

(2016) 06 RAJ CK 0026

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 364 of 2016

M/s. Geo Miller Co. Pvt. Ltd.

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 06-06-2016

Acts Referred:

Citation : (2016) AIR(Raj) 130 : (2016) 3 WLN 422

Hon'ble Judges : Mr. Govind Mathur and Mr. G.R. Moolchandani, JJ.

Bench : Division Bench

Advocate : Mr. S.D. Singh with Mr. Vipul Dharnia, Advocates, for the Appellant; Mr. Prithvi Raj Singh, Additional Advocate General with Mr. Dinesh Kumar Ojha, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. Govind Mathur, J.—To question correctness of the judgment dated April 5, 2016, passed by learned Single Bench in SB Civil Writ Petition No.6613/2015, this appeal is preferred.

2. The facts, as unfolded in the judgment impugned, are that to construct and establish a plant known as "UWSS Jodhpur, Takhat Sagar Based Water Supply Works viz. Improvement of New Intake, RW Pump House, RW Pipeline, WIP, CWR and related work ("the facilities") on single responsibility basis turnkey job contract including necessary design, build and operation and maintenance for ten years", the State of Rajasthan invited tenders. The appellant petitioner, a company incorporated under the Companies Act, said to be having experience in the business of establishing Water Treatment Plants, Effluent Treatment Plants, Sewage Treatment Plants throughout the country, submitted bid for the work referred above with all required documents.

3. Under office order dated 15.6.2015, the Chief Engineer (Project), Department of Public Health Engineering, Jodhpur, declared the technical bid submitted by the appellant petitioner non responsive. The Chief Engineer concluded that the

technical proposals given are non responsive, (i) due to failure to submit form CON-2; "Historical Contract Non performance"; and (ii) breakup of credit limits available, utilised and balance required as on 4.2.2015.

4. On receipt of the order dated 15.6.2015, the appellant under a communication dated 16.6.2015 conveyed to the Minister, Public Health & Engineering Department, Government of Rajasthan, Jaipur that the decision dated 15.6.2015 suffers from serious illegality, unreasonableness, arbitrariness and is lacking rational. A request was also made to the Chief Engineer (Project) to recall the order dated 15.6.2015 being unjust. The appellant also tendered an explanation in brief pertaining to the reasons given for treating the technical bid non responsive. As per the appellant, the bid was opened on 18.6.2015 without examining the details and the explanation submitted on 16.6.2015.

5. Aggrieved by the order dated 15.6.2015 and its consequential events taken place, the appellant petitioner preferred a petition for writ that came to be dismissed by learned Single Bench under the judgment impugned. Before learned Single Bench, it was submitted on behalf of the appellant petitioner that as per Rule 59 of the Rajasthan Transparency in Public Procurement Rules, 2013 (hereinafter referred to as "the Rules of 2013"), the bid evaluation committee is supposed to determine responsiveness of a bid on basis of bid documents and that cannot be held non responsive without having any material deviation, reservation or omission. The "deviation" is a departure from the requirements specified in the bidding documents and "reservation" is the setting of limiting conditions or withholding from complete acceptance of the requirements specified in the bidding documents. The term "omission" means the failure to submit part or all of the information or documentation required in the bidding documents. As per sub-rule(3) of Rule 59 of the Rules of 2013, a material deviation, reservation or omission is one that, (a) if accepted, shall :- (i) affect in any substantial way the scope, quality, or performance of the subject matter of procurement specified in the bidding documents; or (ii) limits in any substantial way, inconsistent with the bidding documents, the procuring entity's rights or the bidder's obligations under the proposed contract; or (iii) if rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids. As per sub-rule(4) of Rule 59 of the Rules of 2013, the bid evaluation committee should examine the technical aspects of the bid in particular, to confirm that all requirements of bidding documents have been met without any material deviation, reservation or omission.

6. As per learned counsel, in the case in hand, the bid evaluation committee held the appellant petitioner non responsive without having any material deviation, reservation or omission. The respondents also failed to point out existence of any eventuality referred in clauses (a) and (b) of sub-rule(3) of Rule 59 of the Rules of 2013 before making the order dated 15.6.2015.

