
(2018) 10 RAJ CK 0059
In the Rajasthan High Court
Case No : Civil Writs No. 8492 of 2018

M/s Dilip Buildcon Limited @APPELLANT@Hash State Of Rajasthan

Date of Decision : 26-10-2018

Acts Referred:

Rajasthan Transparency in Public Procurement Act, 2012 — Section 38
Constitution of India, 1950 — Article 226

Citation : (2018) 10 RAJ CK 0059

Hon'ble Judges : Ashok Kumar Gaur, J

Bench : Single Bench

Advocate : R.P.Singh, Nishant Sharma, J.M.Saxena, S.S.Hora, Rahul Lodha

Final Decision : Dismissed

Judgement

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1. The petitioner-Company has filed the present petition challenging the order dated 05.01.2018 wherein its technical bid has been treated as "non-responsive" on account of not fulfilling the required experience of seven years, as the petitioner-Company is alleged to have commenced the construction work on 27.12.2010.
2. The petitioner-Company has felt aggrieved against order dated 29.01.2018, passed by the Chief Engineer (first appellate authority) and order dated 13.04.2018, passed by the Principal Secretary, Water Resource Department (second appellate authority), who have rejected the first and second appeals respectively filed by the petitioner-Company against rejection of his technical bid, communicated to him vide order dated 05.01.2018.
3. The petitioner-Company has further sought a mandamus against the respondents to consider its technical bid as responsive and to evaluate the financial bid accordingly in pursuance of E-Notice Inviting Bid No.07/2017-18 dated 10.10.2017 for construction of Isarda Dam, across Banas river

for drinking water, near village Banetha, District Tonk (Rajasthan)." ,,,,,,

4. The brief facts of the case are that the Government of Rajasthan, Water Resource Department, issued E-Notice Inviting Bid (NIB) dated" ,,,,,,

10.10.2017 for planning, investigation, design, drawing and construction of Isarda Dam, across Banas river for drinking water, near village Banetha," ,,,,,,

District Tonk (Rajasthan) on Engineering Procurement Construction basis (Single Responsibility Turn Key Project) including its operation and ,,,,,,

maintenance for five years (hereinafter shall be referred to as â??the NIBâ??) ,,,,,,

5. The petitioner-Company has pleaded in the petition that as per the original NIB, the date for downloading the tender document was from 10.10.2017" ,,,,,,

to 16.11.2017 and the date for uploading the tender document was till 16.11.2017 by 1800 Hrs (PM) and the deadline for submitting the bid was ,,,,,,

17.11.2017 by 1300 Hrs (PM). It is pleaded that on 06.11.2017 a corrigendum bearing letter No.4754 was issued amending the time towards the ,,,,,,

process of bid submission and bid submission deadline was extended till 07.12.2017 by 1300 Hrs (PM) ,,,,,,

6. The petitioner-Company has pleaded in the petition that under Section-3 [Evaluation and Qualification Criteria] of the bid document, the petitioner-" ,,,,,,

Company satisfied the condition No.4(i) which required experience under construction contracts in the role of contractor, sub-contractor or" ,,,,,,

management contractor for at least last seven years prior to the bid submission deadline. ,,,,,,

7. The petitioner-Company has pleaded that since it fulfilled all the eligibility conditions, the petitioner-Company submitted the bid on 06.12.2017 and" ,,,,,,

also submitted the Earnest Money Deposit (for short â??EMDâ??) to the tune of Rs.13,07,00,000/- i.e. 2% of the estimated cost of work being" ,,,,,,

Rs.653.50 Crores, vide bank guarantees." ,,,,,,

8. The petitioner-Company has pleaded that a concession agreement dated 25.03.2010 was signed by the National Highway Authority of India for the ,,,,,,

works of four laning of Ahmedabad to Godhra Section of NH-59 from Km 4.200 to Km 122.420 in the State of Gujarat on design, build, finance," ,,,,,,

operate and transfer (DBFOT) basis. It is pleaded that under the said work, Pan India Infrastructures Pvt. Ltd. was appointed as" ,,,,,,

