(2016) 03 RAJ CK 0016

In the Rajasthan High Court

Case No : Civil Writ Petition No. 620/2016

Technocraft Construction-Woodhill (JV) — APPELLANT

Vs

State of Rajasthan and Others — RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Transparency in Public Procurement Act, 2012 — Section 38(1), Section 38(4), Section 7

Citation : (2016) 03 RAJ CK 0016

Hon'ble Judges : Alok Sharma, J.

Bench : Single Bench

Advocate : R.K. Agarwal, Sr. Advocate and Mammoon Khan, for the Appellant; Rajendra Prasad, Sr. Advocate, AAG and Ashish Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Alok Sharma, J.—1. Under challenge is the order dated 14.12.2015, passed by the Principal Secretary, Local Self Government Department, Jaipur in second appeal under the Rajasthan Transparency in Public Procurement Act, 2012 (hereinafter "the Act of 2012") holding that the respondent No. 3--M/s. P.C. Snehal Tantia (JV) was technically responsive as per the terms and conditions of the bid document relating to the E-tender for procurement of the works of providing, laying, joining, testing and commissioning of sewer system and all ancillary works alongwith design, construction, supply, installation, testing and commissioning (civil, mechanical, electrical and other necessary works) based on SBR process inclusive of provision for treated waste water reuse including one year defect liability and thereafter 10 years O&M for towns under packages mentioned in the table of the Notice Inviting Bids (NIB) under NIB/4/15-16 (hereinafter "the works"). (In issue was package No. 1 for Chirawa and Nawalgarh).

2. Relevant facts of the case are that the petitioner-Company as a joint venture

(JV) of Technocraft Construction Pvt. Ltd. and Woodhill Infrastructure Ltd. submitted a bid for package Nos. 1 & 3 of the works aforesaid. Respondent No. 3 as a joint venture with Tantia Construction Ltd., amongst other, also submitted its bid. The technical bids of the petitioner-Company and the respondent No. 3 were both declared responsive on 06.11.2015. Thereafter, on the same day the financial bid of respondent No. 3 for both packages was found L-1. The petitioner-Company was as L-2.

3. Having lost out to the respondent No. 3, the petitioner-Company set up a case by way of two first appeals under Section 38(1) of the Act of 2012 stating that the documents with annexures pertaining to the bidding process as available on the e-portal of the Rajasthan Urban Infrastructure Finance and Development Corporation Ltd. (hereinafter "Procuring Entity") indicated that the respondent No. 3 did not satisfy the financial resources criteria warranted under NIB, consequent to which being technically unresponsive neither its financial bid could be considered not it declared successful as L-1 qua the two packages in issue.

4. On consideration of the first appeal, it was allowed by the First Appellate Authority by its order dated 01.12.2015 on the ground that (i) formatted information particularly in respect of form FIN-5 relating to assured revolving line of credit facility was not supplied; (ii) the procuring authority had not held that the non-compliance by the respondent No. 3 with the terms of conditions of the e-tender was the minor deviation to justify waiver and resultant consideration as responsive; (iii) that subsequent clarification of the respondent No. 3 under its letter dated 28.09.2015 did not partake the character of a firm commitment of a line credit facility by the bankers of respondent No. 3 for executing the works contracted and (iv) finally that the non-funded credit of the respondent No. 3 with reference to its bank guarantee limits could not be considered to be open line of credit, consequent to which it could not be held that the respondent No. 3 disclosed financial resources in form FIN-3 satisfied the financial resources requirement as indicated in its form FIN-4--the aggregate of financial requirements for the contract/s under execution and the financial requirement/ resources for the contracts under package Nos. 1 & 3 of the e-tender.

5. Aggrieved the respondent No. 3 filed a second appeal under Section 38(4) of the Act of 2012 before the Principal Secretary, Local Self Government Department, Jaipur. On consideration of the matter, it was held by the Second Appellate Authority that the procuring authority in holding the respondent No. 3 as responsive on the technical bid, having disclosed requisite financial resources had acted within its discretion by resort to Rules 59, 60 & 61 of the Rules of 2013. It was held that the petitioner-Company had admitted during the hearing of the second appeal that the information in form FIN-5 was not mandatory and where the bidder satisfied the financial resources criterion on the basis of information in form FIN-3 with reference to information in form FIN-4 it was entitled to be declared responsive. The Second Appellate Authority found that the bids of the respondent No. 3 vis a vis that of the petitioner-Company were also

lower by a sum of Rs. 22 crore making it in public interest to accept its bids. Hence this petition.

