
(2011) 12 GAU CK 0074
In the Gauhati High Court
Case No : Writ Petition (C) No. 2623 of 2011

Shri Kamal Singh Dugar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Citation : (2012) 1 GLD 207

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : N. Dutta, Mr. P. Mahanta and Mr. P. Gohain, for the Appellant; U. Rajbanshi, SC, PWD, for the Respondent Nos. 1 and 3, Mr. D.K. Mishra Mr. P. Sarmah and Mr. B. Prasad, for the Respondent No. 5, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—A notice inviting tenders, in two bid system i.e. technical bid and financial bid, for shifting of Assam State Electricity Board (ASEB) "line and sub-station including dismantling of existing circuit at different locations under the jurisdiction of SESD, SESD-I, SESD-II, SESD-III & UESD of CAEDCL to facilitate the construction work of Silchar by-pass road (Package No. NH(Elect)/SIL/2010-11/04) with approximate value of Rs. 605.22 lakh, was issued by the Chief Engineer, PWD (NH Works), Assam, on behalf of Governor of Assam, pursuant to which 3(three) bidders, namely, Shri Kamal Singh Dugar (writ petitioner), M/r. Dutta Electricals (respondent No. 5) and M/s. Assam Electricals submitted their bids. The technical evaluation committee having found the bids of the writ petitioner and the respondent No. 5 being responsive, the Addl. Chief Engineer, PWD (Electrical), Govt. of Assam, vide communication dated 09.05.2011 informed the writ petitioner and the respondent No. 5 about the same and requested them to attend the office at the time of opening of the financial bids. The writ petitioner has challenged the decision of the technical evaluation committee as well as the decision of the respondent authority as communicated by the aforesaid communication dated 09.05.2011 to open the

financial bid of the respondent No. 5, on the ground that the bid of the said respondent being violative of the instruction to bidders (ITB), laying down the qualification, the decision to open its financial bid is illegal. I have heard Mr. N. Dutta, learned Sr. counsel for the petitioner, Mr. U. Rajbangshi, learned standing counsel appearing for the respondent Nos. 1 and 2 and Mr. D.K. Misra, learned Sr. counsel appearing for the respondent No. 5. None appears for the other respondents.

2. Mr. Dutta, learned Sr. counsel for the petitioner referring to the clauses 4.3(g) of the "qualification of bidders" and 4.5.3(b) of "general experience" as stipulated in the ITB, has submitted that to become technically responsive, a bidder must have experience of completion of similar nature of single work in any single year during last 5(five) years, value of which shall not be less than 40% of the total tender value. According to the learned Sr. counsel the experience of the bidders must relate to the completion of similar nature of single work in any single year during the last financial year of not less than 40% of the total tender value, as stipulated in clause 4.3(g) and the respondent No. 5 having not completed the similar nature of single work in any single year, the value of which is 40% of the total tender value, they cannot be held to be technically responsive. It has also been submitted that since the project, which was shown as experience by the respondent No. 5, was executed by a joint venture, of which the respondent No. 5 was a member, the weightage towards experience of the said respondent in respect of the said project is to be given in proportion to his participation in the joint venture, which is being 33.33%, it did not have the required experience of executing similar nature of electrical work of the value of at least 40% of the value of the proposed contract. According to the learned Sr. counsel, the respondent authorities while scrutinizing the technical bid of the respondent No. 5, relating to the experience, did not consider the fact of completion of the project shown as experience by a joint venture vis-a-vis the respondent No. 5's proportionate participation in the joint venture. Referring to the proceeding of the technical evaluation committee dated 13.04.2011, which is available on record, it has also been submitted by the learned counsel that it is evident therefrom that the respondent No. 5 do not have the experience in the similar nature of electrical work as required by clauses 4.3(g) and 4.5.3(b), as in the remark column of such evaluation, the technical evaluation committee mentioned that the respondent No. 5 though has the experience of augmentation of existing 33/11 KV sub-station works, the same was however without construction of HT/LT line. The learned counsel submits that the nature of works for which the bids are invited being shifting of ASEB line and sub-station including dismantling of existing circuit at different locations, the respondent No. 5's bid cannot be found to be technically responsive. The learned Sr. counsel, therefore, submits that the decision to open the financial bid of the respondent No. 5 is illegal and needs to be interfered with.

