(2015) 03 DEL CK 0007

In the Delhi High Court

Case No : WP (C) 1344/2015, CM Nos. 2358/2015 and 2907/2015

Opaque Infrastructure Pvt. Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Citation : (2015) 4 AD 460

Hon'ble Judges : Sanjeev Sachdeva, J.;Badar Durrez Ahmed, J.

Bench : Division Bench

Advocate : C. Mukund and Abilash Attri, for the Appellant; Sanjeev Narula and Ravindra Gill, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.—The petitioner has filed the present petition seeking a writ in the nature of mandamus directing the respondent to accept the National Small Industries Corporation (NSIC) certificate submitted by the Petitioner in furtherance of the tender as valid and eligible for exemption from payment of earnest money and for further directing the respondent to open the price bid of the petitioner.

2. On 29.07.2014, the respondent No. 2 Indian Oil Corporation Limited floated four separate Notices inviting e-tender (NIT) for supply and installation of High Mast Signage work including design manufacturing, supply, transportation, installation and Commissioning at various retail outlets of Indian Oil Corporation. The tender was a two bid system, i.e., the technical bid and the price bid.

3. On 04.08.2014, the petitioner submitted both the technical as well as the price bids. The petitioner claimed itself to be a Micro, Small and Medium Enterprise (MSME).

4. As per the petitioner, the petitioner was eligible for exemption from submitting earnest money deposit. As per the petitioner certificate dated 06.06.2014 issued by NSIC was submitted with the bid document.

5. On 11.11.2014, the Indian Oil Corporation Limited is stated to have informed the petitioner that the technical bid of the petitioner had been rejected. It is contended that the reasons for rejection were not communicated. However, subsequently on a demand, the reason communicated was that the petitioner did not meet the pre-qualifying condition of the NIT. As per the petitioner, the alleged ground of rejection is the invalidity of the NSIC certificate.

6. The petitioner contended that since the petitioner was an MSME, the petitioner was entitled to an exemption from payment of Earnest Money Deposit and as such the respondents could not have rejected the petitioner''s technical bid. Impugning the rejection of the technical bid by the respondents, the petitioner has filed the present petition.

7. On 10.02.2015, notice in the petition was issued and it was directed that in the meantime, the petitioner shall deposit the entire Earnest Money Deposit as required from those bidders who do not qualify for any exemption and the price bid of the petitioner shall be opened and the result shall be handed over to this Court within one week from today.

8. An application was filed by the respondent No. 2 seeking vacation of the interim order and the matter was, accordingly, taken up on the said application and was finally heard.

9. As per the respondents, it was a tender condition that the Earnest Money Deposit instrument had to be uploaded on the e-tender website as a PDF document and all tenderers, who claimed exemption from Earnest Money Deposit, should upload the valid exemption NSIC certificate. All documents and Earnest Money Deposit instruments were to be uploaded with the technical/ commercial bid. It is contended that the petitioner, having accepted the tender condition and having submitted his bid without any demur or objection, cannot be permitted to impugn the tender condition and in case, the petitioner desired to avail of any exemption in accordance with the terms of the tender condition, then the petitioner had to strictly comply with the same. It is contended that the petitioner applied in the MSME category seeking exemption from deposit of EMD, the petitioner should have ensured that the certificate submitted by the petitioner was in conformity with the tender conditions and entitled the petitioner for an exemption. It is submitted that the exemption from submission of EMD was only available to the parties as per MSME Act 2006. It is contended that as per the tender, for a certificate to be valid, it should be valid on the date of the opening of the bid and also cover the items tendered. It is submitted that it was a condition of the tender that, in case, EMD was not furnished, the bid shall be rejected.

10. It is submitted that the tenders were invited for supply and installation of High Mast Signage and as such the petitioner was required to submit a Certificate covering the said item/type of work. It is contended that the certificate submitted by the petitioner was covering three items, i.e., (i) Civil

Engineering Services (ii) Set Design Building/Architectural Planning Services/ Electrical Designing/Fabrication Services and (iii) Technical consultancy Services, which were not items covered by the subject tender, i.e., High Mast Signage or similar works. It is contended that other participants, who had claimed exemption, had submitted NSIC certificates covering the items of work covered by the subject tender.