Concessionaireâ??s EPC and the said entity appointed the petitioner-Company

vide agreement dated 26.04.2010 as Contractor for the said work.,,,,,,

9. The petitioner-Company has pleaded in the petition that it was the contractor in the said work since 26.04.2010 and therefore had the due.,,,,,,

experience of seven years, required under the clause for qualifying as a successful bidder. The petitioner-Company has pleaded that it was given",,,,,,

mobilization advance on 27.04.2010 towards the said work, as shown from the TDS certificates and ledger account. The petitioner-Company has",,,,,,

pleaded that it had submitted the work completion certificate dated 10.07.2013 for the said project along with the bid which records that it was the.,,,,,,

contractor and the date of agreement was 26.04.2010.,,,,,,

10. The petitioner-Company has further pleaded that even in the excel-sheet filed along with the tender, the date of issue of the work was mentioned",,,,,,

by the petitioner-Company as 26.04.2010 and not 27.12.2010.,,,,,,

11. The petitioner-Company has pleaded in the petition that the respondents declared the technical bid of the petitioner-Company, as non-responsive,",,,,,

on the basis of typographical error in Form-EXP-1 [General Construction Experience] and without considering the concerned documents filed with the.,,,,,,

bid and also without seeking any clarification from the petitioner-Company, despite provisions to that effect in the tender document.",,,,,

12. The petitioner-Company has pleaded in the writ petition that when it came to know about the bid order dated 05.01.2018, petitioner-Company",,,,,,

immediately wrote a letter dated 06.01.2018 and acknowledged that there was a typographical error in one of the forms of the bid. The petitioner-.,,,,,,

Company also annexed other certificates along with his representation clearly showing that the petitioner-Company had experience for more than.,,,,,,

seven years. It has been pleaded that in spite of such clarifications being given, the representation of the petitioner-Company was not considered by",,,,,,

the respondents and financial bid was opened hurriedly on 08.01.2018.,,,,,,

13. The petitioner-Company has pleaded that feeling aggrieved and dissatisfied with the notice dated 05.01.2018 and subsequent actions of the.,,,,,,

respondents, Company filed S.B.Civil Writ Petition No.966/2018 before this court and the said petition was disposed of on 16.01.2018 with direction to",,,,,,

file appeals, as per provisions of the Rajasthan Transparency in Public Procurement Act, 2012 (hereinafter shall be referred to as "the Act of",,,,,,

2012") and the interim protection was also given to the petitioner-

Company.,,,,,,

14. The petitioner-Company has pleaded that it filed first appeal under Section 38 of the Act of 2012 before the respondent No.3 on 17.01.2018," ,,,,,,

however, the petitioner-Company's first appeal was dismissed on 29.01.2018 by the impugned order. The petitioner-Company has pleaded that it" ,,,,,,

filed second appeal before the respondent No.4 on 30.01.2018 and the said second appeal was also dismissed on 13.04.2018 by the impugned order.,,,,,,

The petitioner-Company has now challenged the orders of both the appellate authorities as well as the order dated 05.01.2018 whereby technical bid ,,,,,,

of the petitioner-Company has been found to be non-responsive.,,,,,,

15. The petitioner-Company has assailed action of the respondents as arbitrary and illegal by treating its technical bid as non-responsive. The ,,,,,,

petitioner-Company has alleged that it was awarded a contract on 26.04.2010 and after signing the said contract, several steps were required to be" ,,,,,,

taken and when the petitioner-Company filed work completion certificate dated 10.07.2013, the authorities have wrongly treated experience of the" ,,,,,,

petitioner-Company w.e.f. 27.12.2010.,,,,,,

16. The petitioner-Company has alleged that if seven years experience is to be counted backwards from the last date of submission of form i.e. from ,,,,,,

07.12.2017, the petitioner-Company since had entered into the agreement on 26.04.2010, it has to be assumed that the petitioner-Company had" ,,,,,,

completed the required seven years experience.,,,,,,

17. The official respondents have filed reply to the writ petition. The respondents have pleaded that the petitioner-Company did not meet the ,,,,,,

