

(2023) 09 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 118 Of 2023

JLD Construction Private Ltd

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 07-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2023) 09 GAU CK 0003

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : K.N. Choudhury, M.K. Das, P.K. Tiwari, A.R. Gogoi

Final Decision : Dismissed

Judgement

1. Heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. M.K. Das, learned counsel for the appellant. Also heard Mr. P.K. Tiwari, learned senior counsel, assisted by Mr. A.R. Gogoi, learned counsel for respondent nos. 2 to 5. None appears on call for the respondent nos.1 and 6.

Case of the petitioner:

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for a direction to cancel/ revoke/ rescind/ set aside (i) the "Tender Evaluation Committee" (TEC for short) Report dated 10.12.2022, and (ii) the work order dated 28.12.2022, issued by the authorities of NHPC Ltd. 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. The petitioner has also prayed for declaring the bid of the petitioner to be the only responsive bid and to direct the respondent authorities to allot the work to the petitioner in respect of NIT dated 05.08.2022.

3. In brief, the case of the petitioner is that being qualified, it had participated in the hereinbefore referred tender floated by the NHPC Limited. Out of 11 (eleven)

bidders including the petitioner, who had participated in the tender process, 1 (one) bidder was disqualified in the pre-bid stage and 8 (eight) other bidders were disqualified during the techno-commercial bid stage. Thus, only the petitioner and the private respondent no.6 remained as the qualified bidders in the techno-commercial bid stage. As per the work order dated 28.12.2022, impugned in this writ petition, the respondent no.6 was the lowest bidder. Accordingly, the petitioner is challenging the qualification of the respondent no.6 in the techno-commercial bid by projecting that the respondent no.6 was initially disqualified due to want of document. However, in a most arbitrary and grossly illegal manner, the TEC had granted an opportunity to the respondent no.6 to produce documents relating to Employee Provident Fund (EPF for short) registration, which is alleged to be in violation of clauses 2, 3.2, 17 and 18 of the NIT as the said document was accepted after the last date of submission of the bid. Thus, it is the case of the petitioner that it is the only successful bidder at the techno-commercial stage. Accordingly, the petitioner claims that the bid of the respondent no.6 was required to be treated as non-responsive bid and the petitioner was entitled to be awarded with the contract work as a responsive bidder.

Submission on behalf of the petitioner:

4. In course of his submissions, the learned senior counsel for the petitioner has extensively referred to various clauses of the "Information to Bidders" (ITB for short), appended to the "Notice Inviting Tender" (NIT for short) with emphasis on clauses 2.1, 2.1.(b), 3, 3.2.A.(b), 3.2.B.(i), 8, 16.1, 16.4, 17, 18.1, 18.4 as well as clause 7.1(iv), 7.1(v) of the "Contracts Manual for Civil Works and Services Contract (Volume 1), 2020 of the NHPC" (hereinafter referred to as "NHPC Manual 2020" for brevity).

5. It was submitted that although amendment of the bid document was permissible, however, it could be done before the closing date of submission of bids without altering the bid amount. Accordingly, it has been submitted that although under clause 16.4 of the ITB, the tendering authority had the power to seek a document even after the last date of submission of bid, but by following such procedure, it was not permissible for the tendering authority to make a non-responsive bid to a responsive bid.

6. The learned senior counsel for the petitioner has submitted that as one of the bid document, Brahmaputra Infrastructure Ltd. (respondent no.6) had submitted EPF registration certificate of Brahmaputra Consortium Limited which was a different entity, for which the respondent no. 6 was liable to be declared as non-responsive. Accordingly, in the TEC report dated 29.11.2022 (Annexure-B to the writ petition), though it was recorded that the EPF certificate submitted in the name of Brahmaputra Consortium Limited was not as per NIT, but by a subsequent TEC report dated 10.12.2022, it has been recorded that the respondent no.6 had not submitted the EPF certificate in the name of the bidder as required under clause 3.2(B)(i), they should be asked to submit the same. It

was submitted that despite such request being made, the respondent no. 6 had only submitted a copy of EPF payment challan (ECR) in the name of Brahmaputra Infrastructure Limited i.e. in the name of the bidder instead of producing the EPF Registration Certificate. Thereafter, vide TEC report dated 10.12.2022, recommendation was made to consider the bid of the respondent no.6 as responsive. By referring to the TEC report dated 29.11.2022 (Annexure-B of the writ petition), the learned senior counsel for the petitioner had submitted that although 8 (eight) bidders were disqualified during the techno commercial evaluation process, no other bidders were given similar opportunity of submitting rectified and/or additional documents. Therefore, it was submitted that the respondent nos.2 to 5 had not maintained a level playing field for all the bidders and it was apparent that the respondent no.6 was showed favouritism by the tendering authorities in general and the TEC in particular.

