(2017) 02 DEL CK 0078

In the Delhi High Court

Case No : W.P(C) 5996 of 2016

Richa Industries Limited APPELLANT

Vs

Delhi Metro Rail Corporation RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:

Citation : (2017) 4 ADDelhi 398 : (2017) 238 DLT 406

Hon'ble Judges : Mr. Badar Durrez Ahmed and Mr. Ashutosh Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Krishnendu Datta with Ms. Sanjana Saddy, Advocates, for the Petitioner; Mr. Dinesh Malik, Advocate, for the Respondent No. 2

Final Decision : Allowed

Judgement

Ashutosh Kumar, J.—The petitioner, a limited company, engaged in the business of textiles and manufacturing of prefabricated steel structures for erection of warehouses, factories, workshops, railway station sheds, etc. participated in a bid issued by respondent no.1, for supply, fabrication and erection of pre-engineered roof structures of 8 elevated stations. In the aforesaid bid, the respondent no.2 had also submitted a bid and was declared to be the L-1 bidder (lowest bidder) whereas the petitioner was placed at L-2.

2. The petitioner has challenged the decision of the respondent no.1 of opening the cost bid of respondent no.2 on the ground of it''s bid not being compliant with the requirements set out in "Instructions To Tenderers" (ITT).

3. The petitioner, therefore, has prayed for the following reliefs:

(a) "Issue a writ, order or direction in the nature of certiorari and/ or any other writ, order or direction quashing the impugned action/ decision of the Respondent No. 1 in opening and/ or accepting the financial bid of Respondent No. 2 on 16.06.2016 and/or awarding the tender to Respondent no.2;

(b) Issue a writ, order or direction in the nature of certiorari and/ or any other writ directing the Respondent No.1 to disqualify the Respondent No.2 for placing a materially defective bid and providing false information in its bid document;

(c) Issue a writ, order or direction in the nature of mandamus and/ or any other writ, order or direction directing the Respondent No.1 to disqualify the Respondent No.2 and grant the tender to the Petitioner who is the lowest bidder in terms of the Tender rules.

(d) pass an order in respect of the costs of litigation in favour of the Petitioner and against the Respondents.

(e) pass such other and further orders as this Hon''ble Court may deem fit and proper in the interests of justice and equity.

(f) pass such other and further orders as this Hon''ble Court may deem fit and proper in the facts of the instant case."

4. The learned counsel for the petitioner has drawn the attention of this Court to tender conditions especially clause B 1.1 of ITT which provides that the tender documents submitted by the tenderers should include bill of quantities/pricing documents and clause B 1.2 of ITT, requiring the tenderers to submit bids which are responsive to the requirements of the tender documents.

5. Attention has also been drawn to clause 2.5 of the ITT which requires a tenderer to quote prices as per clauses 11.1.1 of the General Conditions of Contract (GCC) and clause 17 of the Special Conditions of Contract (SCC).

6. For the sake of completeness, the aforesaid provisions of ITT, GCC and SCC are extracted below:

Clause B 1.1 and B 1.2 of ITT:

"B1.1 The Tender Documents, as listed below, have been prepared for the purpose of inviting tenders for construction of all Permanent and Temporary Works in connection with Contract: CC-111: Supply, Fabrication, and Erection of Pre-Engineered Roof Structure of 8 elevated Stations viz Shahid Nagar, Raj Bagh, Rajendra Nagar, Shyam Park, Mohan Nagar, Arthla, Hindon River and New Bus Adda (GZB) on Oils had Garden to New Bus Adda Corridor and as more particularly described in these documents.

(a) Notice of Invitation to Tender;

(b) Instructions to renderers including annexures;

(c) Form of Tender Including appendices;

(d) Special Conditions of Contract Including Schedules;

(e) General Conditions of Contract;

(f) Condition of Contracts on Safety, Health & Environment (SHE);

(g) Employer''s Requirements including Appendices;

(h) Technical Specifications;

(i) Tender Drawings;

(j) Bill of Quantities I Pricing Document.