3. Mr. Rajbangshi, learned standing counsel appearing for the respondent Nos. 1 and 2, on the other hand, placing reliance on the materials available on record as

produced by him, has submitted that though neither the technical evaluation committee nor the authority appears to have taken into consideration the proportionate participation of the respondent No. 5 in the joint venture, which has executed the projects shown as experience, for the purpose of giving weightage towards experience, so as to determine the percentage of the value of such project, as required by clause 4.5.3(b), the respondent No. 5 being the power of attorney holder of the joint venture, in whose favour the similar contract was awarded by the ASEB and the said respondent having, by virtue of such power, executed the work, the entire value of the work-executed by him is to be treated as his experience for the purpose of ascertaining whether he has completed 40% of the total value of the proposed contract. According to the learned counsel since the value of the work shown as experience is more than 40% of the total value of the proposed contract, the respondent No. 5 was rightly found to be technically responsive. It has also been submitted by Mr. Rajbangshi that the nature of work of the project executed by the respondent No. 5 as power of attorney holder of joint venture, is similar to the nature of work proposed to be executed under the notice inviting tenders, which was executed in a single year.

4. Mr. Misra, learned Sr. counsel appearing for the respondent No. 5 submits that the "qualification of bidders" as stipulated in clause 4.3 of the ITB are not the essential qualification required to be fulfilled by the bidders, so as to declare a bid of a bidder technically non-responsive for non-compliance of any of the clauses of 4.3 of the ITB. It has been submitted that in clause 4.5.3 of the ITB, the essential requirements to be fulfilled by the bidders are stipulated, which does not require completion of similar nature of single work in a single year during last 5(five) years, instead requires the experience in successfully completing or substantially completing at least one contract of similar nature electrical work, value of which is at least 40% of the value of proposed contract, within the last 5(five) years, and not in a single year. The learned Sr. counsel further submits that in case of a project, shown as experience and executed by a joint venture, if a member of such joint venture actually executed the work, the entire experience would be credited to him and consequently the entire value of such work has to be taken into consideration for the purpose of ascertaining the 40% of the value of the proposed work towards experience. In the instant case, according to the learned Sr. counsel, it is not in dispute that by virtue of the power of attorney executed by the joint venture, the respondent No. 5 did execute the entire work of augmentation of 6(six) existing 33/11 KV sub-stations in Assam under the ASEB, value of which being more than 40% of the value of the proposed contract, the respondent authority has rightly found the bid of respondent No. 5 technically responsive. Mr. Misra further submits that the technical evaluation committee having found that the respondent No. 5 has executed the similar nature of electrical work and as such the bid of the respondent No. 5 technically responsive, this Court in the absence of anything to the contrary may not record a finding that the project which was completed by

the respondent No. 5, by virtue of the power of attorney is not of similar nature of the proposed work. The learned Sr. counsel, therefore, submits that no illegality has been committed by the respondent authority in finding the bid of the respondent No. 5 as technically responsive and in deciding to open his financial bid.

5. I have considered the submissions of the learned counsel for the parties and also perused the pleadings as well as the materials available on record as produced by Mr. Rajbangshi, learned standing appearing for the respondent Nos. 1 and 2.

6. The Chief Engineer, PWD (N.H. Works), Govt. of Assam on 04.01.2011 invited the bids from the intending bidders for the work of shifting of ASEB line and sub-stations including dismantling of existing circuit at different locations, to facilitate the construction work of Silchar by-pass road with the estimated value of Rs. 605.22 lakh by following two bid system, namely, technical bid and the financial bid. The financial bids of those bidders, who are found to be technically responsive are to be opened. Clause 4 of the ITB stipulate the qualification of bidders". Clause 4.5.3, which relates to the "general experience", requires fulfillment of certain, minimum criteria by the bidders. Clause 12.1 of the said ITB stipulates the documents to be submitted along with the technical bid of the bidders. Clause 26 of the ITB stipulates the manner of examination of bids and the determination of responsiveness.

