
(2007) 04 DEL CK 0228

In the Delhi High Court

Case No : Writ Petition (C) 1309 of 2007

Kapsch Metro JV

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 25-04-2007

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2007) 2 CTLJ 64 : (2007) 140 DLT 378 : (2007) 95 DRJ 668

Hon'ble Judges : Mukul Mudgal, J;Aruna Suresh, J

Bench : Division Bench

Advocate : Neeraj Kishan Kaul, Sushant Kumar, Arvind Nayyar, Rahul Singh and Vikas K. Aggarwal, for the Appellant; Sandeep Sethi Krishan Kumar, Divya Jain and Gaurav Duggal, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—The respondent No. 2, National Highways Authority of India (NHAI) vide Notice dated 20th November, 2006 No. NHAI/CM/MTCS/2006-II invited tenders from established and reliable manufacturers/suppliers for the design, supply, installation, testing, commissioning and maintenance of state-of-the-art Toll Collection Systems at toll plazas on National Highway.

2. As per Clause 2.7.1 of the Tender Notice, the bidders were required to submit their proposals along with an application fee of Rs. 5000/- or US\$ 125 and an Earnest Money Deposit (hereinafter referred to as "EMD") of Rs. 10,000,000/- (Rupees Ten Million only) or US\$ 25,0000 in the form of a demand draft/pay order drawn in favor of "National Highways Authority of India" or any scheduled bank payable at New Delhi. It was further stated in the tender document that the EMD could also be in the form of a Bank Guarantee as per Clause 3.2.2 and the format specified in Section VIII of the document was to be valid for a period of 180 days from 5th January 2007 which was the original date fixed for the opening of the bids. It was also mentioned in the Tender document that a bid submitted without EMD and/or the application fee will be summarily rejected.

3. The case set up by the petitioner is as under:

(a) The petitioner Kapsch Metro JV, vide letter dated 4.1.2007 participated in the abovementioned tender and submitted its proposal as per Clause 2.12.3 of the tender document. The petitioner also submitted its Application fee of Rs. 5000/- in the form of DD/Pay Order No. 679819 drawn in favor of "National Highways Authority of India" Canara Bank, Mayapuri Branch, New Delhi and submitted the EMD of US\$ 25,000 in the form of Bank guarantee dated 3rd January, 2007 being Ref. No. 316020164955-HX issued by Standard Chartered Bank which was valid for a period of 180 days from 5th January 2007.

(b) As per Clause 2.18 of the tender document, the Bid was to be opened at the NHAI premises but the same was postponed on 4.1.2007 afternoon and rescheduled for 22nd January, 2007 (17 days later) without any prior intimation to the individual bidders.

(c) The petitioners accordingly submitted their bid on 22.01.2007, as per the rescheduled date of the opening of the bid according to the procedure outlined in the Bid. When the bid of the Petitioner was opened on 22nd January, 2007, the EMD submitted by the Petitioner in the form of the bank guarantee was valid for 180 days for a value of Rs. Ten Million (Two Hundred Fifty Thousand Dollar), with effect from the original date of the bid i.e. 5th January, 2007.

(d) The petitioners upon realizing the fact that the bank Guarantee was in effect required to be from the rescheduled date of the opening of the bid, i.e., 22nd January 2007, and not from 5th January 2007, acted promptly by rectifying the same and thereby furnishing the amended Bank Guarantee dated 1st February, 2007 for a period of 180 days from the revised date of Bid opening and valid up to 21st July, 2007. The amended bank guarantee was sent to the NHAI by the petitioner vide letter dated 4th February, 2007.

(e) The petitioner apprehending rejection of the bid on the ground that the Bank Guarantee was made in conformity only after the opening of the bid despite the fact that the original Bank Guarantee was valid for a period of 180 days with effect from the non-rescheduled date of opening of bid that is 5th January, 2007, made a representation on 12th February, 2007 to the respondent No. 2 indicating the bonafide mistake and informing them about the rectification of the same.

(f) Despite that rectification and amendment of the bank Guarantee the respondent No. 2 issued the impugned letter dated 15th February, 2007 expressing its refusal to process the document (Bank Guarantee) after the opening of the bids on the 22nd January, 2007.

