(2021) 03 OHC CK 0012

In the Orissa High Court

Case No : Writ Petition (Civil) No. 12743 Of 2020

M/s. Y.B. Constructions Pvt. Ltd — APPELLANT

Vs

Union Of India And Six Others — RESPONDENT

Date of Decision : 24-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Citation : (2021) 03 OHC CK 0012

Hon'ble Judges : Dr S. Muralidhar, CJ;K.R. Mohapatra, J

Bench : Division Bench

Advocate : Kananbala Roy Choudhury, S.K. Roy Choudhury, Prasanna Kumar Parhi, Narendra Kumar Mishra, Nitish Kumar Mishra, Ajay Kumar Roy, S. Mishra, Debasis Das

Final Decision : Allowed

Judgement

K.R. Mohapatra, J.

1. The Petitioner in this writ petition calls in question the rejection of its technical bid by the Indian Tourism Development Corporation (ITDC) for the work "Development of Tourism Facilitation Centre-cum-Multilevel Parking at Puri, Odisha (Prasad Scheme)" (for brevity 'the work') under Annexure-5.

2. Pursuant to a Tender Call Notice (Annexure-1) issued by the ITDC for the work for an estimated cost of Rs.19,12,65,674.25, the Petitioner, Opposite Party No.7 and other bidders submitted their bids. The last date of submission of the bid was 2nd January, 2020 and the technical bid was scheduled to be opened on 3rd January, 2020 at 16.00 hours electronically. It is revealed from the averments in the writ petition that after opening of the technical bids, the Petitioner was sent an e-mail from the Senior Manager (Civil)-HQ, ITDC-Opposite Party No.4 on 31st January, 2020 requiring him to submit the following:

(i) Copy of the work order and scheduled of quantity for the work for an amount of Rs.25,96,99,318.00.

(ii) History and structure of firm, name of Director/Partners/Proprietor/with Technical Staff.

3. The Petitioner was required to comply with the requirements by 5th February, 2020. Responding to the e-mail, the Petitioner submitted the required documents/information on 4th February, 2020 through e-portal under Annexure-3. Thereafter, the Petitioner also sent some clarificatory documents to the Opposite Party No. 4 through e-mail on 24th February, 2020 under Annexure-4. On 18th March, 2020, the status of both the technical as well as financial bid was uploaded by the tendering authority. The Petitioner was also informed vide e-mail dated

18th March, 2020 under Annexure-5 series as follows:

"You are informed that your bid for the above tender has been rejected during Technical evaluation by the duly constituted committee for the reason Technically not Qualified because all documents not submitted as per NIT through e-tendering portal.

In case of any clarifications or feedback, you may contact Tender Inviting Authority (TIA)."

4. The relevant portion of the appendix to Annexure-5 reads as follows:

"Proposal for Technical Parity for work of "Development of Tourism Facilitation Centre cum Multi Level Parking at Puri, Odisha (Prasad Scheme)", submitted vide note dated 10.02.2020 (N-11 to N-16) (file received on 13.02.2020 at S Cell) and note dated 20.02.2020 (N-17) by the constituted committee comprising of Sh. Manoj Kumar Sr. Mgr (C)-HQ Sh. T. Murli, Mgr (Civil-HQ & Sh Mukesh Kumar Mgr (F&A)-Project Finance and DGM (Civil)-infra. After scrutinizing the proposal, the status of bidders after submission of deficient documents is found as under:-

(1) M/s. B.C. Bhuyan Constructions Pvt. Ltd, Bhubaneswar: After submission of deficient document i.e. Copy of Profit & Loss Statement for FY 2018-19 (refer page 1 of Deficient documents file) and verification of Similar work experience Certificates of agency (refer page 209 to 2012) of this file), the party is found as technically at par,(2) (3) M/s. Y.B. Construction Pvt. Ltd., Bhubaneswar: the agency is found as technically disqualified due to following reasons:

(a) Initially at Technical Bids stage, the agency has submitted only Completion Certificate dated 27.09.2019 for value of Rs.25,96,99,318.00 (refer page 384 of Technical Bids File) and Letter of Acceptance dated 21.10.2016 (refer page 385) for amount of Rs.27,00,01,000.00. In Completion Certificate dated 27.09.2019, Original Contract Value was mentioned as Rs.25,43,15,588.00.

