
(2011) 05 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 2896 of 2011

M/s. Striker and Brothers Partnership Concern

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 17-05-2011

Acts Referred:

Citation : (2011) 3 ShimLC 390

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—By means of this petition the petitioner, which is a partnership concern, has challenged the rejection of the technical bid submitted by it for construction of works, namely, periodical renewal in Km.60/600 to 78/0 and 86/0 to 105/0 of old national highway No-88 now renumbered as NH-103 with estimated costs of Rs. 9,89,23,132/-. It is not disputed that the petitioner is a Class-A contractor. It is also not disputed that he has carried out works of construction of roads as per the monetary limits, which were laid down in the tendered documents. He is qualified in all other aspects. The only question is whether the petitioner has experience of having done work of approximately Rs. 3.95 crores on the "Highway".

2. The bid documents contain general conditions and in the general conditions qualification of the bidder are given. Clause 4.3(c) reads as follows:--

4.3. If the Employer has not undertaken pre-qualification of potential bidders, all bidders shall include the following information and documents with their bids in Section 2:

(a) xxx... xxx... xxx...

(b) xxx... xxx... xxx...

(c) experience in works of a similar nature and size for each of the last five years

and details of works underway or contractually committed; and clients who may be contacted for further information on those contracts;

3. Thereafter, qualification criteria is also given in the bid document and clause 2.6.3(b) of the qualification criteria reads as follows:--

2.6. Qualification criteria

xxx... xxx... xxx...

2.6.3. General Experience

The applicant shall meet the following minimum criteria:

(a) xxx... xxx... xxx...

(b) Experience in successfully completing or substantially completing at least one contract of highway (road and/or bridge works)/airport runway of at least 40% of the value of proposed contract within the last five years.

4. The respondents had invited tenders for the aforesaid works the value of which was of Rs. 9,89,23,132/-. Therefore, according to clause 2.6.3(b) to be eligible the bidder should have done work of Rs. 3.95 crores approximately to qualify for submitting his bid. The petitioner submitted his bid and alongwith the bid submitted a document being a completion/performance certificate showing that he had done work of the value of Rs. 4,51,51,855/- for up gradation of Bheger Bachhreti Road. The tender of the petitioner was rejected on the ground that experience of the petitioner is of construction of a rural/district road which is not a Highway within the meaning of clause 2.6.3(b) and therefore, cannot be taken into consideration. It is also not disputed that as far as National Highway is concerned the petitioner has carried out some construction work but the value of the same is less than Rs. 3.95 crores.

5. The only question which arises for consideration is what is the meaning to be assigned to the term "Highway" contained in clause 2.6.3(b) quoted hereinabove. Shri S.R. Sharma, learned Counsel for the petitioner contended that the petitioner is an A-class contractor. He has carried out the work of construction of roads of the value of much more than Rs. 3.95 crores in the last five years. The petitioner has all the experience of doing road repair/maintenance and bridge work. He further contends that the petitioner concern has all the necessary machinery for carrying out the works which are subject matter of the present tender and therefore, according to him the petitioner has the potential to carry out such work and should not have been excluded.

6. He in support of his statement has made reference to the dictionary meaning of the word "Highway". According to Oxford English Dictionary the term Highway means a public road. A public road is a road where any member of the public as a matter of right can walk. In Black's Law Dictionary the term Highway has been defined as a free and public roadway, or street; one which every person has the right to use. In popular usage, refers to main public road connecting towns or

cities. Shri S.R. Sharma, learned Counsel, relying upon such definition of the highway contends that the road on which the petitioner concern carrying out the construction is a highway. Therefore, the petitioner's bid could not have been rejected.

7. On the other hand on behalf of the respondents it is contended that the term Highway used in clause 2.6.3.(b) has to be read in the context of the contract and can only be read to mean National Highway or State Highway and not any other road. It is contended on behalf of the respondents that the State is looking for a person with reasonable and sufficient experience of carrying out the works of a similar nature.

8. There is no manner of doubt that the term Highway when used in general parlance will include any public road. Here we are concerned with the term used in a contract to carry out the works of repair/maintenance of a National Highway. Clause 4.3.(c), which is general in nature, itself lays down that the bidder should have experience of carrying out works of a similar nature and size for each of the last five years and alongwith the bid document should submit the details of the works being undertaken or completed. This clause itself shows that the experience required should be in works of similar nature. What is the meaning of the phrase "similar nature"? The term road is more generic in nature and any work of construction of a road cannot be said to be of a work similar in nature. The most similar would be the work on National Highway. Less similar would be carrying out the work on a State Highway and even less similar would be work on a district or rural road.

9. Clause 2.6.3.(b) which is the qualification criteria and is more specific in nature lays down that the person should have completed at least one contract of highway of 40% of the value of the contract. The argument of Shri Sharma, Advocate, that highway is a public road and therefore, experience of carrying out works of any road should be taken into consideration seems attractive at first blush. However, on closer scrutiny it cannot be said that in case the person who is to award the contract restricts the meaning of the word highway to national or state highways it is doing anything which is illegal. The Apex Court in a number of judgements has held that when the State acts in the realm of contract, it must act fairly and should not act in an arbitrary manner. All equals should be treated equally. The converse is that un-equals cannot be treated equally. Some benefit will have to be given to the people who have done work of the nature exactly or most closely similar to the work which is the subject matter of the contract. The stand of the State is that it has only considered those persons eligible who had carried out construction work of requisite amount on national/state highways, cannot be said to be a stand, which is arbitrary. In fact this classification has a direct nexus with the object which is sought to be achieved, namely, that the road should be constructed to the best quality by a person who has the necessary competence and experience to carry out such work.

10. This does not mean that this Court is in any manner doubting the

competence of the petitioner but at the same time when the person who invites bids lays down certain conditions and these conditions are just and reasonable the person inviting bids can also give a reasonable interpretation to the terms of the bid. The interpretation given by the respondents to the term highway i.e. that it has to be read as State Highway or National Highway cannot be said to be an unreasonable interpretation.

11. It has been lastly contended that this condition has been made to suit the person who was to be awarded the work. This Court is not going into this aspect of the matter, whether the person who has been awarded the contract was duly qualified or not, is not the subject matter of this petition, in which the only question is whether the petitioner has been rightly disqualified or not. Therefore, in view of the above discussion the present petition is dismissed. However, it is made clear that if the petitioner, if so advised, can challenge the award of the contract to the successful bidder on all grounds which may be open to him by filing a separate petition which case can be defended by the respondents on all grounds which are available to them. No order as to costs.