(g) This has led to the present writ petition. The relevant clauses of the Tender document have been reproduced belows:

2.7 APPLICATION FEE (AF) AND EARNEST MONEY DEPOSIT(EMD)

2.7.1. The proposal should be submitted along with an application fee of Rs.

5000/- (Rupees Five Thousand Only) OR US\$ 125 (US Dollar One Hundred Twenty Five Only) and an EMD of Rs. 10,000,000/- (Rupees Ten Million Only) OR US\$ 250,000 (US Dollar Two Hundred Fifty Thousand) in the form of a demand draft / pay order drawn in favor of "National Highways Authority of India" on any Scheduled bank payable at New Delhi. EMD can also be in the form of a Bank Guarantee as per Clause 3.2.2 and the format specified in Section VIII of this document valid for a period of 180 days. The Bid submitted without eMD and / or the application fee will be summarily rejected.

2.13 LATE BIDS

Any bid received by the Purchaser after the time and date for receipt of bids prescribed by the Purchaser in the tender as per Section-II - 2.18 may be rejected and returned unopened to the Bidder.

2.14 MODIFICATION AND WITHDRAWAL OF BIDS

2.14.1 The Bidder is allowed to modify or withdraw its submitted bid any time prior to the last date prescribed for receipt of bids, by giving a written notice to the purchaser.

2.14.2. Subsequent to the last date for receipt of bids, no modification/ withdrawal of bids shall be allowed.

2.19 OPENING OF PROPOSAL

The Evaluation Committee or its authorized representative will open the tenders. Sequence of opening shall be as follows:

- i. Application fee and Earnest Money Deposit.
- ii. Pre-Qualification & Technical Proposals.
- iii. Commercial Proposal.

2.20.3 Phase-1: Application fee & EMD: First, the envelope containing application fee and Earnest Money Deposit will be opened and if both are found furnished by the Bidders in the prescribed manner, then the second envelope containing Pre-Qualification & Technical Proposal documents shall be opened. At any stage during the evaluation, if the EMD is found invalid, the respective Bidder's bid will be summarily rejected.

3.2.2 BANK GUARANTEE

The Bank Guarantee issued by following banks would be accepted. SBI or its subsidiaries, any Indian Nationalized Bank, IDBI or ICICI Expert import Bank of India, a foreign bank (issued by a branch outside India) with counter guarantee from SBI or its subsidiaries or any Indian Nationalized Bank, and any scheduled commercial bank approved by RBI having a net worth of not less than Rs. 500 crores as per the latest annual report of the bank. In the case of foreign bank (issued by a branch in India), the net worth in respect of Indian operations shall

only be taken into account.

(h) Learned Senior Counsel for the petitioner, Sh. Neeraj Kishan Kaul, submitted that the EMD was valid for a period 180 days with effect from 5th January 2007 and that without prejudice the EMD was amended and the bank guarantee extended for a further period of 17 days making it compliant with the re-scheduled date of the opening of the bid. Sh. Kaul submitted that despite the rectification and amendment of the bank guarantee the respondent issued the impugned letter dated 15th February 2007 without application of mind. Sh. Kaul also submitted that the petitioner was only seeking consideration of the bid of the petitioner which deserved such consideration following the due diligence and prompt action which has been displayed by the petitioner by amending the bank guarantee in order to conform to the requirements of the tender.

(i) The learned Counsel for the petitioner also placed reliance on the decisions of the Hon"ble Supreme Court in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, and *Union of India (UOI) Vs. Kuldeep Singh*, . The principle on which the petitioners are basing their case has been laid down in *Poddar Steel Corporation's* case (*supra*) where the Hon"ble Supreme Court held as under:

...as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous details, and is not entitled to waive even a technical irregularity of little and no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main objects to be achieved by the condition. In the first case, the Authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

Relying on the above mentioned principle, it was submitted that as soon as the mistake with regard to the validity of the bank guarantee was discovered, a fresh bank guarantee was furnished after rectifying the mistake within a reasonable period and Therefore, the petitioner's bid is worthy of fair consideration. It was also submitted that the deficiency averred against the petitioner was not which violated any essential condition of eligibility and at best was in variance of the condition. Consequently, it was submitted that the principles enshrined in the above decision in *M/s Poddar Steel's* case clearly applied to the present case.