Submission on behalf of the respondent nos. 2 to 5:

7. Per contra, the learned senior counsel for the respondent nos.2 to 5 had submitted that the allegation that they had given unequal treatment to the respondent no.6 to enable their non-responsive bid to be a valid bid was totally false and incorrect because out of 10 (ten) bidders whose bids were evaluated by the TEC at the stage of techno-commercial evaluation, as many as 6 bidders including the petitioner were provided an opportunity to provide additional information/ documents. In this regard, the learned senior counsel for the respondent nos. 2 to 5 has referred to clause 7.1(iv) of the NHPC Manual 2020, and it has been submitted that it was permissible for the TEC, while processing and accepting the tenders and during bid evaluation, to ask the bidder for clarification of its bid on minor non-conformity by giving the request in writing and requiring response in writing. It was submitted that the said clause contained a rider that no change in the price or substance of the bid shall be sought, offered or permitted. The learned senior counsel for the respondent nos.2 to 5 has also produced a photocopy of relevant pages of the "Manual for Procurement of Works (Updated June, 2022) published by the Govt. of India, Ministry of Finance, Department of Expenditure" (hereinafter referred to as "GoI Manual 2022" for brevity), which empowers the tendering authority/committee to seek clarification of bids and for shortfall documents. It has been submitted that it was permissible for the TEC to call for documents which pre-existed at the time of tender opening on the basis of recommendations. It would be appropriate to quote clause 5.4.5 thereof, which is extracted below:

"5.4.5 Clarification of Bids/ Shortfall Documents: During evaluation and comparison of bids, the Procuring Entity may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further. No change in prices or substance

of the bid including specifications, shall be sought, offered or permitted. No post-bid clarification at the initiative of the bidder shall be entertained. The shortfall information/ documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, GSTN number has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a contract without its completion/ performance certificate, the certificate can be asked for and considered. However, no new contract should be asked for so as to qualify the bidder.”

8. By referring to clause 3.2.B(i) of the Instructions to Bidders (ITB for short), it was submitted that under the said clause, the bidder was required to produce EPF registration number and not the EPF registration certificate. Therefore, the EPF challan, which was subsequently produced by the respondent no. 6 was sufficient compliance of the said clause. By referring to the stand taken in para-18 of the affidavit-in-opposition, it was submitted that in an earlier tender process, the respondent no.6 had submitted a document dated 21.10.2009, issued by the Employees Provident Fund Organization, Regional Office, Delhi regarding change in the name of EPF registration from Brahmaputra Consortium Ltd. to Brahmaputra Infrastructure Ltd. Accordingly, it was submitted that while the EPF registration number of Brahmaputra Consortium Ltd. contained establishment code number: DL 35337 (i.e. five digit number), the EPF challan in the name of respondent no.6 i.e. Brahmaputra Infrastructure Ltd. contained Establishment Code number: DLCPM 0035337000 (ten digit number). In this regard, the learned senior counsel had submitted that earlier the establishment codes of 5 (five) digits were entered manually and he has been instructed that after computerisation process in EPFO, the establishment codes are now of 10 (ten) digits.

9. Moreover, by producing a copy of note-sheet under File no. NH-SLP-SDWF011/26/2022-DSW (Computer no. 64095), the learned senior counsel for the respondent nos. 2 to 5 had submitted that vide Note-66 that was made by the Manager (FIN), the EPF challan which was produced on clarification being sought, was considered and the Finance Department had suggested reviewing the evaluation of the said bidder. As per Note- 67, the General Manager (FIN) opined that the tender evaluation needs to be reviewed. Accordingly, under Note-71, the TEC had recommended to open the price bid of 8 (eight) techno-commercially responsive bidders, which included the petitioner as well as the respondent no.6. Hence, it was submitted that the tendering authorities including TEC had scrupulously followed the mandate of the 2020 Manual for accepting the EPF challan of respondent no.6 and to treat its bid as responsive.