On seeking clarification and Work Order with BOQ/schedule of Quantity & Rates for work vide TEC's email dated 31.1.2020 and Govt. E-Procurement System (copy placed at page 624 and 125 respectively of Deficient Documents File) the agency has submitted Detailed Letter of Acceptance (DLOA) dated 23.12.2016 for amount of Rs.27,00,01,000.00 with incomplete set of Schedule of Quantities & Rates (refer page 120 to 123 of Deficient Documents File). Moreover, in Letter of Acceptance dated 21.10.2016 and Detailed Letter of Acceptance (DLOA) dated 23.12.2016 submitted by the agency. Contract Value/Work Order amount is mentioned as Rs.27,00,01,000.00 and in Completion Certificate dated 27.09.2019, Contract Value/Work order amount is mentioned as Rs.25,43,15,588.00. Due to above discrepancies in documents despite seeking clarification vide E-mail dated 31.1.2020 & E-tendering portal and failure of agency to fulfill shortcomings, it is vetted to technically disqualify the agency as recommended by TEC and DGM(C)-infra vide note dated 10.2.2020."

5. From the above, it appears that although the completion certificate produced by the Petitioner dated 27th September, 2019 was for a value of Rs.25,96,99,318.00 and Letter of Acceptance (LOA) dated 21st October, 2016 was for an amount of Rs.27,00,01,000.00, but, in the completion certificate dated 27th September, 2019, the original contract value was mentioned as Rs.25,43,15,588.00. On seeking clarification and Work Order with BOQ/Schedule of Quantity & Rates for work vide TEC's e-mail dated 31st January, 2020, the Petitioner submitted a Detailed Letter of Acceptance (DLOA) dated 23rd December, 2016 for an amount of Rs.27,00,01,000.00 with incomplete set of Schedule of Quantities & Rates. Moreover, there is discrepancy of Contract Value/ Work order amount in the LOA dated 21st October, 2016 and the Completion Certificate dated 27th September, 2019. The above discrepancy in the documents submitted by the Petitioner could not be clarified in spite of submitting documents vide e-mail dated 31st January, 2020. As such, its technical bid was rejected.

6. From the reasons assigned by the TEC, it appears that the technical bid of the Petitioner was rejected for submission of defective certificate in support of completion of similar nature of work by the Petitioner. In terms of clause-19 of the NIT, the bidders were required to submit completion certificate of similar nature of work.

Clause-19 of the NIT reads as follows:

"19. Proof of having Successfully Completed "Similar works" (Similar Works means "Civil works") during last seven years.

a. Three similar completed works costing not less than the amount equal to 40% of the estimated cost.

OR

b. Two similar completed works costing not less than the amount equal to 50% of the estimated cost.

OR

c. One similar completed work costing not less than the amount equal to 80% of the estimated cost.

Note: The contractors participating in tenders are required to submit completion certificate and copy of work order.

Similar work means - "Civil works"