It was further submitted that the petitioner neither modified the bid nor was there any error in the EMD in respect of the amount furnished by the petitioner. The petitioner submitted the amended EMD to bring it in consonance within the prescribed period of 180 days which was on account of postponement of the opening day of the bid unilaterally by the respondent. It was submitted that the revised date was published on the internet on 4th January 2007 and that the

petitioner was only seeking consideration of the commercial bid that too if the respondent No. 2 was satisfied with the fulfillment of the other requirements in the technical bid of the petitioner. It was also submitted that the respondent No. 2 was State within the meaning of Article 12 of the Constitution and is duty bound to diligently spend public funds.

4. Mr. Sandeep Sethi, the learned Counsel for the respondent placed reliance on the decision of the Hon''ble Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, and *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, , and submitted that the respondent No. 2 reserved the right to disqualify any bid as long as there existed a valid reason and was not a decision borne from any mala fide, arbitrary or unreasonable behavior. This principle was succinctly laid down by the Hon''ble Supreme Court in *Air India''* case (supra) as follows:

7. ...The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness....

5. We are of the view that this entire imbroglio has arisen because of the postponement of the date on which the tenders were to be opened, i.e., from 4th January 2007 to 22nd January 2007 (17 days later) by respondent No. 2. If Clause 2.7 of the tender is examined it is evident that it required that the EMD in the form of a bank guarantee was to be valid for a period of 180 days. On the date the bid was submitted by the petitioner, i.e., 5th January 2007 it was valid for 180 days. Even according to the respondent No. 2 if the date of opening the bid was not postponed the petitioner's bid would have been in order. The amount being a large amount (EMD of Rs. 10,000,000/- (Rupees Ten Million only) or US\$ 25,0000) the technical non compliance is bonafide and the period taken for rectification of the EMD not so unreasonable so as to completely vitiate the petitioner's bid. Consequently, to accept the respondent No. 2's pleas would be tantamount to invalidating the petitioner's bid on a hyper-technical construction on account of a situation brought about only by the postponement of the bid by respondent No. 2 itself. Taking into account the fact that the bids are

international it will be wholly unjust to deny the petitioner the opportunity to participate in the tender process, specially since no unfair advantage has been gained by the petitioner in this process. The petitioners are not stealing a march over any of their competitors by altering their bid amount. The petitioners have been conscientious enough by updating the EMD on their own after coming to know of the technical non-compliance. We fail to see how the Respondent No. 2 can claim that public interest would not be subserved by the participation of the petitioner. Wider competition in such circumstances is always in public interest and Therefore, we do not find that there is sufficient reason for Respondent No. 2 to exclude the petitioners' bid for such a minor discrepancy and that too one which was cured on a timely basis suo moto by the petitioner. In our view, since public interest requires a wider participation of bidders to ensure healthy competition, the dictum laid down by the Hon'ble Supreme court in M/s Poddar Steel Corpn.'s case (supra) would be clearly applicable and the enforcement of the validity period of the EMD Clause by the respondent No. 2 by insisting on the literal compliance of the 180 day validity period would not be justified. At the highest, the deficiency was of the 17 days period in the EMD of a 180 validity period and this too was subsequently altered in order to conform to the prescribed requirement. We are of the view that in this case, the time lag of 17 days is a technical irregularity of little significance and is worthy of being waived as per the dictum laid down by the Hon'ble Supreme Court in M/s Poddar Steel's case (supra). Furthermore, the same has been set right and is now fully compliant with the requirements of the tender. In our view, this is an eminently fit case where strict literal compliance would not subserve public interest or indeed the interest of justice. In so far the judgments relied upon by the respondent No. 2 is concerned, we are of the view that they are not applicable in the instant case because Respondent No. 2 is being unreasonable by not even allowing the petitioners bid a fair consideration especially considering that there has been no accrual of unfair advantage to any of the parties. In this view of the matter, the writ petition is allowed and the letter dated 15th February 2007 is quashed and the bid of the petitioner is directed to be considered in accordance with law by the respondents.