
(2011) 07 J&K CK 0032

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 537 of 2011

National India Construction Company	APPELLANT
Vs	
State of J. and K. and Others	RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Citation : (2011) 3 JKJ 463

Hon'ble Judges : Jai Pal Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J. P. Singh, J.—The Petitioner-National India Construction Company Engineers and Contractors, submitted its Tender documents to

compete for the Award of Contract-JK04-132 Construction of Road from R.D kilometers 2nd of Nagarlanchan to Kansar, in Block Bhaderwah

and JK04-111-Gando to Dharayari in Block Bhaleesa, in response to Chief Engineer, Pradhan Mantri Gram Sadak Yojana (PMGSY) JKRRDA,

Jammu's Notice No. 7/PMGSY/Jammu of October 2010 dated 21.10.2010. The bids were submitted in two Formats, i.e., (i) Technical Bid and

(ii) Financial Bid.

2. The Respondents found the Petitioner's Technical Bids Non-Responsive, which, in turn disentitled it, to seek consideration of its Financial Bids

to compete for the Award of the Contracts.

3. Aggrieved by the rejection of its Technical Bids for the Contracts, referred to hereinabove, the Petitioner has approached this Court seeking

quashing of the Chief Engineer, PMGSY (JKRRDA) Jammu's No. CEJ/PMGSY/1038-1074 dated 23.04.2011, wherein the Petitioner does not

figure in the list of those whose bids were found Responsive, besides a Command to the Respondents to consider its Financial Bids for the

Contracts, treating its Technical Bids, Responsive.

4. In their Response to the Writ Petition, the Respondents say that the Technical Bids submitted by the Petitioner were not accompanied by the

requisite Certificate in respect of its Ongoing Commitments, in conformity to Clause 4.6 of the Clauses in Section 2 appearing under the heading

'Instructions To Bidders' of the Standard Bidding Document, and, in this view of the matter, technical bids were found Non-responsive rendering

the Petitioner disentitled to seek consideration of its Financial Bids for Award of the Contracts.

5. Appearing for the Petitioner, its learned Counsel Mr. Pranav Kohli, submitted that the Petitioner had submitted all requisite documents on the

basis whereof its Bidding capacity 3 could be determined; but the Respondents acted illegally in rejecting its Technical Bids on the ground that it

had failed to submit requisite documents regarding its On-going Commitments, when, as a matter of fact, the Petitioner had no On-going

Commitment, omission to furnish information whereof, would result in holding its technical bids Nonresponsive.

6. According to the learned Counsel, the Contract bearing Package No. JK05-049 regarding construction of Road from Tara to Doha allotted to

the Petitioner, could not be taken as its On-going Contractual Commitment, because the Contract had not yet taken-off, on the date of the

submission of the bids, for want of forest clearance, and the rejection of bids by the Respondents, treating Contract Package No. JK05-049 as

Ongoing Commitment, was, therefore, erroneous. Alternatively, he submitted that as the details of the On-going works which were tendered prior

to the NIT in question, were already available with the Department, so the Respondents could well assess its bidding capacity applying the formula

indicated in Clause 4.6 of the Standard Bidding Document and the rejection of its Technical bid by the Respondents was, therefore, even

otherwise unjustified.

7. Learned Counsel lastly submitted that in view of the information supplied by the Petitioner with the Writ Petition, the Petitioner is required to be

held eligible to compete for the 4 Award of Contracts on the basis of its Financial

Bids.

8. Per contra, referring to Clauses 1.3.2 and 4.6 of the Clauses appearing in the Standard Bidding Document, the Respondents' learned Counsel,

Mrs. Goswami submitted that the Contract Package No. JK05-049 regarding construction of Road from Tara to Doha, which stood allotted to

the Petitioner, was a Contractual Commitment of the Petitioner and its omission to supply requisite Certificates regarding its On-going

Commitment, as compulsorily required in terms of Clause 4.2 of the Standard Bidding Document, rendered it a disqualified bidder and the

rejection of its Technical Bids by the Respondents was, therefore, justified.