7. Clause 4.3 of the ITB stipulates the information and documents which the bidders are required to include with their bids. Sub-clause (g) of clause 4.3 provides for submission of information and documents by a bidder in respect of experience in works of a similar nature and size for each of the last 5(five) years and details of works underway or contractually committed. It also stipulates that such experience is to be of similar nature of electrical work, in any single year during last 5(five) years, of not less than 40% of the total tender value. The relevant portion of clause 4.3 of the ITB is quoted below :-

4.3 If the Employer has not undertaken pre- qualification of potential bidders, all bidders shall include the following information and documents with their bids in Section 2.

(a)...

...

...

(g) Experience in works of a similar nature and size for each of the last five years, and details of works underway or contractually committed; and clients who may be contracted for further information on those contracts;

And experience to complete similar nature of single work in any single year during last five years not less than 40% of the total tender value.

...

...

(p)....

8. Clause 4.5.3 stipulates the required "general experience" of a bidder. Sub-clause (b) of the said clause provides that the bidder must meet the minimum criteria of experience in successfully completing or substantially completing at least one contract of similar nature electrical works, value of which is at least 40% of the value of the proposed contract, within last 5(five) years. It also provides that such work may be executed by the bidder as prime contractor or as a member of joint venture or sub-contractor. In case of a sub-contractor, he should have acquired experience of execution of all major items of works under the proposed contract and in case of the project executed by a joint venture, weightage towards experience of the project would be given to each joint venture in proportion to their participation in the joint venture. Sub-clause (b) of clause 4.5.3 of the ITB is quoted below :-

4.5.3 General Experience:

The applicant shall meet the following minimum criteria:

(a)...

(b) Experience in successfully completing or substantially completing at least one contract of similar nature electrical works, at least 40% of the value of proposed contract within the last five years.

The works may have been executed by the Applicant as prime contractor or as a member of joint venture of sub contractor. As sub contractor, he should have acquired the experience of execution of all major items of works under the proposed contract. In case of project has been executed by a joint venture, weightage towards experience of the project would be given to each joint venture in proportion to their participation in the joint venture.

....

9. Part-C of Section-1 deals with the "Preparation of Bids". Clause 12 provides the documents to be enclosed with the technical and financial bid. Clause 12.1 provides that the technical bid shall comprise qualification information, supporting documents, certificates, undertakings, affidavits as specified in Section 2; any other information pursuant to clause 4.2 of the instruction; undertaking that the bid shall remain valid for the period specified in clause 15.1; acceptance/non- acceptance of Dispute Review Expert proposed in clause 36.1; authority to seek reference from the bidders Bankers (clause 4.3.1) and bid security in the form specified in Section 8 (if furnished in the form of bank guarantee).

10. Part-E of the ITB deals with the "Bid Opening and Evaluation". Clause 26 of

the ITB stipulates how the bids are to be examined and how to determine the responsiveness. Clause 26.1 provides that during the detailed evaluation of the technical bids, the employer will determine whether each bid (a) meets the eligibility criteria defined in clause 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities and (d) substantially responsive to the requirement of the bidding documents.

11. It, therefore, appears that while in clause 4.5.3(b), relating to the general experience of the bidder, it has been stipulated that the experience in successfully completing or substantially completing at least one contract of similar nature electrical works within last 5(five) years, value of which is at least 40% of the value of the proposed contract, is required, clause 4.3(g) provides for supply of information and documents relating to the experience of completion of similar nature of single work in any single year during the last 5(five) years, value of which is not less than 40% of the total tender value. There is, therefore, difference between clause 4.5.3(b) and clause 4.3(g). Since clause 4.5.3 lays down the minimum requirement to be fulfilled by a bidder, in the matter of experience, the criteria mentioned therein are only required to be fulfilled, those being the essential conditions. The stipulation in clause 4.3(g) being relating to the information and documents to be supplied, any stipulation therein, which is contrary to the minimum requirement specified in clause 4.5.3(b) relating to experience cannot be termed as the criteria to be satisfied by the bidders. That being the position, a bidder, in the matter of experience, must have the experience in successfully completing or substantially completing at least one contract of similar nature electrical works, within the last 5(five) years, value of which is 40% of the value of the proposed contract, as stipulated in sub-clause (b) of clause 4.5.3 and not the experience of completion of similar nature of single work in any single year during the last 5(five) years, value of which is not less than 40% of the total tender value, as stipulated in sub-clause (g) of clause 4.3 of the ITB.