Appointed Date,"27th December, 2010" ,,,,,,

Agreement Date,"26th April, 2010" ,,,,,,

Date of Start,"27th December, 2010" ,,,,,,

Construction Period,27 months ,,,,,,

Scheduled date of completion,"27th March, 2013" ,,,,,,

Actual date of completion,31.03.2013 ,,,,,,

Form-EXP-1 [General Construction Experience]; the same was mandatory to each bidder to give in the format and the petitioner-Company itself ,,,,,,

submitted the starting month/year was 27.12.2010 and ending month/year was 31.03.2013. The said document has been filed as Annexure-R5/3 with ,,,,,,

the reply to writ petition.,,,,,,

27. The respondent No.5 has pleaded that the date of agreement/contract of the petitioner-Company on 26.04.2010 in no case can be relevant for the.,,,,,,

purpose of experience because the start date of the contract was mentioned as 27.12.2010. The respondent No.5 has further submitted that the.,,,,,,

requirement of experience is an essential and material condition of the contract and technical qualifications given in the bid document are pre-requisite.,,,,,,

and necessary before entertaining the bid. The respondent No.5 has pleaded that the claim of the petitioner-Company to declare as technically.,,,,,,

qualified is absolutely baseless.,,,,,,

28. Learned Senior Counsel for the petitioner-Company Mr.R.P.Singh has made following submissions in support of the case of the petitioner-.,,,,,,

Company:-.,,,,,,

(a) There was a typographical error in the document submitted by the petitioner-Company and in fact the date of commencement of work was.,,,,,,

26.04.2010 itself, the date on which the petitioner-Company had entered into the agreement. The typographical error was sought to be clarified by",,,,,,

petitioner-Company but the same was not permitted erroneously.,,,,,,

(b) There was an ambiguity in the tender document and due to such ambiguity the petitioner-Company in a bonafide manner had given the date of.,,,,,,

agreement as 26.04.2010 and the work which commenced on 27.12.2010 cannot have relevance once the agreement is executed to undertake a.,,,,,,

particular project.,,,,,,

(c) The petitioner-Company has the requisite seven years experience on the last cut-off date and the respondents have illegally kept the petitioner-.,,,,,,

Company out of fray in the matter of grant of contract.,,,,,,

(d) The respondents have illegally deprived the petitioner-Company to rectify/ correct the typographical error in one of the forms of tender document.,,,,,,

and immediately on discovering of the typographical error, the petitioner-Company responded but the respondents acted arbitrarily in proceeding to",,,,,,

open the financial bid without involving the petitioner-Company.,,,,,,

(e) The action of the respondents is not in conformity with the settled law that while considering the decision making process of the Government, in",,,,,,

awarding contracts, such process should exclude the remotest possibility of

discrimination, arbitrariness and favouritism and the same should be" ,,,,,,
transparent. ,,,,,,

(f) Opening of financial bid eventually by the respondents on 08.01.2018 showed that the petitioner-Company had given the bid of Rs.50 Crores less ,,,,,,

than the lowest financial bid opened on 08.01.2018. The State being the custodian of public money is required to consider the best offer which is given ,,,,,,
by a bidder to bring down the cost of public projects and respondents have ignored this aspect of the matter in most illegal manner. ,,,,,,

29. Counsel for the petitioner-Company, in support of his arguments, has relied upon the judgment of the Apex Court in the case of Industrial" ,,,,,,

Promotion & Investment Corp. of Orissa Ltd. Vs. New India Assurance Co. Ltd. & Anr. reported in 2016 (15) SCC 315 [para 9 & 10], New" ,,,,,,

Horizons Ltd. & Anr. Vs. UOI & Ors. reported in 1995 (1) SCC 478 [para 17] and Ganpati Rv-Talleres Alegria Track Pvt. Ltd. Vs. UOI and ,,,,,,

Another reported in 2009 (1) SCC 589 [para 23]. ,,,,,,

30. Per contra, Mr.J.M.Saxena, learned Additional Advocate General has submitted that the claim of the petitioner-Company is wholly unjustified. The" ,,,,,,

petitioner-Company did not have the requisite seven years experience. Counsel submitted that there was no ambiguity in any of the stipulations ,,,,,,

provided under the bid document. Counsel submitted that if at all there was some query by any bidder, there was a pre-bid conference meeting, as per" ,,,,,,

condition No.2.2.2 of the tender document and the petitioner-Company was well within its right to ask for clarifications about experience or any other ,,,,,,

issue. ,,,,,,

31. Counsel submitted that there is a proper format in the tender document as Form-EXP-1 [General Construction Experience] and the petitioner- ,,,,,,

Company at S.No.11 had given the starting month and year as 27.12.2010 as experience and the ending month and year was shown as 31.03.2013 ,,,,,,

and the role of bidder was shown as sub-contractor of four laning of Ahmedabad to Godhra Section. Counsel submitted that the petitioner-Company ,,,,,,

itself has filled the format and has given the construction experience and as such it cannot be said that the respondents have treated the petitioner- ,,,,,,