B1.2 The Tenderer is expected to examine carefully the contents of all the above documents. Failure to comply with the requirements of the Tender documents will be at the Tenderer''s own risk. Tenders that are not substantially responsive to the requirements of the Tender documents will be rejected."

Clause 2.5 ITT

"C2.5 Tenderers shall quote all prices as per Clause 11.1.1 of GCC and clause 17 of S.C.C."

Clause 11.1.1 of GCC:

"11.1.1 Inclusions / Exclusions

(i) Unless otherwise stated In the Special Conditions of Contract the Contract Price, subject any to any adjustment thereto in accordance with the Contract shall be all inclusive (including all taxes, duties. royalties etc.) except :Value Added Tax (VAT} paid under Delhi VAT act 2005 where work is done in Delhi Value added tax(VAT) paid under other State Govt VAT act if work is done in that state.

ii) Nothing extra shall be payable over the quoted rates, notwithstanding any provision to the contrary in any law for the time being in force, save and except what is specifically provided in General or Special Conditions of Contract.

iii) The reimbursement (as per this Sub-clause) of whatsoever nature shall be provided only for Permanent Works. No reimbursement (as per this Sub-clause) shall be provided for Temporary Works and fuel."

(Emphasis provided)

Clause 17 of SCC:

"17 Sub-Clause 11.1.1: The Contract Price

(a) The contract price, subject any to any adjustment thereto in accordance with the contract shall be all inclusive (including all taxes, duties, royalties etc.) including value Added tax (VAT) paid under Delhi VAT act 2005 where work is done in Delhi and Value Added Tax (VAT) paid under other State Govt VAT act work is done in that state.

(b) The contract price in Schedule ''A'' may be quoted either in Indian Rupees or partly in any freely convertible Foreign Currency."

7. Clause 2.6 of the ITT makes it compulsory for a bidder to quote prices as per

tender conditions and also show separately the amount of service tax included in the bid prices. This is required for the reason that exemption of construction, erection, commissioning or installation of original works pertaining to monorail or metro in respect of contracts entered into on or after 01.03.2016 has been withdrawn and therefore, the DMRC (respondent no.1) would be required to reimburse the payments made by the contractors on account of service tax on actuals based on submission of documentary proof of payment, subject to the ceiling limit.

8. Relevant part of Clause 2.6 of ITT reads as hereunder:

"C 2.6 The tenderers must note the following:

(a) Service Tax: Exemption on construction, erection, commissioning or installation of original works pertaining to monorail or metro as per notification No. 25/2012 Service Tax dated 20.06.2012, in respect of contracts entered into on or after 01st March 2016 has been withdrawn vide notification No. 09/2016 dated 01.03.2016. The bidder shall quote price as per tender conditions and show separately the amount of service tax included in the bid price. DMRC will reimburse the payments made by contractors on account of service tax on actual based on submission of documentary proof of payment, subject to the ceiling limit indicated by the bidder as above. The employer has approached the Government of India for restoration of service tax exemption notification No. 25/2012 dated 20.06.2012. In case Government of India restores the exemption to metro rail projects, the amount included by the bidder towards service tax will not be payable and adjustment will be made accordingly."

(Emphasis provided)

9. Clause 15.1 of the tender document reads as hereunder:

"C15. Pricing Document

C15.1 The Pricing Document is included in Bill of Quantities / Pricing Document; Volume 6. However, an excel file is provided in the bid documents and the rates shall be quoted in that excel file only. The tenderer shall download the excel file and after quoting their rates upload the same accordingly. The rates shall not be offered/quoted elsewhere in the technical submission/ tender submission. The Tenderer shall complete the Pricing Document /quote their rates in accordance with the instructions given in Bill of Quantity/Pricing Document. The completed Pricing Document including price of minor deviations in Appendix 13A for such deviation as mentioned in Appendix 13 of FOT shall be submitted. The rates shall be quoted in excel file provided in the bid documents."