9. I have heard learned Counsel for the parties, perused relevant Clauses of the Standard Bidding Document and gone through the findings

recorded by the Respondents holding the Petitioner's Technical Bids Non-Responsive.

10. In view of the case set up by the Petitioner in the Writ Petition and the Respondents' response thereto, the question that, therefore, falls for

determination is as to whether Contract bearing Package No. JK05-049 regarding construction of Road from Tara to Doha, which though allotted

to the Petitioner, had not taken off for want of forest clearance, on the date of the submission of the bids, was the Petitioner's Contractual

Commitment; and its failure to furnish details thereof along with 5 the tender documents, renders it ineligible to seek consideration of its Financial

Bids for Award of the Contracts in question?

11. To deal with the issue, regard needs to be had to some of the Clauses appearing in the Standard Bidding Document.

These read thus:

(A) List of Documents to be enclosed with the Bidding Documents by the intending Bidders (on the formats prescribed in Section 3-Qualification

information)

1 Copy of enlistment card.

2 Profit and loss statement and Auditors for past five years.

3 Total monetary value of civil construction works performed for each of last five years.

4 Successful completion certificate of a work of similar nature and size during the

last five years.

5 Details of works in progress or contractually committed with certificates from the concerned Executive Engineer.

6 Evidence of ownership of major items construction equipments name in Clause 4.4b(B)(1) of APPENDIX TO ITB or evidence or arrangement of possessing them on Hire/lease/buying.

7 Details of technical personals proposed to employed for the contract having the qualification defined in Clause 4.4b(B)(1) of APPENDIX TO ITB.

8 Earnest money.

9. Certificate from the bank stating therein that credit of 10% of contract value will provided by the bank for execution of scheme for which the bid is submitted.

10. Copy of Pan Card.

12. 'Clause 4.2-

All bidders shall include the following information and documents with their bids in Section 3. Qualification Information unless otherwise stated in the Appendix to ITB:

(a) Copies of original documents defining the constitution or legal status, place of registration, and principal place of business; written power of attorney of the signatory of the Bid to commit the Bidder;

(b) Total monetary value of civil construction works performed for each of the last five years;

(c) Experience in works of a similar nature and size for each of the last five years, and details of works in progress or contractually committed with certificates from the concerned officer of the rank of Executive Engineer or equivalent.

(d) Evidence of ownership of major of construction equipment named in Clause 4.4 B (b) (i) of ITB or evidence of arrangement of possessing them on hire/lease/buying as defined therein.

(e) Details of the technical personal proposed to be employed for the Contract having the qualifications defined in Clause 4.4 B (b) (ii) of ITB for the construction.

(f) Reports on the financial standing of the Bidder, such as profit and loss statements and auditor's reports for the past three years;

(g) An undertaking that the bidder will be able to invest a minimum of cash up to the percentage (defined in the Appendix to ITB) of the contract

price of works, during the implementation of the works;

(h) Evidence of access to line(s) of credit and availability of other financial resources/facilities (10 percent of the contract value) certified by banker

(the certificate being not more 6 than 3 months old).

(i) Authority to see references from the Bidder's bankers;

(j) Information regarding any litigation or arbitration during the last five years in which the Bidder is involved, the parties concerned, the disputed

amount and the matter;

(k) Proposals for subcontracting the components of the Works for construction/up-gradation, aggregating to not more than 25 percent of the

Contract Price; and if amount put to bid is Rs. 5 Crore and above, subcontracting of part/full routine maintenance of Roads after completion of

construction work.

(l) The proposed methodology and programme of construction, backed with equipment and material planning and deployment, duly supported

with bRoad calculations and Quality Management Plan proposed to be adopted, justifying their capability of execution and completion of the work

as per technical specifications and within the stipulated period of completion.

