(2003) 09 OHC CK 0061

In the Orissa High Court

Case No : Writ Petition (C) No. 6962 of 2003

P.K. Construction and S.N. Kanungo APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 24-09-2003

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (2003) 2 OLR 518

Hon'ble Judges : Sujit Barman Roy, C.J;L. Mohapatra, J

Bench : Division Bench

Advocate : R.K. Rath, S.S. Kanungo and N.R. Rout, for the Appellant; P. Mohanty, A.G.A., for the Respondent

Judgement

L. Mohapatra, J.—The petitioner in this writ application calls in question the legality of the order in Annexure-5 issued by the opposite party No. 5 rejecting the security bid given by the petitioner and holding the tender as non-responsive in terms of ITB Clause 16.3.

2. Case of the petitioner is that it is a joint venture firm and takes up different works in the State of Orissa. Opposite party No. 2 through the Orissa State Disaster Mitigation Authority (OSDMA) invited sealed bids for the work C.D.R. to Kartiachira Drainage System in Balasore District in Package No. ST/BLDS-I which was approximately valued at Rs. 1,87,38,140/-. The petitioner being joint venture firm participated in the bid along with four others. The petitioner''s bid being the lowest responsive bid, decision was taken to recommend petitioner''s bid for approval and accordingly the Chief Engineer, Drainage Division, Cuttack (opposite party No. 2) forwarded the same to the opposite party No. 3. On 8.5.2003 the Tender Committee of opposite party No. 3 recommended petitioner''s bid the World Bank Group (opposite party No. 5) for approval. On receipt of the said recommendation the Tender Committee of the World Bank Group sought for certain clarifications vide its letter dated 21.5.2003 from opposite party No. 3. Points on which clarification was sought for is that whether

in a bid submitted in the name of Joint Venture, the bid security should be in the name of Joint Venture, whether the Joint Venture agreement is verified and found to be acceptable and further clarification was also sought for about the credit facility certificates. In response to the above queries, the opposite party No. 3 clarified the points raised by the opposite party No. 5. It was specifically mentioned by the opposite party No. 2 that as per clause 4.4. of the bid documents, bids from Joint Ventures are acceptable and minimum qualification criteria for each partner of the Joint Venture individually is not stipulated in the document, for which experience of M/s. S.N. Kanungo, the second partner of the Joint Venture was considered. It was also clarified that as per the requirements of Clause 16, bid security amount was made by means of bank guarantee from a nationalised bank and therefore should be accepted. However, in Annexure-5 the said recommendation was not accepted and the opposite party No. 5 observed that the bid security having been furnished by one of the partners of the Joint Venture and not having been given by the Joint Venture, the same violates the guidelines and accordingly the tender submitted by the petitioner ultimately should be treated as non-responsive, Challenging the said decision of the opposite party No. 5, this writ application has been filed.

3. Counter-affidavit has been filed by the opposite parties 1 to 4. It is stated in the counter affidavit that bid security furnished is not acceptable since the same was by one of the partners of the Joint Venture and not by the Joint Venture. Defects pointed by the opposite party No. 5 was justified and while recommending case of the petitioner said fact had been overlooked by the Department.

4. Considering the nature of dispute as presented before this Court by both parties, it appears that the dispute only relates to the bid security which is admittedly furnished by one of the partners of the Joint Venture. Shri Rath, learned counsel appearing for the petitioner submitted that even though the bid security is furnished by one of the partners of the Joint Venture, the same should be accepted by the opposite parties in view of the fact that the entire purpose of keeping bid security is satisfied by furnishing bank guarantee, more so, when the bank itself by letter dated 29.5.2003 has clearly indicated that the bid security for the work concerned is valid and accepted by the bank even if P.K. Constructions has bided in name of its joint venture with M/s. S.N. Kanungo and bank guarantee having been issued in favour of the Executive Engineer, Drainage Division, Balasore and the same can always be encashed/invoked. Merely because bank guarantee has been furnished by one of the parties of the Joint Venture, the opposite parties were not justified in treating the tender of the petitioner non-responsive.