7. Referring to aforesaid clause of the NIT, Ms. Roy Choudhury, learned counsel for the Petitioner submitted that the Petitioner had submitted documents in compliance with Clause-19(c) of the NIT, which required the Petitioner to submit proof with regard to one similar completed work costing not less than the amount equal to 80% of the estimated cost. The Petitioner had submitted the final completion certificate of the Indian Oil Foundation for, which comes to Rs.25,96,99,318.00 (excluding GST). The work done by the Petitioner is Rs.27,00,01,000.00 inclusive of all taxes. It is well above 80% of the estimated cost of the work to be undertaken under the NIT. Thus, the Petitioner has satisfied the requirement of Clause-19(c) of the NIT by submitting completion certificate, which is much higher than 80% of the estimated cost of the work to be undertaken by the NIT i.e. Rs.19,12,65,674.25. But Tender Evaluating Committee (TEC) rejected its technical bid arbitrarily on a flimsy ground showing discrepancy in the figures in the documents submitted by the Petitioner. It is her submission that in fact, there is no discrepancy at all in the documents submitted by the Petitioner. The TEC by misreading and misconstruing the documents submitted by it rejected its bid arbitrarily, which is not sustainable in the eyes of law. Accordingly, she prayed for setting aside the order of rejection under Annexure-5 and to open its price bid along with others for evaluation.

8. Mr. Mishra, learned Senior Advocate appearing for ITDC vehemently objected to the submission of Ms. Roy Choudhury, learned counsel for the Petitioner. Referring to the counter affidavit filed by Opposite Party Nos. 2 to 6, he submitted that the Petitioner submitted the bid on 31st December, 2019 enclosing Letter of Acceptance dated 21st October, 2016 for value of Rs.27,00,01,000.00 and completion certificate dated 27th September, 2019 for original contract value of Rs.25,43,15,588.00 and executed value of Rs.25,96,99,318.00 in support of completion of similar work by the Petitioner. After the technical bids of the bidders were opened on 3rd January, 2020, the same was scrutinized by the Scrutiny Cell where after deficiencies of the respective bidders were informed to them vide e-mail on 31st January, 2020 for submitting clarificatory/deficient information and documents by 5th February, 2020 through e-portal. Since the amount mentioned in the completion certificate submitted by the Petitioner did not match with the LOA submitted by it, it was specifically informed to submit the copy of the work order and schedule of quantity for the work done amounting to Rs.25,96,99,318.00 together with history and structure of the firm, name of the Director/Partners/Proprietor with technical staff before 5th February, 2020. The Petitioner in response to the same submitted voluminous papers through e-portal on 4th March, 2020. Since there was a mismatch in the first and last page of the schedule of quantities for

Rs.27,00,01,000.00 and abstract of payments including the 12th and final bill for the work done amounting to Rs.25,96,99,318.00, the technical bid of the Petitioner was rejected. It is his submission that not only the schedule of quantities of the completed work for Rs.27,00,01,000.00 remained incomplete but also no such schedule of quantities for Rs.25,96,99,318.00 as called from the Petitioner was submitted. Accordingly, the TEC evaluated the technical bids of the bidders on 10th February, 2020 which came to be compiled on 21st February, 2020 as per the note sheet attached to the writ petition as Annexure-5. On consideration of the bids submitted by Opposite Party No.7, namely, M/s. B.C.Bhuyan Constructions Private Ltd. and M/s. K.N. Mishra Construction (India) Private Ltd. (not made a party to the writ petition) were found to be technically qualified. Accordingly, the financial bids of technically qualified bidders were opened on 18th March, 2020, but before issuance of the work order in favour of successful bidder, due to outbreak of pandemic of COVID-19 and Janata Curfew with effect from 22nd March, 2020 followed by the successive lockdowns, the work order could not be issued. In the interregnum, this Court vide order dated 11th June, 2020 passed in I.A. No. 5840 of 2020, as an interim measure, restrained the Opposite Parties from issuing the work order in favour of Opposite Party No.7, who was the successful bidder.

9. Mr. Mishra, learned Senior Advocate strenuously argued that due to discrepancy in the documents submitted by the Petitioner with regard to value of completion of the work, its technical bid could not be considered favourably. In spite of affording opportunity, the Petitioner could not clarify the same to the satisfaction of TEC. As such, there is no illegality in rejecting the technical bid of the Petitioner as communicated vide Annexure-5. Hence, he prays for dismissal of the writ petition being not maintainable.

