no hesitation in holding that the learned Single Judge has not committed any illegality in upholding the decision of the respondent NHPCL of treating the bid of the respondent No.6 herein as responsive and issuing work order in his favour in relation to the work of the NIT in question.

So far as regarding the proposition of law laid down in the judgment of the Hon'ble Supreme Court rendered in Sorath Builders (supra) and Tata Cellular (supra), there is no quarrel about the same. However, as we have already concluded that the respondent NHPCL was very well within its rights to seek clarifications from the bidders in respect of their bids as per the terms of the clauses 21.2 and 21.4 of the NIT (Instruction to Bidders) and clause 5.4.5 of the Manual for Procurement of Work, 2022, the above referred decisions are of no help to the appellant.

There is also an admission in the Bar that after issuance of the Work Order, the work has almost been completed.

14. In view of the above discussions, the appellant has failed to make out any case for interference with the impugned judgment dated 07.09.2023 passed by the learned Single Judge in WP(C) 118/2023. Hence, the present appeal is dismissed.

No order as to costs.