13. 'Clause 4.6 -

Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity for construction work is equal to or more

than the total bid value. The available bid capacity will be calculated as under:

Assessed Available Bid capacity = $(A * N * M - B)$

Where A = Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the last year

at the rate of 8 percent a year) taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bids are invited (period up to 6 months to be taken as halfyear and more

than 6 months as one year).

M = 2 or such higher figure not exceeding 3 as may be specified in the Appendix to ITB.

B = Value, at the current price level, of existing commitment and on-going works to be completed during the period of completion of the works for which bids are invited.

Note: The statements showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for

each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent.

14. ' Section 3

Qualification Information

1.3.2. Information on Bid Capacity (works for which bids have been submitted and works which are yet to be completed) as on the date of this

bid.

Existing commitments and on-going construction works:

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15. Before dealing with the formulated issue, the expression 'Contractually Committed' appearing in Clause 4.2(C) of SECTION 2 of the

Standard Bidding Document, needs to be properly understood, to find answer to the issue in question.

16, The use of two expressions viz., 'Works in progress' or 'Contractually committed', appearing in Clause 4.2(C), when construed, in the light of

the phraseology used in Clause (C), leaves no manner of doubt, that what the Respondents had intended the desirous tenderers to supply it, was

the details of the works which were already in progress, And which, they had contractually committed to undertake, so that the ASSESSED

ABVAILABLE BIDDING CAPACITY, of the Bidder could be ascertained, meaning thereby, that every tenderer, desirous of competing for the

Award of the Advertised Contracts, was required to furnish the details of the works which were in progress, besides those, it was under

contractual obligation so to do, pursuant to the sanction of any allotment in its favour to execute the work.

17. Looking to the intention of the Respondents to know the capacity of the desirous bidder as to whether or not it, according to their

contemplation, was eligible to compete for the Contract, the expression 'or' appearing in the Clause 4.2 (C) of Section 2 of the Standard Bidding

Document, cannot be read disjunctively, because such a construction, may not suit to express the declared intention of the Respondents, which is

apparent from a bare reading of various clauses of Section 2 of the Standard Bidding Document, in terms whereof, the Assessed Available Bid

Capacity of the desirous bidder, was required to be determined taking into consideration the VALUE AT THE CURRENT PRICE LEVEL, of

existing commitment(s) and On-going works to be completed during the period of completion of the works for which the bids were invited.

18. Although the expression 'Contractually Committed' is not defined in the Tender Documents yet when read in conjunction with the other

expression 'Works in Progress', appearing in Clause (C) of Section 2 of the Standard Bidding Document, it becomes explicit that the expression

'Contractually Committed' pertains to those works which the bidder had undertaken to do for the Respondents.

19. Therefore, to say that, those works, which, though allotted, had not actually taken off, because of one or the other reason(s), would not fall

within the meaning of the expression 'Contractually Committed' would be doing violence to the provisions of the Clause which the Respondents

had introduced to know the bidding capacity of the bidder to participate in the financial bids and successfully complete the work, if allotted.

20. The Petitioner's learned Counsel's contention that as the 9 Contract bearing package No. JK05-049 regarding construction of Road from Tara

to Doha, though allotted to the Petitioner, had not taken off, would not attract the expression 'Contractually Committed works', is therefore, found

untenable, in that, with the allotment of the work and its acceptance thereof, the Petitioner becomes contractually committed to the Respondents to

undertake the work, and, in this view of the matter, it was required to supply the requisite particulars in respect of the allotted work.

21. At this stage, reference needs to be made to Clause 4.6 of Section 2 of the Standard Bidding Document which prescribes additional necessary

condition for those who fulfill the Minimum Qualification Criteria, to acquire requisite eligibility to seek consideration of their bids.