10. Mr. Das, learned counsel for the successful bidder-Opposite Party No.7 in his submission supported the contention raised by Mr. Mishra, learned Senior Advocate. It is his submission that since the Opposite Party No.7 has ceremoniously complied with all instructions in the NIT, followed the instructions of the tender inviting authority from time to time and has come out successful in the bid being the L1, the decision of TEC should not be interfered with in a writ jurisdiction under Article 226 of the Constitution.

11. Heard Ms. Roy Choudhury, learned counsel for the Petitioner, Mr. Parhi, learned Assistant Solicitor General for Odisha for Opposite Party No.1, Mr. Mishra, learned Senior Counsel for Opposite Party Nos. 2 to 6 and Mr. Das, learned counsel for the Opposite Party No.7 at length with reference to the documents cited.

12. It is not disputed that the Petitioner has submitted the bid along with required documents within the stipulated time. It has also responded to the clarification sought for vide e-mail dated 31st January, 2020 under Annexure-3 within the stipulated time, i.e., on 4th February, 2020. The Petitioner in support of the claim of completion of similar nature of work submitted documents as per

Clause-19 (c) of the NIT, which stipulates that the bidders should have successfully completed similar nature of work costing not less than the amount equal to 80% of the estimated cost during the last seven years. Admittedly, the estimated cost of the work is Rs.19,12,65,674.25. The Petitioner submitted the bid documents along with completion certificate issued by the Indian Oil Foundation, a Government of India Undertaking, which shows that the Petitioner had executed the value of contract of Rs.25,96,99,318.00 (excluding GST) under Annexure-A/2. Authenticity of the said documents was never disputed by the Tender Evaluating Committee. Appendix to Annexure-5 discloses that the Tender Evaluating Committee rejected the technical bid of the Petitioner on the ground that although in the LOA dated 21st October, 2016 and DLOA dated 23rd December, 2016, the contract value/ work order amount is mentioned as Rs. 27,00,01,000/-, but the completion certificate submitted by the Petitioner on 27th September, 2019 was for a value of Rs.25,96,99,318.00. Thus, the contract value of the work in the letter dated 27th September, 2019 and the Letter of Acceptance dated 23rd December, 2016 did not match. As such, due to the aforesaid discrepancy in the documents despite seeking clarification, the Tender Evaluating Committee rejected the technical bid of the Petitioner.

13. It is the submission of Ms. Roy Choudhury, learned counsel for the Petitioner that the value of completed work was for a pre-GST period and if the GST is included, it matches with the value mentioned in the Detailed Letter of Acceptance (DLOA) submitted by the Petitioner.

14. Mr. Mishra, learned Senior Advocate submitted that the Petitioner did not submit the documents as at Annexure-3 which discloses that the original contract value of the work was for Rs.27,00,01,000.00 (pre-GST). Had it been submitted along with the tender documents, there would have been no difficulty in considering the technical bid of the Petitioner. In absence of such document, which has been obtained much after the last date of submission of the clarification, the decision of the TEC cannot be faulted with.

15. Taking into consideration the aforesaid facts and circumstances of the case as stated above, it appears that the TEC tried to find out certain discrepancy in the value of execution of similar nature of work executed by the Petitioner, but that loses its relevance as the executed value of the contract of Rs.25,96,99,318.00 (excluding GST) was never disputed and it is admittedly more than 80% of the estimated cost of the tender in question. The documents submitted by the Petitioner in support of the executed value of the contract of similar nature of work being much more than 80% of the total estimated cost, there was no difficulty on the part of TEC to accept the same and consider the technical bid of the Petitioner favourably.

16. In that view of the matter, this Court is of the considered opinion that rejection of the technical bid of the Petitioner as communicated to it under Annexure-5 is not just and proper. Accordingly, the same is set aside. The Tender Evaluating Committee is directed to consider the financial bid of the Petitioner

along with other bidders who have come out successful in the technical bids afresh and proceed with the matter accordingly.

17. This writ petition is allowed to the above extent, but, in the circumstances, there shall be no order as to cost.