Company technically disqualified in wrong and illegal manner. ,,,,,,

32. Mr.J.M.Saxena, learned Additional Advocate General submitted that the requirement of having seven years experience cannot be diluted in any" ,,,,,,

case and even if the petitioner-Company is having 21 days less experience, the same does not make the petitioner-Company technically qualified",,,,,,

bidder and the authorities have not committed any illegality. Mr.Saxena has further submitted that this court under Article 226 of the Constitution of,,,,,

India may not exercise its discretionary power to confer or to make technically disqualified bidder to be technically qualified only on account of the,,,,,

alleged offer of Rs.50 Crores less for the entire project. Mr.Saxena submitted that first of all the petitioner- Company has to be technically qualified,,,,,

than only the question of comparison of financial bid can be raised by the bidder. Mr.Saxena submitted that the petitioner-Company has not reached to,,,,,

that stage of opening of financial bid and as such it cannot be pleaded that the petitioner-Company had given better offer in respect of the public,,,,,

project.,,,,,,

33. Mr.S.S.Hora, learned counsel for the respondent No.5 submitted that the experience required is the actual experience and not the comparison on",,,,,,

papers or by having only a certificate or alleged date of agreement dated 26.04.2010. Mr.Hora submitted that the State Officers of the respondents,,,,,

have proceeded as per the terms and conditions prescribed in the tender document and as per own version given by the petitioner-Company, it had",,,,,,

commenced the work on 27.12.2010 and the period prior to 27.12.2010 to 26.04.2010 cannot be counted for the purpose of construction experience.,,,,,,

Mr.Hora submitted that the documents and information submitted by the petitioner-Company itself reflected that they were not technically qualified,,,,,

and as such no inference is required to be made by this court. Mr.Hora has submitted that scope of interference in tender matters is very limited and,,,,,

the experience/technical qualification is essential and the same cannot be diluted by the court by exercising power under Article 226 of the,,,,,

Constitution of India.,,,,,,

34. Counsel submitted that experience is to be given ordinary meaning but the requirement has to be strictly complied. Mr.Hora further submitted that,,,,,

though there was no typographical error, as has been claimed by the petitioner-Company, assuming for the sake of argument, the said error cannot be",,,,,,

allowed to be corrected after opening of the bid and the respondents have accordingly taken proper decision in rejecting the claim of the petitioner-,,,,,,

Company.,,,,,,

35. Mr.S.S.Hora, learned counsel for the respondent No.5, in support of his arguments, has placed reliance on the judgments of the Apex Court in" ,,,,,,

Xen Isarada,Xer (Isarada),SE Isarda,CAO WR,ACE WR,,

Project,W R Zone,Project,Zone,Zone,,

Div. Tonk,Jaipur,Circle Tonk,Jaipur,Jaipurâ??,,

1. General,,,,,,

1.1,Scope of Bid,1.1.1,"In support of the invitation to Bid indicated in the Bid

Data Sheet (BDS), the Procuring Entity as indicated in

the BDS, issues this Bidding Document for the

procurement of works as named in the BDS and as

specified in Section V, Procuring Entity's

Requirements." ,,,

1.4,Eligible Bidders,1.4.1,"A Bidder may be a natural person, private Entity,

Government-owned Entity or, where permitted in the

Bidding Documents, any combination of them with a

formal intent to enter into an agreement or under an

existing agreement in the form of Joint Venture [JV],

Consortium or Association. In the case of a Joint

Venture, Consortium or Association:- all parties to the

Joint Venture, Consortium or Association shall sign the

Bid and they shall be jointly and severally liable; and a

Joint Venture, Consortium or Association shall nominate

a representative who shall have the authority to conduct

all business for and on behalf of any and all the parties of

the Joint Venture, Consortium or Association during the

Bidding process. In the event the Bid of Joint Venture,

Consortium or Association is accepted, either they shall

form a registered Joint Venture, Consortium or

Association as company/firm or otherwise all the parties

to Joint Venture, Consortium or Association shall sign the

Agreement." ,,,

2. Contents of Bidding Document,,,,,,,,

2.2,"Clarification of

Bidding

Document and

Pre-Bid

Conference",2.2.1,"The Bidder shall be deemed to have carefully examined

the conditions, specifications, size, make and drawings,

etc. of the Works and Related Services to be provided.

