
(2015) 10 RAJ CK 0014
In the Rajasthan High Court
Case No : Civil Writ Petition No. 3959 of 2015

Lahoty Buildcon Ltd.

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 07-10-2015

Acts Referred:

Citation : (2015) 10 RAJ CK 0014

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : Sameer Jain, for the Appellant; Saurabh Saraswat, Dy. G.C.,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Alok Sharma, J—The matter comes up on the second stay application. With the consent of the counsel for the parties, the petition is being disposed of.

2. The case of the petitioner-Company is that its bid in pursuance to the NIT dated 20.10.2014 for augmentation of water Supply Scheme for Bhiwadi Town in Rajasthan (hereinafter "work") has been arbitrarily rejected vide order dated 10.03.2015 despite it fulfilling the requisite technical qualification as prescribed. It has been submitted that the petitioner-Company had itself completed one work of similar nature as was required under the NIT in issue as PHED's contractor to an extent of Rs. 29.69 crores and another "work" as sub-contractor of Nagarjuna Construction Company to an extent of Rs. 32.30 crores as evident from the certification dated 14.09.2009 issued by Nagarjuna Construction Company, submitted with the bid. This satisfied the technical criteria of the NIT in issue which inter alia required that three similar works aggregating to Rs. 18.16 crores ought to be executed by the bidder in last seven years, or in the alternative two similar works to an extent of Rs. 22.70 crores or one similar work amounting to Rs. 36.31 crores ought to be executed within the preceding seven years. Yet the terms and conditions of the eligibility criteria were apparently misconstrued by the respondents in overlooking the second work to an extent of

Rs. 32.30 crores executed by the petitioner-Company as a subcontractor of Nagarjuna Construction Company who had been engaged by the respondents themselves for the Regional Water Supply Scheme for 45 villages from Nathdwara Head works of Bagherika Naka Project on single Responsibility Turnkey Basis on 27.01.2007 for a consideration of Rs. 35.50 crores (hereinafter "the Udaipur [works]"). It was submitted that the conditions of NIT dated 20.10.2014 did not distinguish the nature of experience with reference to the manner of the "works" being obtained/executed. Experience whether as PHED's contractor or as a sub-contractor of a third party was valid and ought to have been considered to be sufficient for fulfilling the prescribed technical criterion. Counsel for the petitioner-Company has submitted that as the petitioner's bid was the only valid bid in response to the NIT dated 20.10.2014, it should have been declared successful and the petitioner-Company granted the contract. In the circumstances, the order rejecting the bid passed on 10.03.2015 is arbitrary and be set aside. Further the second NIT dated 20.09.2015 for the same work be held to be vitiated by arbitrariness and mala fides in the facts of the case. Ground of public interest based on loss of public revenue in the event the subsequent NIT dated 20.09.2015 is allowed to be proceeded with, has also been agitated.

3. Per contra, counsel for the respondents submitted that the contract qua Udaipur works prohibited assignment or sub-letting without prior written permission of the respondent-Department. No assignment of the Udaipur works by Nagarjuna Construction Company to the petitioner-Company was ever allowed in writing. No such permission was sought nor granted by the respondent-Department. In the circumstances, the completion certificate of the said work purportedly issued by Nagarjuna Construction Company to the petitioner-Company qua Udaipur works was of no avail and could not be considered as requisite experience. The petitioner-Company was then found with experience of only one work of similar nature, as the work tendered under NIT dated 20.10.2014 of a value of Rs. 29.69 crores. It has been submitted that thus the petitioner-Company neither satisfied the condition of participation in two contracts of similar nature with the requisite aggregate value of Rs. 22.70 crores nor it have a single work of similar nature with a value of Rs. 36.31 crores as required by the NIT in the alternative. Government counsel further emphatically submitted that "participation" as required under clause 2.4 of the NIT entailed that the one claiming experience ought to have "participated" in the bidding process, found suitable by the "employer", evidenced by a privity of contract and then executed the said work successfully. Experience from sub-contracting, more so in breach of the contract between the employer and the contractor qua such contract could not be reckoned to be "participation". The requisite experience in the NIT dated 20.10.2014 properly understood was "participation" and was the criterion for technical eligibility. Even otherwise the Executive Engineer of the Udaipur works has denied countersigning completion certificate dated 14.09.2009 qua Udaipur works purportedly issued by the Nagarjuna Construction

Company in favour of the petitioner-Company.