7. Learned Single Bench, however, did not accept the argument advanced by observing and holding as under:-

"A reading of Form FIN 3.3 read with clauses 2.3.3 in Part 111 of the bid document clearly required the bidder to supply details of credit limit (funds based and non-funds based) available with the bidder and the same was not to be less than Rs. 22.9 crores. There was a requirement to specify proposed sources of financing such as liquid assets, unencumbered real assets, lines of credit and other financial means, net of current commitments, available to meet the total construction cash flow demand of the subject contract or contracts as indicated in section 3 (evaluation and Qualification Criteria). Requirement of supplying information of "net of current commitments" is nothing other than seeking information as to unutilized funds available. The information as supplied by the bank on 31.3.2015 regarding financial viability did not disclose whether the petitioner had any funds available to it as on date bid document was submitted. The information sought does not go beyond the scope of the bid requirement as the very purpose of having information about unutilized funds available with bidder touches upon the credibility and viability of the Company to execute the contract. In case a bidder, though having a credit limit had already utilised the entire funds available, it would amount to having no credit limit for the next project to be undertaken. The financial viability was part and parcel of the bid documents and the financial position ought to be reflected as on the date the bid was submitted. Therefore, it is held that the documents submitted on 4.2.2015 did not furnish complete and correct information as required and thus there is no infirmity in the order dated 15.6.2015.

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Rule 59 of the rules of 2013 clearly allows a bid evaluation committee to determine the responsiveness of a bid on the basis of bidding documents submitted and in case there is any deviation, reservation or omission the bid can be declared as non-responsive. As defined in Rule 59 (2)(c) of the Rules of 2013 "Omission" is the failure to submit part or all of the information or documentation required in the bidding documents. In the present case there is omission on the part of the bidder to supply full details and particulars as required in Form Con 2 as well as details of un utilised credit balance as on date of submission of the bid document and therefore the order dated 15.6.2015 holding the bid to be non-responsive is justified."

8. The finding given by learned Single Bench is assailed with submission that the order dated 15.6.2015 has been held justified without measuring its correctness as per requirements of Rules 59(2) and (3) of the Rules of 2013. It is urged that under the Rules it is not simple "omission", but "material omission" as referred under sub-rule(3) of Rule 59 and this should have been examined by the bid evaluation committee at the scale of sub-rule(3) of Rule 59. The committee should have arrived at a definite conclusion that deviation or omission said to be committed by the appellant is having affect in any substantial way the scope, quality or performance of the subject matter of procurement specified in the bidding documents, or the limits in any substantial way, inconsistent with the

bidding documents, the procuring entity's rights or the bidder's obligations under the proposed contract; or if rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids. The respondents, even in reply to the writ petition, nowhere stated about such material deviation, reservation or omission on part of the appellant petitioner. Learned Single Bench in spite of it affirmed the order dated 15.6.2015 by holding that the appellant petitioner is guilty of "omission", ignoring the requirement of law i.e. "material omission" as suggested under sub-rule(4) of Rule 59 of the Rules of 2013.

9. Per contra, as per learned Additional Advocate General Shri P.R.Singh, learned Single Bench under the judgment impugned considered all aspects of the matter and arrived at a just conclusion, which does not require any interference in intra court appeal. It is stated that the appellant petitioner did not submit form CON-2 resulting into the misrepresentation by stating that "no pending litigation against us (bidder Geo Miller & Co. Pvt. Ltd.)", whereas it is in litigation with M/s Bihar Urban Infrastructure Development Corporation Ltd. (BUIDCO). No unutilised credit facility on the date of issuance of original certificate i.e. February 4, 2015 was also submitted. As per the eligibility criteria the credit limit available with the bidder should not be less than Rs. 229 million within three months from the date of opening of envelope "A", but the certificate dated 4.2.2015 produced by the appellant petitioner was incomplete as that was not informing "available credit facility".

10. In rejoinder, while pressing the submissions advanced, it is urged on behalf of the appellant petitioner that no case is pending against the appellant initiated by any agency including BUIDCO seeking any monetary reliefs. The appellant petitioner is not a defendant or respondent in any claim or suit said to be filed by the BUIDCO. It is asserted that there is no claim, much less to say a sum of Rs. 111 crores, the amount referred by learned Single Bench. According to the appellant it submitted the certificate relating to net worth being a sum of Rs. 24.88 crores against the required net worth of Rs. 22.9 crores and the same is not in any dispute. The appellant filed a petition before Hon'ble Delhi High Court against invocation of the bank guarantee to the extent of Rs. 2.4 crores. A petition filed by the appellant cannot be treated as a litigation against it, hence no need was there to give details of that. For the sake of argument, even if it is accepted that the bank guarantee of Rs. 2.4 crores be permitted to be encashed, then too that would not reduce net worth of the appellant below the required worth in the bid in question. Learned counsel appearing on behalf of the appellant also pointed out that prior to 15.6.2015 the appellant received a letter dated 23.5.2015 asking the appellant to clarify certain matters including the details allegedly not filled-in form CON-2. In response to the communication dated 23.5.2015 the appellant petitioner sent communication dated 2.6.2015 along with series of the documents including the documents with respect to the work order issued by the BUIDCO and thereafter invocation of the bank guarantees. The appellant petitioner also brought into knowledge about the cases said to be pending in different courts filed by the appellant against the BUIDCO,