(Emphasis provided)

10. A bare reading of the aforementioned clauses make it clear that it was incumbent upon the tenderers to strictly adhere to the terms and conditions of the tender documents and the ITT. In case of a minor deviation from the

requirements mentioned in the tender, the same was required to be brought to the notice of the employer by way of a disclosure in Appendix 13A to the tender document.

11. The financial bids of the tenderers were opened on 16.06.2016 wherein the respondent no.2 was shown as L-1 (the lowest bidder). Since the bid of the successful tenderers were uploaded on the e-portal of respondent no.1, the petitioner could learn that the bid document submitted by respondent no.2 was not in accordance with the tender requirements as the price quoted by respondent no.2 was firstly, not inclusive of all taxes as required under ITT and secondly, the service tax component in its price bid was not indicated separately.

12. The bid details and the pricing document of respondent no.2 have been brought on record as Annexure P-5.

13. This departure from the tender conditions by respondent no.2 has admittedly not been disclosed in the bid documents in terms of Appendix 13 of the tender document.

14. To evaluate whether the bid of a particular tenderer was compliant with the terms and conditions of the tender, the respondent no.1 in accordance with E4.3 of the tender document was required to see whether each tender is substantially responsive to the requirements as set forth and in case of any inconformity, the bid was liable to be rejected. What would be a material deviation, leading to disqualification and rejection of a bid has also been clarified in E4.4.

15. E4.3 and E4.4 read as hereunder:

E4.3 Evaluation of Responsiveness

The employer will determine whether each tender is substantially responsive to the requirements of the Tender Documents i.e. it conforms to all terms, conditions and specifications of the tender document. In case of any inconformity, the tender shall be disqualified and rejected. E4.4 Evaluation of Material deviation or reservation Each tender shall be evaluated for any material deviation or reservation. Material deviation or reservation is one:

? which contains unauthorized changes to the Memorandum of Understanding from the Memorandum of Understanding accepted for Pre-qualification.

? which contains any deviation in tender security with regards to amount, validity, form and format.

? which affects in any substantial way, the scope, quality or performance of the Works;

? which limits in any substantial way, is inconsistent with the Tender Documents, the Employer''s right or the Tenderer''s obligations under the Contract; or

? whose rectification would affect unfairly the competitive position of other tenderers presenting responsive tenders. Tender having any material deviation or reservation shall be disqualified and rejected."

16. The aforesaid material deviation of respondent no.2 was brought to the notice of respondent no.1 by the petitioner but such communication evoked a queer response by respondent no.1, viz. holding the petitioner to be violating the terms of clause E2.1 and E2.2 of ITT thereby rendering the bid of the petitioner liable to be rejected. A legal notice, asking for disqualification of respondent no.2 was also served upon the respondent no.1 by the petitioner but the same has not been heeded to.

17. The petitioner has approached this Court upon coming to know that the award is being concluded in favour of respondent no.2.

18. In Tata Cellular v. Union of India : 1994 (6) SCC 651, though the Supreme Court has ruled for judicial restraint in dealing with such matters on the ground that a court of law does not sit in appeal over such decisions of the administrative authority but it merely reviews the same in the absence of any expertise in the field and also because the Government necessarily has freedom of contracting with parties, but has not excluded the judicial review in absolute terms. The decision of an authority must not only be tested by the application of Wednesbury principle of reasonableness but should also be free from any arbitrariness bias or malafides.

19. When specific instructions have been given in the tender documents regarding pricing/cost as also the mode of evaluation for testing whether a particular bid is compliant of the terms and conditions of the tender, the same should be strictly enforced or else the sanctity and purity of the entire process of tender would be at peril. The bidders as well as the employer inviting the tender are bound by the requirements of the tender document. In the absence of adherence to the requirements set forth by the employer/agencies inviting tender, there would be a much greater risk of discrimination and perhaps even favouritism which is necessarily an anathema to the concept of fairness, rule of law and the principle of treating everybody equally.

