(2016) 03 KL CK 0086

In the High Court Of Kerala

Case No : W.P.(C) No. 6893 of 2016 (J)

The KSCC Ltd. APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Citation : (2016) 03 KL CK 0086

Hon'ble Judges : A. Muhamed Mustaque, J.

Bench : Single Bench

Advocate : Bechu Kurian Thomas, Senior Advocate, Paul Jacob (P), Enoch David Simon Joel, S. Sreedev, Rony Jose and George A. Cherian, Advocates, for the Appellant; C.K. Sherin, Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

A. Muhamed Mustaque, J.—1. The Government of Kerala invited a tender for the work, namely, the "Dam Rehabilitation And Improvement Project (DRIP) - Rehabilitation and basic facilities of Kallada Irrigation Project". This work is proposed to be executed based on a loan advanced from the International Bank for Reconstruction and Development (for short, the "IBRD")/a credit from the International Development Association (IDA).

2. The issue in this writ petition is regarding disqualification of the petitioner in the bid.

3. The petitioner is a Joint Venture formed between the Kerala State Construction Corporation Ltd. and M/s. Valiyavilayil Construction Company. Ext. P1 is the Joint Venture. Admittedly, none of the constituents possess pre-qualification experience for the work. It is the petitioner''s case that one of the parties to the Joint Venture, namely, the Kerala Construction Corporation Ltd., which is a Government Company, is exempted from applying for pre-qualification and is declared as pre-qualified for the works tendered by the State Government Departments (Except National Highway works and Central Government

sponsored works requiring scrutiny and approval of Government of India) State Government undertakings and local bodies in case where the pre-qualification is adopted for the execution of works. The petitioner relies on Ext. P2 in support of the above contention. Therefore, the petitioner challenges disqualification on the ground that the petitioner does not have the need to fulfil the pre-qualification criteria of experience.

4. Though, many other arguments have been raised, all other issues would depend upon answering the question of requirement of pre-experience of the petitioner. There is no impediment as per the tender documents to consider a Joint Venture. The instruction to bidders is produced as Ext. P4.

5. The stand of the second respondent is that the Government order relaxing pre-qualification to the company has no relevance in this matter as the work is financed by the World Bank. In the counter affidavit filed by the second respondent it is contended that the stipulation in the tender document is based on the guidelines of IBRD. It is stated in para.9 as follows:

"9. The World Bank stipulated eligibility qualifications of the bidders as specified in clause 5 of Ext. P3 and Ext. P4, for which approval from the World Bank and of the Government of India is required and Ext. P2 is inapplicable for such works funded by the World Bank. In the selection process it is noted that one of the partners of the Joint Venture is a government enterprise dependant on Government, having one of its Directors who is presently the Nodal Officer of the project (DRIP) and thus the contractor and the employer would become the same person in reality, which is impermissible."

6. Clause 3.1 of the general conditions of the instruction to bidders stipulates that the invitation for bids is open to all bidders from the eligible countries as defined under the IBRD Guidelines. It is further stipulated in clause 4.1 that all bidders shall stipulate qualification information in the bid document. There is no dispute that IBRD Guidelines would apply in this matter. The eligibility qualification is stipulated in clause 5 of Ext. P3 invitation for bids, which reads as follows:

"5. ...To qualify for award of the contract, each bidder in its name should have in the last five years i.e. 2014-15, 2013-14, 2012-13, 2011-12 & 2010-11*

(a) achieved, in at least one financial year, a minimum annual financial turnover (in all classes of civil engineering construction works only) of INR 94 million @ 2014-2015 price level.

(b) satisfactorily completed (not less than 90% of contract value), as a prime contractor, (or as subcontractor duly certified by the employer/main contractor) at least one similar work of value not less than of INR 70 million @ 2014-2015 price level...."

7. It is specifically stated in the above clause that the bidding procedures are as prescribed in the World Bank''s Guidelines.

8. In the above context it is apposite to quote clauses 2.9 and 2.10 of the IBRD Guidelines, which stipulate as follows:

"2.9 Prequalification is usually necessary for large or complex works, or in any other circumstances in which the high costs of preparing detailed bids could discourage competition, such as custom-designed equipment, industrial plant, specialized services, some complex information and technology and contracts to be let under turnkey, design and build, or management contracting. This also ensures that invitations to bid are extended only to those who have adequate capabilities and resources. Prequalification shall be based entirely upon the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their (a) experience and past performance on similar contracts, (b) capabilities with respect to personnel, equipment, and construction or manufacturing facilities, and (c) financial position.

2.10 The invitation to pre-qualify for bidding on specific contracts or groups of similar contracts shall be advertised and notified as described in paragraphs 2.7 and 2.8 above. The scope of the contract and a clear statement of the requirements for qualification shall be sent to those who responded to the invitation. All such applicants that meet the specified criteria shall be allowed to bid. Borrowers shall inform all applicants of the results of pre-qualification. As soon as pre-qualification is completed, the bidding documents shall be made available to the qualified prospective bidders. For pre-qualification for groups of contracts to be awarded over a period of time, a limit for the number or total value of awards to any one bidder may be made on the basis of the bidder''s resources. The list of pre-qualified firms in such instances shall be updated periodically. Verification of the information provided in the submission for pre-qualification shall be confirmed at the time of award of contract, and award may be denied to a bidder that is judged to no longer have the capability or resources to successfully perform the contract."

9. Therefore, the question is whether Ext. P2 Government Order exempting the Kerala State Construction Corporation Ltd. can be extended to any contract to be awarded based on the World Bank aid under the IBRD Guidelines. As seen from Ext. P2 itself, the Government never intended to dispense pre-qualification criteria on work which required any approval of the Government of India. The loan provided to the State Government is based on the approval/scrutiny of the Government of India. Nowhere in Ext. P2 is it stipulated that the exemption would apply to any project being executed with the aid of the World Bank. It is to be noted that Ext. P2 in fact is issued to promote the State owned undertaking in relation to the work sponsored by the State Government. The intention is quite clear from Ext. P2 itself. When specific guidelines are there, prescribing norms and conditions for awarding of the contract, that conditions will have to be followed. There is no challenge regarding the notification prescribing IBRD Guidelines for the tender invited. Since IBRD Guidelines form part of the tender conditions, the petitioner cannot claim any exemption without there being a

challenge regarding the tender conditions. In contractual matters, dominant interest of the sponsor has to be protected. The IBRD Guidelines is inseparable from the terms and conditions of the tender. Therefore, the petitioner is ineligible for consideration for tender as the petitioner does not have any experience. Thus, the writ petition is dismissed.