but without taking that into consideration and also ignoring the explanation and the documents submitted, acted upon the communication dated 23.5.2015 and passed the order impugned dated 15.6.2015. While giving these details, emphasis of the counsel for the appellant is that the purpose of giving all these details was to have an objective consideration with regard to the bid submitted as per the scale laid down under sub-rule(3) of Rule 59 of the Rules of 2013. The respondents without taking into consideration the explanation and the documents given, held the appellant non-responsive and the learned Single Bench also failed to appreciate that no consideration was made to examine any material "deviation, reservation or omission" on part of the appellant.

11. On examination of the entire record we also find that there is no material on record on basis of that it can be said that the bid evaluation committee examined case of the appellant petitioner as per the standards required under sub-rule(3) of Rule 59 of the Rules of 2013. The Rules of 2013 have been framed by the State Government exercising the powers conferred by Section 55 of the Rajasthan Transparency in Public Procurement Act, 2012. The Act of 2012 is enacted to regulate public procurement with the objectives of ensuring transparency, fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy and safeguarding integrity in the procurement process and for matters connected therewith or incidental thereto. The Rules of 2013 provides a complete scheme to execute the Act of 2012 which demands absolute transparency, fairness and equitable treatment of bidders in promotion of competition and enhancing efficiency and economy. Rule 59 of the Rules of 2013 stipulates for determination of the responsiveness of a bid by a bid evaluation committee on basis of bidding documents and the provisions of sub-section(2) of Section 7 of the Act of 2012.

12. As already stated, learned Single Bench held the order dated 15.6.2015 justified by arriving at a conclusion that the appellant is guilty of "omission", but the requirement of the rule is not simple omission but "material omission" and to examine that the bid evaluation committee should have measured all the documents as per the standards given under sub-rule(3). In reply to the writ petition nothing has been stated as to how the bid evaluation committee satisfied itself about the standards given under sub-rule(3) of Rule 59 of the Rules of 2013. The committee, before arriving to any conclusion, while examining a bid and the documents submitted therewith, before treating the same non-responsive, should have satisfied itself that the omission is such that in the event of acceptance of bid, it shall affect in any substantial way the scope, quality, or performance of the subject matter of procurement specified in the bidding documents; or limits in any substantial way, inconsistent with the bidding documents, the procuring entity's rights or the bidder's obligations under the proposed contract, or if rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids. The use of word "material" in sub-rule(2) in addition to the standards given under sub-rule(3) of Rule 59 is having great significance. In view of these provisions, the bid evaluation committee

bears a task to examine bids before it minutely and in consonance to the provision of the Rules. The committee cannot treat a bid non responsive merely on count of simple omissions, deviations or reservations, but is supposed to determine affect of these defaults on merits by keeping in mind the provision of Rule 59(3) of the Rules of 2013. This is not a mere formality but provision for strict compliance to ensure fair competition and also to maintain transparency. In the instant matter the compliance of this provision has not been made in its spirit. The failure on the part of the bid evaluation committee to adhere the sub-rule(3), in our considered opinion, makes the order dated 15.6.2015 bad. This aspect of the matter has not been considered by learned Single Bench while dismissing the petition for writ. The judgment impugned, in our considered opinion, thus is bad.

13. Accordingly, this appeal is allowed. The judgment impugned dated 5.4.2016, passed by learned Single Bench is set aside. The order dated 15.6.2015, passed by the respondent Chief Engineer (Project), Public Health & Engineering Department, is also set aside. The respondents are directed to redetermine the responsiveness of the bid submitted by the appellant petitioner on the basis of bid documents by taking into consideration the requirements of sub-rules(3) and (4) of Rule 59 of the Rules of 2013. While reconsidering the bid, the bid evaluation committee shall also take into consideration the explanation submitted by the appellant petitioner including the documents annexed to it or submitted otherwise.

14. No order to costs.