5. Shri Mohanty, learned Additional Government Advocate appearing for the opposite parties, on the other hand, submitted that as per the Guidelines Procurement under IBRD Loans and IDA Credits documents for works shall require security in an amount sufficient to protect the Borrower in case of breach

of contract by the Contractor. This security shall be provided by a performance bond or a bank guarantee in an appropriate form and amount, as specified by the Borrower in the bidding document. The amount of the bond or guarantee may vary, depending on the type of security furnished and on the nature and magnitude of the works. A portion of this security shall extend sufficiently beyond the date of completion of the works to cover the defects liability or maintenance period up to final acceptance by the borrower; alternatively, contracts may provide for percentage of each periodic payment to be held as retention money until final acceptance. Contractors may be allowed to replace retention money with an equivalent security after provisional acceptance. It was further contended that in view of such guidelines, the contractor in whose favour the work is awarded is required to furnish a performance security in form of bond or bank guarantee. In the present case, the tenderer is a Joint Venture and therefore performance security has to be given by the Joint Venture and not by a partner of the Joint Venture. In view of the above reasons, it is stated that the World Bank (opposite party No. 5) has not accepted the performance security furnished by the petitioner and while recommending the tender of the petitioner this fact was overlooked. Shri Mohanty further submitted that no writ application is maintainable against opposite party No. 5 and therefore the same should be dismissed.

6. Bid Document for the concerned work was produced by the learned counsel for the petitioner for examination of the Court. Clause 4.4 of the said Bid Document prescribes that bids are acceptable from the Joint Venture firm. So far this aspect of the case is concerned, there is no dispute. Clause 16 of the Bid Document prescribes for Bid Security. Said clause provides that the bidder shall furnish, as part of his Bid, a Bid security in the amount as shown in column 4 of the table of IFB for the particular work. This bid security shall be in favour of the Executive Engineer, Drainage Division, Balasore and may be in one of the forms, such as bank guarantee issued by a nationalised/scheduled bank located in India. Clause 16.6 of the bid Document further prescribes that the bid security may be forfeited for the following reasons :

(a) If the Bidder withdraws the Bid after Bid opening during the period of Bid validity;

(b) If the Bidder does not accept the correction of the Bid price, pursuant to Clause 27;

(c) In the case of successful Bidder, if the Bidder fails within the specified time limit to (i) sign the agreement; or (ii) furnish required performance security.

Conditions of the Contract in the Bid Documents provides for securities. Clause 52.1 of the Conditions of Contract provides as follows:

"The performance security (including additional security for unbalanced bids) shall be provided to the Employer not later than the date specified in the letter of Acceptance and shall be issued in an amount and form and by a bank or surety acceptable to the Employer o and denominated in Indian Rupees. The Performance Security shall be valid until a date 28 days from the date of expiry of Defects Liability period and the additional security for unbalanced bids shall be valid until a date of 28 days from the date of issue of the certificate of completion. The performance security of Joint Venture shall be in the name of the Joint Venture."

7. On plain reading of the aforesaid provisions contained in the Bid Document as well as the conditions of contract read with the guidelines as indicated above and relied upon by the learned Additional Government Advocate, it is clear that the performance security is required by the Department to protect borrower in case of breach of contract by the contractor. Therefore, the entire purpose of including this condition is that in case the contractor commits any breach of contract, the performance security can be invoked/encashed so that the borrower does not sustain any loss. Now coming to the facts of the case in hand, admittedly, the bidder is a Joint Venture firm and performance security in shape of bank guarantee has been furnished by one of the partners of the Joint Venture firm. Question is whether furnishing of such bank guarantee towards performance security by one of the partners of the Joint Venture firm serves the purpose behind inclusion of such condition. As is evident from letter of the bank (Annexure-7), prima facie, it appears that the bank guarantee is in respect of the work in favour of the designated officer. The letter of the bank relied upon by the petitioner is quoted below :

"This is to state that the Bank Gurantee No. 22/03 dated 21.4.03 issued in favour of Executive Engineer, Drainage Division. Balasore as Bid Security for the work "CDR to Kantiachira Drainage System in Balasore District (Package No. ST/ BLDD-I)" is valid and accepted by the Bank even if P.K. CONSTRUCTIONS has bided in name of its Joint venture with M/s. S.N. KANUNGO namely P.K. Constructions - S.N. Kanungo JV. All terms and conditions as the Guarantee remain unchanged."

Considering the declarations given by the bank as quoted above, we are, prima facie, of the view that the purpose for which such a condition has been included, can be met even if the said bank guarantee has been furnished by one of the partners of the Joint Venture. We are of further view that instead of insisting on technicalities the Department should look to the purpose for which such performance security is required to be furnished and whether by furnishing of bank guarantee by one of the partners of the Joint Venture satisfies the purpose or not.

8. We, therefore, dispose of this writ application directing the opposite parties 1 to 4 to reconsider the issue in view of the observations made by us in consultation with the opposite party No. 5 and take a decision afresh as early as possible so that the work does not suffer. We are not considering the objections raised by the learned counsel for the State Government regarding maintainability of the writ application against the opposite party No. 5 as no writ is being issued

against opposite party No. 5.

Sujit Barman Roy, C.J.

I agree