6. Mr. R.K. Agarwal, Sr. Advocate appearing with Mr. Mammoon Khan, for the petitioner-Company submitted that the order passed by the Second Appellate Authority under Section 38(4) of the Act of 2012 is wholly perverse in finding that the respondent No. 3 had the requisite financial resources as disclosed in form FIN-3 to satisfy the financial resources requirement under form FIN-4. Mr. R.K. Agarwal submitted that the execution of the two packages required working capital adequate to meet with the obligation of the bidders in the course of execution. For this only funded credit facility could be taken into reckoning and non-funded credit facility could not be considered such as bank guarantee limits as reflected in form FIN-3 furnished by the respondent No. 3. The contention of Sr. counsel was that the financial resources necessary had to be an assured revolving line of credit for executing the work under the contract. The respondent No. 3 did not have such revolving line of credit for being declared responsive on the technical bid. It was submitted that against the aggregated financial resources required by the respondent No. 3, with reference to its ongoing contract/s and the two packages for which it had made the bid in pursuance to the e-tender in issue, was Rs. 92 crore as against which it only had a cash credit account facility towards funded credit facility by its Bankers to an extent of Rs. 22.50 crore odd only. The bank guarantee limit of Rs. 56.50 crore by the Kalupur Commercial Co-operative Bank Ltd. and bank guarantee limit of Rs. 22.75 crore by the Ahmedabad Merchantile Cooperative Bank Ltd. could not be taken into account as an assured line of credit. Consequently both the procuring authority and the Second Appellate Authority have wrongly held the respondent No. 3 to be responsive on the technical bid.

7. Mr. Sudhir Gupta, Sr. Advocate appearing with Mr. Sauren Mehta, for respondent No. 3 submitted that the challenge to the respondent No. 3 being found to be technically responsive on 06.11.2015 was a belated one subsequent to the respondent No. 3''s financial bid in respect of package Nos. 1 & 3 being found to be 22 crores less than that of the petitioner-Company. It was further submitted that even otherwise the case set up by the petitioner-Company is wholly specious based on a misreading of Clause 4.4.6--form FIN No. 3 relating to sources of financial resources. In terms of form FIN No. 3 bidders were required to set out proposed sources of financing, such as liquid assets, unencumbered real assets, lines of credit and other financial means, net of current commitments, available to meet the total construction cash flow demands of the subject contract. It was submitted that in terms of form FIN-3, the respondent No. 3 had asserted resources of finance duly supported by evidence to an extent of Rs. 140 crore 6 lacs. Mr. Sudhir Gupta submitted that the objective of submission of form FIN-3, FIN-4 & FIN-5 in terms of Clause 4.4.6, 4.4.7 & 4.4.8 of the bid document was to evaluate the fulfillment of the requirements stipulated in the financial criteria laid down in the bid document whereunder a bidder was to demonstrate access to, or availability of liquid

assets, lines of credit or other financial resources (other than any contractual advance payments) to meet the bidder''s financial resources requirements during the execution of the works contracted. It was submitted that where availability of requisite financial resources, as detailed in form FIN-4, was made out in terms of the sources detailed in form FIN-3, it was not mandatory to submit form FIN-5 which related to revolving line of credit for execution of the contract. It was submitted that even otherwise form FIN-5 submitted by the petitioner-Company itself was not as per the format prescribed by the procuring entity. Further before the Second Appellate Authority it was agreed by the petitioner-Company that form FIN-5 was not mandatory if the financial requirement criterion as per form FIN-4 of the bid document was fulfilled by sources of financing detailed under form FIN-3. Mr. Sudhir Gupta finally submitted that in the event of declaration of respondent No. 3 as non-responsive in the technical bid for alleged lack of requisite financial resources, the State would suffer a loss of Rs. 22 crore as respondent No. 3 as L-1 both in package Nos. 1 & 3 had quoted an aggregated price of Rs. 22 crore less than the petitioner-Company.

8. Mr. Rajendra Prasad, Sr. Advocate and AAG appearing with Mr. Ashish Sharma, for the procuring entity submitted that the technical evaluation of bids was carried out in a fair and transparent manner as per terms and conditions of the bid documents and the provisions of the Act of 2012 and the rules of 2013. It was submitted that while evaluating the responsiveness of the technical bids, the Bid Evaluation Committee adhered to provisions of Rules 59, 60 & 61 of the Rules of 2013 which read as under:

"59. Determination of responsiveness.-

(1) The bid evaluation committee shall determine the responsiveness of a bid on the basis of bidding documents and the provisions of sub-section (2) of section 7.