12. Sub-clause (b) of clause 4.5.3 provides that such work may have been executed by the bidder as prime contractor or as a member of joint venture or sub-contractor. It has further been clarified that in case of a project executed by a joint venture, for the purpose of ascertaining the experience of a member of the joint venture, weightage in proportion to their participation in the joint venture is to be given. Hence in case of a project executed by a joint venture, weightage towards the experience of the project in respect of each of the members of the joint venture would be in proportion to their participation in the joint venture, meaning thereby their share in such joint venture. There being no ambiguities and it is being clear from the stipulation in sub-clause (b) of clause 4.5.3 of the ITS that in case of a project executed by a joint venture, weightage towards experience of the project would be given to each of the members of the joint venture, in proportion to their participation in the joint venture, there is no scope for giving an interpretation that in case a member of the joint venture, by virtue of the power of attorney executed by the other members of the joint

venture, executes the project, 100% weightage towards the experience of the project of that member has to be given, as contended by the learned counsel appearing for the respondents.

13. This leads to the question as to the weightage to be given towards the experience of the project offered by the respondent No. 5 as his experience. The records produced by the learned counsel for the respondent Nos. 1 and 2 do not reveal such consideration by the authority while technically evaluating the bid of the respondent No. 5, who is admittedly a member of the joint venture and whose participation in such joint venture is in equal shares with two other members. However, it appears from the materials made available on record as well as the proceeding of the technical evaluation committee dated 13.04.2011 that the project which was shown as experience by the respondent No. 5 worth Rs. 430.53 lakh. There being 3(three) members of the joint venture executing the said work, all the 3(three) members will have equal shares and their participation in the joint venture being equal, in the absence of anything to the contrary placed on record, the weightage towards the experience of the said project to be given to the respondent No. 5, being a member of the joint venture, would be 33.33% of the value of the project worth Rs. 430.83 lakh, i.e. Rs. 143.60 lakh.

14. The requirement of the experience as stipulated in clause 4.5.3(b) of the ITB being successful completion or substantial completion of one contract of similar nature electrical work, value of which must be at least 40% of the proposed contract value of Rs. 608.22 lakh, the respondent No. 5 must have the experience of successfully executing the work worth Rs. 243.29 lakh (40% of Rs. 608.22 lakh). Since the respondent No. 5 has the experience of executing the worth of only Rs. 43.6 lakh, it does not have the required experience as stipulated in sub-clause (b) of clause 4.5.3 of the ITB and hence the respondent No. 5 cannot held to be technically responsive and his financial bid therefore cannot be opened as decided by the respondent authority.

15. As noticed above, the work for which the notice inviting bids issued on 04.01.2011 was for shifting of ASEB line and sub-stations, including dismantling of existing circuit at different locations, to facilitate the construction work of Silchar by-pass road. The project which was executed by a joint venture, of which the respondent No. 5 was a member, and which was offered for consideration towards experience, relates to design, engineering, manufacture and testing supply erection and commissioning of power transformers with associated switchgears for augmentation of 6(six) Nos. existing 33/11 KV substations in Assam. It appears from the remark given in the proceeding of the technical evaluation committee held on 13.04.2011 that the said work executed by the joint venture, of which the respondent No. 5 was a member, was without the construction of the HT/LT line. The technical evaluation committee in its report did not specifically state, except the aforesaid remark, whether the work which was executed by the said joint venture is of similar nature electrical works

proposed to be contracted for, though it was the requirement in the ITB.

16. In view of the aforesaid discussion, the decision of the respondent authorities in declaring the bid of the respondent No. 5 as technically responsive and in deciding to open its financial bid is contrary to the stipulation in the notice inviting bids and as such set aside. There being only one bidder remain in the fray i.e. the writ petitioner, it is left open to the respondent authority to decide as to whether they will proceed to open the financial bid of the lone bidder left out in the fray or to issue a fresh notice inviting bids. The writ petition is accordingly allowed, as indicated above. No costs.