22. In terms of the Clause referred to hereinabove, those bidders who meet the Minimum Qualification Criteria will be qualified to compete,

ONLY IF, their Available Bid Capacity for construction work was equal to or more than the total bid value, in terms of the Standard Bidding

Document, which was required to be determined in terms of Clause 4.6 of the Standard Bidding Document, which reads thus:

23. 'Clause 4.6 -

Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity for construction work is equal to or more

than the total bid value. The available bid capacity will be calculated as under:

23. Assessed Available Bid capacity = $(A \times N \times M - B)$

where A = Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the last year

at the rate of 8 percent a year) taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bids are invited (period up to 6 months to be taken as halfyear and more

than 6 months as one year).

M = 2 or such higher figure not exceeding 3 as may be specified in the Appendix to ITB.

B = Value, at the current price level, of existing commitment and on-going works to be completed during the period of completion of the works for

which bids are invited.

Note: The statements showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for

each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent.

24. Admittedly, the Petitioner had not supplied the details of the work which it had contractually committed to the Respondents (Contract bearing

package No. JK05-049 regarding construction of Road from Tara to Goha) with requisite certificate from the concerned officer of the rank of

Executive Engineer, so it would not fall within the definition of a qualified bidder. This is so because furnishing of the details of the contractually

committed works, is undoubtedly an essential condition to qualify as an eligible bidder because in the event of a bidder's commitment to the

Respondents to undertake the allotted work, its bidding capacity, may not be determined, in terms of the Standard Bidding Document, unless the

Respondents would know its Assessed Available Bid Capacity applying the formula appearing in Clause 4.6 of Section 2 of the Standard Bidding

Document, which requirement, is a necessary condition contemplated by the Standard Bidding Document, which a bidder desirous of seeking

consideration of its financial Bid, must necessarily possess.

25. In view of the above discussion, the formulated question is, therefore, answered saying that the Contract bearing package No. JK05-049

regarding construction of Road from Tara to Doha was a contractual commitment of the Petitioner with the Respondents regardless of the fact that

the work had not yet taken off and the Petitioner's omission to supply the details thereof along with requisite certificate from the concerned Officer,

rendered it ineligible to compete in the Financial Bids.

26. The Petitioner's learned Counsel's next submission that the details of the Contract Package No. JK05-049, being already with the

Respondents, its bid needed consideration taking into account the information available with the Respondents, too is found without merit, in that,

the eligibility and qualification of the Petitioner like any other bidder, was required to be determined on the basis of the documents which a bidder,

in terms of the Standard Bidding Document was required to supply to seek consideration of its bid which, inter alia, specifically required the bidder

to furnish the details of the works in progress or contractually committed, with requisite certificate from the concerned Executive Engineer.

27. Even otherwise, non-furnishing of requisite certificate from the concerned Executive Engineer disables the Respondents to determine the

Assessed Available Bid Capacity of the bidder in terms of Clause 4.6 of the Standard Bidding Document, adopting the formula indicated in the

Clause.

28. In the absence of the certificate from the concerned Engineer, the Respondents would be disabled to find the value, at the Current Price Level,

of the existing commitments of the Contractor and the omission of the Petitioner to supply the requisite information, looked from any angle, cannot

be termed as inconsequential, as argued by the Petitioner's learned Counsel.

29. Petitioner's eligibility was required to be determined on the basis of the material supplied by it along with the Tender Documents. The

Information supplied by the Petitioner in the Writ Petition, and that too without

requisite certificate of the concerned Engineer and necessary

documents, which it was required to supply in terms of the Standard Bidding Document, cannot help it in any way to improve its case to seek

consideration of its Financial Bids to which it was found disentitled by the Respondents.

30. The Respondents have given justifiable reasons to hold the Petitioner's bids irresponsible. Their decision cannot, therefore, be faulted.

31. For all what has been said above, the Petitioner's Writ Petition is, therefore, found without merit. It is, accordingly, dismissed lifting interim

order dated 26.4.2011.

32. The records be returned to the learned State Counsel.