(2) A responsive bid is one that meets the requirements of the bidding documents without material deviation, reservation, or omission where:--

(a) "deviation" is a departure from the requirements specified in the bidding documents;

(b) "reservation" is the setting of limiting conditions or withholding from complete acceptance of the requirements specified in the bidding documents; and

(c) "Omission" is the failure to submit part or all of the information or documentation required in the bidding documents.

(3) A material deviation, reservation, or omission is one that,

(a) if accepted, shall:--

(i) affect in any substantial way the scope, quality, or performance of the subject matter of procurement specified in the bidding documents; or

(ii) limits in any substantial way, inconsistent with the bidding documents, the procuring entity''s rights or the bidder''s obligations under the proposed contract; or

(b) if rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids.

(4) The bid evaluation committee shall examine the technical aspects of the bid in particular, to confirm that all requirements of bidding document have been met without any material deviation, reservation or omission.

(5) The procuring entity shall regard a bid as responsive if it conforms to all requirements set out in the bidding documents, or it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the bidding documents, or if it contains errors or oversights that can be corrected without touching on the substance of the bid.

60. Clarification of bids.-

(1) To assist in the examination, evaluation, comparison and qualification of the bids, the bid evaluation committee may, at its discretion, ask any bidder for a clarification regarding its bid. The committee''s request for clarification and the response of the bidder shall be in writing.

(2) Any clarification submitted by a bidder with regard to its bid that is not in response to a request by the committee shall not be considered.

(3) No change in the prices or substance of the bid shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the committee in the evaluation of the financial bids.

(4) No substantive change to qualification information or to a submission, including changes aimed at making an unqualified bidder, qualified or an unresponsive submission, responsive shall be sought, offered or permitted.

(5) All communications generated under this rule shall be included in the record of the procurement proceedings.

61. Non-material Non-conformities in bids.-

(1) The bid evaluation committee may waive any nonconformities in the bid that do not constitute a material deviation, reservation or omission, the bid shall be deemed to be substantially responsive.

(2) The bid evaluation committee may request the bidder to submit the necessary information or document like audited statement of accounts, VAT clearance certificate, PAN, etc. within a reasonable period of time. Failure of the bidder to comply with the request may result in the rejection of its bid.

(3) The bid evaluation committee may rectify non-material nonconformities or omissions on the basis of the information or documentation received from the bidder under sub-rule (2)."

9. It was submitted that Bid Evaluation Committee found certain deficiencies in all bids which without deviations permitted in law, would have resulted in disqualification of almost all bidders, narrowing the competition and loosing out on discovering the most competitive price with resultant loss to the State Government. The Bid Evaluation Committee as per rule 61 of the Rules of 2013 waived off any non-conformity in the bids that did not constitute a material deviation, reservation or omission and then evaluated the bids. It was submitted that in the circumstances, clarifications regarding work experience, construction turnover, net worth, registration certificates and many other aspect of the matter were sought from all the bidders so as to provide them all equal opportunity with the objective to achieve the best competitive rates for the works in issue in public interest. Hence no interference with the impugned order dated 14.12.2015 is warranted.

10. Heard. Considered.

11. The Apex Court in the case of Siemens Aktiengeselischaft & Siemens Ltd. v. Delhi Metro Rail Corporation Ltd. & Ors. , [(2004) 11 SCC 288] has held that in matters relating to tenders and award of contracts, the court exercising powers under Article 226 of the Constitution of India can only examine whether the decision making process was fair, reasonable and transparent and ought to exercise judicial restraint where the impugned decision to award a contract is bona fide with no perceptible injury to the public interest. In Siemens Public Communication Networks Private Ltd. & Anr. v. Union of India & Ors. [, (2008) 16 SCC 215] the Apex Court has held that when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features are to be considered such as, that a contract is fundamentally a commercial transaction, evaluation of tenders and award of contracts are essentially commercial functions where principles of equity and natural justice stay at a distance and if the decision relating to award of contracts is bona fide and in public interest, courts will not exercise the power of judicial review and interfere. It was thereupon held in para 41 that unless it could be concluded that the process adopted or decision arrived at was egregiously arbitrary or irrational, interference at the instance of the court exercising equitable extraordinary under Article 226 of the Constitution of India ought to be eschewed. In Jagdish Mandal v. State of Orissa & Ors. [, (2007) 14 SCC 517], the Apex Court reiterated that the courts in matter of contract should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of record. It was further held that if the decision relating to the award of contract is bona fide and in public interest, the court would not in the exercise of powers of judicial review interfere even if an error in assessment or prejudice to a competing tenderer is caused. It is thus apparent that the jurisdiction of this Court in interfering in the matters relating to tenders and award of contracts thereunder is extremely limited, confined largely to issue of mala fide exercise of power, discrimination, egregious arbitrariness/unreasonableness and detriment to the public interest.