20. In West Bengal State Electricity v. Patel Engineering Company and Ors.: 2001 2 SCC 451, the Supreme Court has very succinctly held that "The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided.

21. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.: (2012) 8 SCC 216, the Supreme Court suggested following questions to be answered before exercising the powers of judicial review.

"24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis provided)"

22. It is definitely in the public interest that everybody should be treated equally and no one is allowed any latitude, which is not available to others.

23. Now, the other important question is whether the departure from the tender condition viz. not including the service tax component in the cost and not indicating it separately, can be said to be such a deviation which can render respondent no.2 disqualified. Minor deviations are permitted if it does not put other competitors in any disadvantageous position and can be permitted if it is at the instance of an employer. But such permission has to be afforded to all and not only to one of the participants.

24. Much has, by now, been said about the essential or substantial conditions of the bid document which cannot be departed from or waived. In the present case, the tender document itself spells out that a bidder would quote prices as per tender conditions and would separately indicate the amount of service tax which is included in the bid price. Therefore, it cannot be said that the aforesaid requirement in the tender document is not an essential condition of contract and that it could be lightly dealt with. The wordings of the various clauses of the tender papers quoted above re-enforce the perception that the pricing offered by the tenderers was to be compliant with specific conditions and the evaluation of the employer inviting the tender, would also be based on a consideration of the fact whether the tender offered conforms to all the terms, conditions and specifications of the tender document. The limits of the material deviation has also been defined in the tender document.

25. In G.J. Fernandez v. State of Karnataka: (1990) 2 SCC 448, the aspect of deviation was dealt with and deviation was held to be permissible as long as the level playing field was maintained and it did not result in any arbitrariness or discrimination.

26. The financial bid of respondent no.2 was apparently not compliant with the terms and conditions of the tender documents and this fact was pointed out by the petitioner but to no avail. This conduct of respondent no.1 therefore smacks of a casual and cavalier approach with regard to the enforcement of condition of its own document. One could have understood if the complaint of the petitioner

would have been dealt with in a different way or respondent no.1 would have taken a decision that it was not an essential condition of the tender requirement to include the service tax. Completely ignoring the aforesaid aspect and holding the petitioner, for having raised objections, to be in violation of the certain provisions of the tender document regarding its conduct, rendering its bid liable to be rejected, discloses an unfair approach.

27. In our opinion, the format of quoting price stipulated in the tender document in the present case is an essential condition and cannot be permitted to be given a go-by as if such requirement were redundant or superfluous. The approach of respondent no.1 in dealing with the aforesaid deviation prima facie appears to be discriminatory and unfair to other participants.

28. The respondent no.2 may have been declared as the lowest bidder perhaps because of it not including the service tax component in the price offered; thus rendering the petitioner as a participant exposed in an uneven playing field. As a rule of law, it may not be necessary to award contract to the lowest bidder. Times without number, it has been re-confirmed that the principle of awarding a contract to a lowest tenderer is applicable when other things are equal. A non-compliant bid even, if lowest, is liable to be rejected.

29. During the course of the arguments, the petitioner who has been adjudged as L-2 has undertaken to match the price quoted by respondent no.2, thereby obviating any consideration regarding loss to the public exchequer as well.

30. Seen in the aforesaid perspective, the decision of respondent no.1 in accepting the financial bid of respondent no.2 on 16.06.2016 is set aside.

31. The respondent no.1 is directed to take a decision within a period of 15 days from the date of passing of this order or intimation thereof, keeping in mind the principles enumerated above.

32. The writ petition is allowed to the aforesaid extent.

CM 24663/2016

1. In view of the petition having been disposed of, the application has become infructuous.

2. The application is disposed of accordingly.

