(2022) 12 DEL CK 0013

In the Delhi High Court

Case No : Civil Writ Petition No. 15632 Of 2022, Civil Miscellaneous Application No. 48658-59 Of 2022

Ram Charan Bansal Construction Pvt. Ltd APPELLANT

Vs

Delhi Jal Board & Ors. RESPONDENT

Date of Decision : 05-12-2022

Acts Referred:
Constitution Of India, 1950 — Article 19(1)(g)

Citation : (2022) 12 DEL CK 0013

Hon'ble Judges : Satish Chandra Sharma, CJ;Subramonium Prasad, J

Bench : Division Bench

Advocate : Shikha Goel, Gagandeep Garg, Nandita Rao, Malvi Balyan

Final Decision : Dismissed

Judgement

1. The Petitioner herein who was unsuccessful in getting the tender for cleaning Gravity Duct No.1 from Kilokari SPS (Filter house) upto Okhla STP, which had been invited by the Respondent No.1 herein vide press notice inviting tender No. 19/EE (Civil) Plant SDW S/E/2022-23, has approached this Court challenging the award of the tender to Respondent No.4 herein on the ground that Respondent No.4 has not uploaded its bidding capacity.

2. Shorn of details, the facts leading to the instant Writ Petition are as follows:

a) It is stated that the Petitioner is a contracting company having expertise in cleaning drains/sewer lines/sumps/gravity duct by machines. It is stated that the Respondent No.3 herein (Executive Engineer (Civil) Plant SDW S/E, Delhi Jal Board) on instructions of Respondent No.2 herein (Additional Chief Engineer (P)-III, Delhi Jal Board) and in the name of Respondent No.1 herein, vide press notice inviting tender No. 19/EE (Civil) Plant SDW S/E/2022-23, invited a tender for cleaning Gravity Duct No.1 from Kilokari SPS (Filter house) upto Okhla.

b) A pre bid meeting was scheduled to be held on 23.09.2022 which could not be conducted due to technical reasons and the same was re-scheduled for

26.09.2022. The last date of submission of tender was extended from 06.10.2022 to 10.10.2020.

c) It is stated that six bids were received by the Respondent No.1, including the bid of the Petitioner herein and the Respondent No.4 herein. It is stated that all the six bids were found to be technically compliant.

d) The Financial bids were, thereafter, opened and the bid of Respondent was accepted as it was the lowest. It is stated in the Writ Petition that in order to maintain transparency, the selected bidders could view and download each other’s documents after the acceptance of the bid. It is stated that when the Petitioner herein downloaded the documents of the Respondent No.4, who was the successful bidder, it was found that the Respondent No.4 did not qualify/meet the financial eligibility criteria, i.e. bidding capacity, which could not be ignored in view of the condition No.36 of the Specifications and Special Terms & Conditions for the work in question. The Petitioner relies on condition No.36 which states that the registered contractors of the Respondent No.1 herein shall be allowed to participate up to their tendering limits without checking their financial and technical credentials except bidding capacity. The Petitioner has, thereafter, filed the instant Writ Petition with the following prayer(s):

“A. Declare the decision of the Respondent No. 1, 2 & 3 for accepting the bid of the Respondent No.4 for tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23 being arbitrary, illegal, void; and unconstitutional under Article 19(1)(g) of the Constitution of Indian;

B. Issue a Writ in the nature of Mandamus or any other appropriate Writ or direction directing the Respondent No. 1, 2 & 3 to withdraw the decision of accepting the bid of the Respondent No. 4 for tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23;

C. Direct the Respondent No. 1, 2 & 3 to issue formal letter cancelling/ withdrawing the decision of accepting the bid of the Respondent No. 4 with respect to the tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23; D. direct the Respondent No. 1, 2 & 3 to not to issue any work order with respect to tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23 issued in favour the Respondent No. 4 i.e., M/S Raj Engg. Company;

E. Direct the Respondent 1, 2 & 3 to issue a formal letter cancelling/ withdrawing the work order if already issued for tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23 issued in favour of the Respondent No.4;

F. Direct the Respondent No. 1, 2 & 3 to award the tender work for "Cleaning of Gravity Duct No.1 from Kilokari SPS (Filter house) upto Okhla STP" vide tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23 to the petitioner being the lower bidder after the Respondent No.4;

G. Pending the hearing and disposal of the present writ petition, stay the operation of the decision of the Respondent No. 1, 2 & 3 for award of tender work for "Cleaning of Gravity Duct No.1 from Kilokari SPS (Filter house) upto Okhla STP" vide tender ref. no. 19/EE (Civil) Plant SDW S/E/ 2022-23 to Respondent No.4;

H. Grant ad-interim reliefs in terms of (G) above;

I. Award costs of this petition and orders thereon;

J. Pass any other or further order(s) which this Hon'ble Court may deem fit and proper, in the facts and circumstances of the case, in the interest of justice.”