4. The further defence of the respondents is that as per Clause 38.1 of Instructions issued to the bidders the employer had reserved the right to accept or reject any bid, and to annul the bidding process and reject all bids at any time prior to contract award. It has been submitted that on a considered decision taken to re-invite the tender, a fresh NIT for the work in issue has been issued on 20.09.2015 in which the petitioner-Company is free to participate. The said decision was neither peremptory, nor arbitrary nor mala fide. It has been submitted that this was so as none of the bidders satisfied the technical criterion as set out in the NIT dated 20.09.2015.

5. It has been further submitted that aside of the aforesaid, the writ petition has been rendered infructuous for the reason that a fresh NIT dated 20.09.2015 with differing conditions of eligibility has been notified by the respondents. This fact counsel for the respondents pointed out, is also evident from para 8 of the second stay application filed by the petitioner-Company wherein it has been averred that "in fact the present tender has modified the terms and conditions"--albeit baseless and bald allegations without material particulars follow that the change of terms and conditions in the NIT dated 20.09.2015 by itself entails proof of mala fide, discrimination and illegality.

6. Heard the counsel for the petitioner-Company and the respondents.

7. In my considered opinion, the writ petition is liable to fail on several counts. First, in terms of the power under Clause 38.1 of the Instructions issued to the bidders, the employer i.e. respondents had the right to reject any bid or otherwise cancel the entire bid process midway. It is no doubt true that the respondents as a State cannot act arbitrarily. However even on that test, the petitioner-Company has no case. It is evident from the facts on record that only one valid bid in response to the NIT dated 20.10.2014 was received by the respondents. That by itself made the bid uncompetitive. Further the case set up in defence to the writ petition by the respondents that the petitioner-Company did not satisfy the requisite technical criteria, is not moonshine. The NIT dated 20.10.2014 required "participation" i.e. work done after evaluation, of the contractor, by the employer, privity of contract with him and successful execution. The petitioner-Company cannot therefore have a right to claim experience on the basis of alleged sub-contracted work from Nagarjuna Construction Company more so when in terms of its contract with the respondent-PHED, Nagarjuna Construction Company was not entitled-to assign/sub-contract the work without permission of the employer-the respondents themselves. Besides, it is uncontroverted that no permission to assign/sub let the contract was ever awarded to Nagarjuna Construction Company. In fact it was never sought qua the "Udaipur works". Further experience certificate for the Udaipur works has been issued on 13.10.2009 by the respondents-Department in the name of Nagarjuna Construction Company. The petitioner-Company claims that the said Nagarjuna Construction Company issued it a certificate of completion

qua the very same Udaipur works on 14.09.2009 for a value of Rs. 32.30 crores. It is inconceivable that such a experience certificate for the same work by Nagarjuna Construction Company to the petitioner-Company would be sustainable in law more so when it flies in the face of prohibition in the contract between the parties qua Udaipur works. In the circumstances, I am disinclined to hold that the rejection of the petitioner-Company's bid by order dated 10.03.2015 was arbitrary, discriminatory or vitiated for any other conceivable reason.

8. Further, it is on record that a fresh NIT dated 20.09.2015 in respect of same work has been floated with different conditions of eligibility whereunder joint venture companies have also been allowed to participate. It is the right of the employer to determine the terms and conditions of its NIT, even amend them to facilitate the widest possible participation and most competitive bids/offers. The petitioner-Company is free to participate in the NIT dated 20.09.2015. Nothing illegal or arbitrary can be attributed to the said "second" NIT dated 20.09.2015.

9. Consequently, I find no force in the petition.

10. Dismissed.

11. Second Stay application needs no address in view of the petition being disposed of.