11. It is contended that out of 15 participants, 12 participants were NSIC registered out of which 10 were qualified as their certificates covered the tender work. It is submitted that since the petitioner did not have the required certificate as per the terms of the tender, he was not eligible for exemption from payment of Earnest Money Deposit and further as the petitioner had not deposited the earnest money, the bid of the petitioner had been rejected.

12. We find merit in the contention of the Respondents.

13. The subject tender is for the following work: Sub:

Supply and Installation of HMS, work includes design, manufacturing, supply, transportation, Installation and commissioning of the complete High Mast Signage, display panels, including civil foundation works, earthing and lightning protection system etc ''at Indian Oil Retail Outlets under Northern Region comprising of Delhi State Office, Punjab State Office, Rajasthan State Office, Uttar Pradesh State Office-I and Uttar Pradesh State Office- II 14. Clause 15 of the tender defines similar work as under:

''Similar Works'' shall mean Supply / Supply and installation of either High Mast Signage or High Mast Lighting system or Monopoles in Petroleum / Power / Telecom sector or Stadium Lighting of minimum height 17 mts, fabricated from steel plates, having hot dipped galvanization as metal protection.

OR

Supplying and installation of RVI elements viz. Monoliths / Totems / Fascia / Signages / Building Cladding / Column cladding involving primarily use of (ACM) Aluminium Composite Material

15. Clause 6 dealing with the Earnest Money Deposit lays down the following condition for exemption from the condition of EMD as under:

EMD Rs 6.30 Lacs

(DD/ BANKERS'' CHEQUE/ BG)

Exemption from submission of EMD:

a. Parties as per MSME act, 2006 (erstwhile NSIC registered parties). In such cases, the certificate to be submitted by the MSME parties shall be valid on the date of tender opening and must cover the items tendered. -

b. PSUs (Central and State) and JVs of IOCL.

(Emphasis Supplied)

16. A perusal of the tender document shows that the bidder had to submit the Earnest Money Deposit or in the alternative if the bidder was claiming exemption, then the certificate to be submitted by the MSME party should be valid on the date of the tender opening and must cover the items tendered.

17. The item in the subject tender is complete High Mast Signage, Display Panels including civil foundation works, earthing and lighting protection system. The similar works as defined in the tender documents means supplying and installation of either High Mast Signage or High Mast Lighting system or monopoles in Petroleum, Power Telecom sector or Stadium Lighting of minimum Height 17 mts fabricated from steel plates having hot dipped galvanization or metal protection or supplying and installation of RVI elements viz Monoliths/ totems/ Fascia/ Signage/ Building Cladding/ Column Cladding involving primarily use of Aluminum Composite Material.

18. The certificate submitted by the petitioner issued by the NSIC covered the following three items.

19. A comparison between the item covered by the tender and the items covered by the certificate clearly shows that the items covered by the certificate are not the items for which the subject tender was issued. Though part of the item covered by the certificate includes civil foundation work, however, that is not the main item for which the tender has been issued and that is only ancillary to the main tender item i.e. supply and installation of High Mast Signage. The tender has been issued for High Mast Signage and none of the three items as specified in the certificate submitted by the petitioner qualify as High Mast Signage or similar work as defined in the tender document.

20. The petitioner submitted the bid being aware of the tender conditions and as such the petitioner should have ensured that if the petitioner was claiming exemption from payment of Earnest Money Deposit then the certificate submitted by it should conform to the tender conditions. The petitioner, having not submitted either the Earnest Money Deposit or a valid certificate qualifying for an exemption, cannot be permitted raise to a grievance of rejection of the bid.

21. There is no merit in the contention of the counsel for the petitioner that the respondents could not have qualified the NSIC certificate by making it restricted to the items covered by the tender and NSIC certificate should have been treated as valid for all items. The tender document itself stipulated that the certificate must cover the items tendered. The petitioner, being aware of the said tender conditions participated in the tender and having participated in the tender, cannot challenge or impugn the tender condition. The petitioner having participated in the tender process can only expect equality and fair treatment in the matter of evaluation of competitive bids. The petitioner cannot be permitted to challenge the terms and conditions of the tender after he had participated in the same.

22. Since the petitioner neither submitted the EMD nor a valid certificate as required by the tender conditions, the bid of the petitioner was clearly non-responsive. The respondent No. 2, in our view, has rightly rejected the technical bid of the petitioner.

23. In view of the above, we find no merit in the petition. The writ petition is, accordingly, dismissed leaving the parties to bear their own costs. The interim order dated 10.02.2015 is vacated.