3. Learned Counsel for the Petitioner submits that the bid of the Respondent No.4 ought not have been accepted for the reason that they did not have the requisite bidding capacity and, therefore, their bid ought to have been disqualified. It is contended that if the bid of the Respondent No.4 is disqualified then the contract should be awarded to the Petitioner herein who is the second lowest bidder. Learned Counsel for the Petitioner places reliance on Clause 36 of the Technical Eligibility Criteria.

4. Clause 36 of the Technical Eligibility Criteria and Clause B4 of the Financial Eligibility Criteria reads as under:

“Clause 36 of the Technical Eligibility Criteria

36. All registered contractors of Delhi Jal Board in a particular category shall be allowed to participate up to their tendering limits without checking their financial and technical credentials except bidding capacity, the status of debarring and undertaking regarding litigation/ arbitration, etc. They shall be exempted from submitting all documents related to the financial and technical eligibility category mentioned in GCC except what is required including bidding capacity and status of debarring along with other documents such as undertaking regarding litigation/ arbitration etc.” (emphasis supplied)

“Clause B4 of the Financial Eligibility Criteria

B.4 Available Bidding Capacity (As per Format 4A) Not applicable

The bidder should have a minimum available bidding capacity of 100 % of the ECV/amount put to Tender i.e. The available bidding capacity shall be worked out by the following formula

Bidding Capacity = (A*N*3) – B

Where, A = Maximum value of construction works executed in any one year during the last five financial years i.e. 2020-21,2019-20, 2018-19, 2017-18and 2016- 17 taking into account the completed as well as works in progress (updated to the current price level), rate of inflation has been taken as 10% compounded per year).

N = Number of years prescribed for completion of works for which bids has been invited.

B = Value at current price level of existing commitments and ongoing works to be completed during the next XX years (period of completion of work for which bids have been invited).Bidders will give a calculation for the same.

Example:

1. For calculating "A" – let's assume the maximum value of construction turnover in last 5 financial years is Rs. 100cr in FY 2016-17. Then taking 10% as given inflation rate, the present value of the maximum construction turnover in FY 2016- 17 shall be Rs 110cr [=100*(1+10%)].

2. For "N", let's assume the current project duration to be 3 years.

3. For "B", let's assume that value for existing commitments and ongoing work in 2014-15, 2015-16 and 2016-17 be Rs. 100 cr., Rs. 150 cr. and Rs. 200 cr. respectively. Then taking 10% as given discount rate, the current price level of existing commitments and ongoing works shall be Rs. 401.65 cr. [={100/(1+10%)^0} + {150/(1+10%)^1} + {200/(1+10%)^2}]].

Bidding Capacity = (A*N*3) – B

= (110*3*3) – 401.65 = Rs. 588.35 cr."

It is the contention of the learned Counsel for the Petitioner that this Clause will over-ride Clause B4.

5. Heard the counsels for the parties and perused the material on record.

6. Material on record indicates that after coming to know that the Respondent No.4 did not have the requisite bidding capacity, the Petitioner wrote a letter to the Respondent No.1 stating that Respondent No.4 has not submitted their bidding capacity and their bid was not technically compliant and, therefore, the financial bid of the Respondent No.4 ought not have been opened. The letter dated 19.10.2022 was replied to by the office of Delhi Jal Board. The said letter reads as under:

"No. DJB/EE(C) Plant/SDW/SE/2022-23/3538 Dated 21.10.2022

M/s. Ram Charan Bansal Construction Private limited, 60, F Block, Vikaspuri, New Delhi 110018.

Name of Work:- Cleaning of Gravity Duct no 1 from Kilokari SPS (Filter House) upto Okhla STP.

Press NIT No.19 dated 16.09.2022. Tender ID: 2022_DJB_229406_1.

Reference No: Letter No Nil Dated 19.10.2022.

The Technical and Financial Eligibility Criteria has already uploaded on DJB Website on the link http:/ /delhi jalboard.nic.in/content/technical-and-financial-eligibility-criteria-tender, it is clearly mentioned under the Sub head "financial Eligibility Criteria" of Eligibility Criteria at Page No 13 vide Clause No B-4, Available Bidding Capacity is applicable for projects with ECV (Estimated Contract Valve) greater than INR 25 Cr.