12. In the case at hand, the issue is with regard to the availability of financial resources with the respondent No. 3 as per form FIN-3 with reference to financial resources criterion in form FIN-4 to execute the works in issue. It is an admitted fact that the respondent No. 3 had submitted details of its financial resources duly supported by the documents from its Banks. Financial resources available to it, as reflected in form FIN-3 were Rs. 1.40 crore 6 lacs. That is not in dispute. It is also not in dispute that the total financial requirement of the respondent No. 3 in terms of Clause 4.4.7--form FIN-4 taking into reckoning its ongoing project and the two package Nos. 1 & 3 for which the bids were made aggregated to approximately Rs. 92 crore. Both the petitioner-Company and respondent No. 3 had agreed before the Second Appellate Authority as recorded in its order dated 14.12.2015 that form FIN-5 was not mandatory. From the order passed by the Second Appellate Authority in proceedings under Section 38(4) of the Act of 2012, it is an admitted position of the petitioner-Company that submission of form FIN-5 by the bidders was not mandatory if the assessment of financial resources criterion--form FIN-4, could be satisfactorily made out with reference to sources of financing reflected in form FIN-3 duly supported by documents.

13. The issue that thus remains for consideration of this Court is as to whether the respondent No. 3 on sources of finance information submitted under form FIN-3 (with reference to financial resources criterion in form FIN-4) with supporting documents had the requisite financial resources to warrant it being held responsive in the technical bid.

14. The only issue agitated in the writ petition and the arguments advanced accordingly by Sr. counsel for the petitioner-Company before this Court is/was whether for evaluating financial resources of the respondent No. 3, non funded credit facility such as bank guarantee limit could be taken into account. In my considered opinion, the argument raised by the counsel for the petitioner-Company seeking exclusion of non-funded credit facility such as bank guarantee limit as resources of finance available for the execution of the contract works is quite untenable. It cannot be denied that bank guarantee limit can be monetized and used as a credit line for project finance. Nothing has been stated in the writ petition and in the course of arguments as to why available bank guarantee limit cannot be reckoned for the purpose of evaluating the financial resources of a bidder. Aside of the aforesaid, in the event of any doubt, the procuring entity had found the respondent No. 3 responsive on the sources of finance qua the financial resources criterion for execution of package Nos. 1 & 3 by resort to Rules 59, 60 & 61 of the Rules of 2013. A wholistic reading of the aforesaid rules allows for non-material deviation from the conditions of a bid for evaluating it. A material deviation is stated under Rule 61 of the Rules of 2013 to be one which does not affect in any substantial way the scope, quality or performance of the subject matter of procurement described in the bidding documents; or limits in any substantial way, inconsistent with the bidding documents, the procuring entity''s rights or the bidder''s obligations under the proposed contract; or if rectified, unfairly affects the competitive position of other bidders presenting

responsive bids. Nothing has been set up in the pleadings of the writ petition to establish that taking into consideration the non-funded credit facilities i.e. bank guarantee limits available to respondent No. 3 for the purpose of evaluating its sources of finance for the execution of the contract works on package Nos. 1 & 3 tantamounted to a material deviation and if so, how? Form FIN-3 required specification of proposed sources of financing such as liquid assets, lines of credit and other financial means to meet to total construction cash flow demands of subject contract/s. "Other means of finance" would include bank guarantee capable of monetisation. This being the position, the procuring entity was entitled to consider non-furnishing of form FIN-5 by the respondent No. 3 as a minor deviation of little event irrelevant to the evaluation of financial resources and regard the respondent-Company''s bid as non-material and the technical bid responsive. Marking "not applicable" in form FIN-5 did not in the circumstances materially alter or depart from the characteristics, terms, conditions and other requirements set out in the bidding documents.

15. The procuring entity having exercised its discretion in terms of Rules 59, 60 & 61 of the Rules of 2013 in holding the respondent No. 3 to be responsive to the technical bids, there was no occasion whatsoever for the First Appellate Authority to hold to the contrary when no material deviation in the evaluation process of the Bid Evaluation Committee was manifest and more particularly when the differentiation between the bids submitted by the respondent No. 3 in respect of the concerned package vis a vis the petitioner-Company was lesser by several crores. The Second Appellate Authority has taken a wholistic and public interest view of the matter, found the action of the procuring entity wholly legal and valid, more so with reference to its power under Rule 59, 60 & 61 of the Rules of 2013 and rightly set aside the order dated 01.12.2015 passed by the First Appellate Authority.

16. The upshot of the aforesaid discussion is that the writ petition is wholly misdirected, without merit and liable to be dismissed.

17. Accordingly dismissed.