If any Bidder has any doubts as to the meaning of any

portion of the conditions or of the specifications,

drawings etc., it shall, before submitting the Bid, refer the

same to the Procuring Entity and get clarifications. A

Bidder requiring any clarification of the Bidding

Document shall contact the Procuring Entity in writing or

e-mail at the Procuring Entity's address indicated in

the BDS. The Procuring Entity will respond in writing or

e-mail to any request for clarification, within seven days

provided that such request is received no later than

twenty-one (21) days prior to the deadline for submission

of Bids as specified in ITB Sub-Clause 4.2.1[Deadline

for Submission of Bids]. The clarification issued,

including a description of the inquiry but without

identifying its source shall also be placed on the State

Public Procurement Portal and should the Procuring

Entity deem it necessary to amend the Bidding

Document as a result of a clarification, it shall do so

following the procedure under ITB Clause 2.3

[Amendment of Budding Document] through an

addendum which shall form part of the Bidding

Document." ,,,

„2.2.2, "The Bidder or his authorized representative is invited to attend the Pre-Bid Conference, if provided for in the BDS. The purpose of the Pre-Bid Conference will be to clarify issues and to answer questions on any matter related to this procurement that may be raised at that stage. If required, a conducted site visit may be arranged by the Procuring Entity." ,,,

„2.2.3, "The Bidder is requested, to submit questions in writing, to reach the Procuring Entity not later than 7 Days before the date of Pre-Bid Conference." ,,,

5. Evaluation and Comparison of Bids.,,,,,,

Criteria, Requirement, "Compliance

Requirements", Compliance Requirements,,, "Documents

Submission/

Requirements.

„Single Entity, Joint Venture,,,

,,, "All Partners

Combined", Each Partner, Lead Partner,

(i) General

Construction

Experience", "Experience under

construction

contracts in the

role of

contractor,

subcontractor, or

management

contractor for at

least the last 7

Years prior to
the Bid
submission
deadline","Must meet
requirement","Must meet
requirement",Not applicable,Not applicable,Form Exp-1
11.,27.12.2010,31.03.2013,225,"Four lanning of
Ahmedabad to
Godhra section of
NH-59 from Km
4.200 to Km
122.420 in the
State of Gujarat
on Design, Build,
Finance, Operate
and Transfer
(DBFOT)B asis
under NHPD
Phase-III PAN
India
Infrastructure
Pvt. Ltd.,
Mumbai, Road
Work",Sub Contract or,

such it cannot be pleaded that the petitioner-Company was prevented by the
respondents to participate in a fair manner and they have been ousted in,,,,,
illegal manner,,,,,

50. The allegation of counsel for the petitioner-Company that appellate
authorities have not considered the appeals of the petitioner-Company in fair,,,,,
manner, this court finds that both the authorities have specifically dealt with all
the contentions raised by the petitioner-Company. The appellate" ,,,,,,

authorities have considered the main issue as whether the petitioner-Company fulfills the qualification sought in the technical bid or not. The date of,,,,,,

start of calculating the experience was taken from the Form-EXP-1, filed by the petitioner-Company and the starting point was 27.12.2010 till" ,,,,,,

06.12.2017 and from the same, it was borne out that the petitioner-Company had six years, eleven months and eleven days experience to its credit" ,,,,,,

which was less than seven years, as sought by the official respondents. The appellate authorities have found that construction experience was one of" ,,,,,,

the important parameters for deciding technical qualification and any material deviation, affecting responsiveness of the bidder, was not to be" ,,,,,,

considered. ,,,,,,

51. This court finds that both the appellate authorities have considered the issues raised before them in a proper and fair manner and no illegality as ,,,,,,

such is found in the impugned orders. ,,,,,,

52. The judgments relied upon by learned counsel for the petitioner-Company do not deal with the situation, as has been obtaining in the present case." ,,,,,,

53. This court does not find any error in the decision taken by the respondents in rejecting the technical bid of the petitioner-Company and further the ,,,,,,

orders passed by both the appellate authorities, upholding the action of the respondents, do not call for any interference by this court." ,,,,,,

54. The present petition being devoid of merit, accordingly stands dismissed." ,,,,,,