10. The learned senior counsel for the respondent nos.2 to 5 had submitted that the petitioner had suppressed material facts in the present writ petition and thus, it was submitted that the petitioner had not come to Court with clean hands. In the said context, it was submitted that the petitioner did not disclose that with its bid, the petitioner had not submitted the following documents, viz., (i) Power of Attorney, and (ii) Contractor Registration Certificate (Class 1 or Class A), which was an essential document. But, instead of declaring the bid of the petitioner as non-responsive, the TEC had sought for the said documents from the petitioner, which was in consonance with clauses 16.4 and 21.4 of ITB. It was submitted that only upon submission of those documents, the bid of the petitioner was declared responsive. It was submitted that if such an opportunity had not been granted to the petitioner, its bid could not have been declared responsive. In this regard, the learned senior counsel for the respondent nos. 2 to 5 had placed reliance on Annexure-R/3 appended to the affidavit-in-opposition, which is a letter dated 13.10.2022 by the Group Sr. Manager (P&C), SLP, NHPC Ltd. to the petitioner to provide the said two documents, pursuant to which the said two documents were provided by the petitioner.

11. In support of his submissions, the learned senior counsel for the respondent nos.2 to 5 has placed reliance on the following cases, viz., (1) Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, (2) Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216, (3) AFCONS Infrastructure Limited v. Nagpur Metro Rail Corporation Limited, (2016) 16 SCC 818, (4) National High Speed Rail Corporation Ltd. V. Monte Carlo Ltd., (2022) 6 SCC 401, (5) Tata Motors Ltd. v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors., 2023 SCC OnLine SC 671, (6) N.G. Projects Ltd. v. Vinod Kumar Jain, (2022) 6 SCC 127, (7) Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489, and (8) Monte Carlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272.

12. It may be mentioned that on conclusion of submissions by the learned senior counsel for the respondent nos. 2 to 5, a prayer for adjournment was made by the learned counsel for the petitioner. However, as the matter was kept part-heard since 22.06.2023, while reserving the case for verdict, liberty was granted to the learned counsel for the petitioner to file written submission. As per directions contained in order dated 29.08.2023, written argument on behalf of the petitioner was filed on 31.08.2023, which is kept as a part of record.

13. In the said note, a stand has been taken that the petitioner was not aggrieved that his bid was not found responsive, but he is aggrieved that the bid of respondent no.6 was found responsive. It was submitted that at the relevant time, the respondent no.6 was not able to provide the EPF certificate, but from Annexure-C to the affidavit-in-opposition, it was seen that the TEC had accepted the EPF challan, which was produced in some other tender, which discloses favouritism in favour of respondent no.6. A further submission is made that the Power of Attorney, Board Resolution and Class-1 contractor certificate was provided when specifically asked for by the NHPC and therefore, the submission

on behalf of the respondent nos. 2 to 5 that the petitioner was not qualified was incorrect. It was also submitted that the EPF certificate was never produced by the respondent no.6 and that the acceptance of EPF challan amounted to acceptance of a document which had changed the competitive position of other bidders. Hence, it was submitted that the TEC had gone beyond its jurisdiction and their actions cannot be made legitimate by referring to Clause-16.4 of the ITB. It was submitted that the taking of EPF certificate from a previous bid was an action which was impermissible, unfair and mala fide and therefore, without jurisdiction. It was also submitted that there was material deviation in the bid of respondent no.6 and thus, the action of the TEC to make the bid of the respondent no. 6 responsive after the last date of submission of bid was in violation of clauses- 16, 17, 18 and 20 of the ITB, which was a flaw in the decision making process of the TEC as well as the tendering authorities. It was also submitted that the cases relied on behalf of the respondent nos. 2 to 5 were not applicable in the facts and circumstances of the case.

Discussion and decision:

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 non-responsive 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.