Also, it is clearly mentioned/marked as Not Applicable in front of the Clause No B.4 "Available Bidding Capacity" (As per format 4A) at Page No 14 of the Uploaded Bid Document of the above mentioned work, as the ECV of the work is less than 25 Cr. Accordingly, Technical Evaluation of the Bids has been carried out.

This issue with the approval of competent authority. Encl: As Above." (emphasis supplied)

7. It is pertinent to mention here that the project value of the instant tender is 4.5 Crores and, therefore, Clause B4 of the Financial Eligibility Criteria is not applicable to the present case.

8. Clause 36 of the Technical Eligibility Criteria is a general criteria laid down by the Respondent No.1 herein for the tenders floated by it whereas Clause B4 of the Financial Eligibility Criteria is a specific criteria in light of the fact that Clause B4 clearly states that it was "not applicable" to the tender in question and, therefore, Clause 36 of the Technical Eligibility Criteria cannot over-ride Clause B4 of the Financial Eligibility Criteria, which is a more specific criteria. In Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, which was decided almost 40 years ago, the Apex Court has held that the words used in the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. In this context, the use of the word "not applicable" in Clause B4 of the Financial Eligibility Criteria of the tender document and its connotation in ordinary parlance cannot be overlooked.

9. A perusal of Clause B4 of the Financial Eligibility Criteria in the notice inviting tender shows that Clause B4 was not applicable to the present tender and all the participants knew that they do not have to submit their bidding capacity. Clause B4 clearly states "Not applicable". In several judgments the Apex Court has laid down that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It has also held time and again that the Courts must not sit as an appellate authority over the way the tender documents have been appreciated by the makers of the documents unless the interpretation is so perverse that no man with ordinary prudence would come to the same conclusion. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited, (2016) 16 SCC 818, the Apex Court has held as under:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

10. This judgment has been quoted with approval by the Apex Court in Uflex Ltd. v. State of T.N., (2022) 1 SCC 165, wherein the Apex Court has observed as under:

"38. On the aspect of Clauses 4.1, 4.5, 4.6(a) and 4.6(b), which formed part of the general terms and the conditions of the technical bid and dealt with the aspect of the past experience in supply and turnover, it was submitted that these very conditions formed a part of the 2015 tender as well. These were challenged by Kumbhat and the writ appeal was dismissed [Kumbhat Holographics v. Commr. of Prohibition & Excise, 2016 SCC OnLine Mad 31424] , and this order was affirmed [Kumbhat Holographics v. State of T.N., 2017 SCC OnLine SC 2065] in the SLP, as already set out hereinbefore.

39. It was emphasised that Alpha's grievance qua the door being shut on them was addressed through Corrigendum 2, which permitted LLPs to participate in the tender. The same very corrigendum addressed the issue relating to hidden text being visible only through Polaroid by adding film. It was submitted that the Division Bench wrongly noted that the hidden colour specification was patented and there were no eligible bidders who would qualify the same as the counter-affidavit contains a list of tenders which had similar conditions and parties had succeeded in the same. For example, the 2019-22 Excise Department, Chhattisgarh tender had similar conditions and Prizm Holography succeeded. The same tender had two other entities who had qualified, including Alpha.

40. On the aspect of tender conditions being tailor-made and the principles of DOSA applying, it was submitted that the latitude must be greater where such high security features are involved. [Assn. of Registration Plates v. Union of India, (2005) 1 SCC 679]

41. Lastly, it was submitted that there was nothing so extraordinary or unique which was being done by the respondents and the practice followed were similar to the practices of other States. The impugned technical specifications have been utilised by several States and public sector undertakings in the past and the tenders were awarded to other players also apart from Uflex and Montage. This would belie the contention that the technology was patented and only a few selected companies were eligible. Not only that, in view of Corrigendum 2, colour change background viewable with film as an identifier did not attract the rigour of a patented technology. In almost an identical tender floated by the State of Chhattisgarh, Uflex and Montage did not succeed during the tendering process.

42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who

are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

43. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a court ought to play."

11. The reply given by the Delhi Jal Board on the question raised by the Petitioner herein is very clear and the tenderer has interpreted the document that Clause B4 of the Financial Eligibility Criteria would not be applicable to the facts of this case and it was not necessary to upload the bidding capacity since the value of the project is only 4.75 crores, i.e. less than 25 Crores.

12. In view of the above, the decision of the Respondents No.1, 2 & 3 does not warrant any interference from this Court.

13. Accordingly, the Writ Petition is dismissed, along with the pending application(s), if any.

