

(2015) 05 DEL CK 0037

In the Delhi High Court

Case No : Writ Petition (C) 443 of 2015

Transstroy (India) Limited

APPELLANT

Vs

National Highways Authority

RESPONDENT

Date of Decision : 21-05-2015

Acts Referred:

Citation : (2015) 221 DLT 156

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : M.Y. Deshmukh and Yatin M. Jagtap, for the Appellant; Arun Bhatta, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Rajiv Shakdher, J.—Essentially, the grievance of the petitioner is qua illegal encashment of its bank guarantee by the respondent. The bank guarantee furnished by the petitioner was in the sum of Rs.5.67 crores. This said bank guarantee was furnished by the petitioner in lieu of bid security, at the stage of filing of the tender. The respondent, evidently, encashed the bank guarantee as it came to the conclusion that the petitioner had filed a "non-responsive" bid.

2. The facts, which led to the institution of the instant writ petition are set out hereinafter:-

2.1 The respondent, floated a Request For Proposal (in short RFP), on 21.2.2014. The RFP, required bids to be submitted for works broadly described as follows:-

"Widening and strengthening of Phalodi-Jaisalmer Section of NH-15 to Two/Four Lane with Paved Shoulder (Km 163.400 to Km 323.857) under NHDP-IV in the State of Rajasthan on Engineering, Procurement and Construction (EPC) basis contract."

(hereafter referred to in short as the said works)

2.2 The petitioner submitted its bid on 12.9.2014. In terms of the tender

conditions, as indicated above, the petitioner submitted a bank guarantee drawn on Bank of India, Hyderabad Branch. The said bank guarantee is dated 11.9.2014.

2.3 The respondent, evidently, on 8.10.2014, wrote to the petitioner that the bank guarantee furnished by it, was not in order. The objections stated by the respondent were incorporated in an annexure to the letter dated 8.10.2014. It may only be indicated that there were two objections stated. It is though, not disputed, during the course of the arguments made before me that what led to the invocation and encashment of the bank guarantee was the following objection:-

"...In the Bank Guarantee submitted, in last para it is written that BG will remain in force till 8.2.2015 and Claim period is 09.04.2015.

As per RFP, Bank Guarantee should be valid and remain in full force for a period of 180 (one hundred and eighty) days from the BID Due Date i.e. 12.9.2014. Therefore, Validity of the BG should not be before 11th March, 2014.

Please clarify..."

2.4 As would be evident on a perusal of the extract as set out hereinabove, the respondent had brought to the notice of the petitioner that its bank guarantee contained errors with regard to the validity period. According to the respondent, the bank guarantee ought to have been valid for 180 days from the bid due date. Since the bid due date was 12.9.2014, according to the respondent, the bank guarantee ought to have remained valid till 11.3.2014. It is in this context that it was also pointed out, that in last paragraph of the bank guarantee, there was a reference to the fact that it would remain in force till 8.2.2015, with the claim period extended to 9.4.2015.

2.5 On receipt of the said communication, the petitioner, immediately, wrote to the respondent vide letter dated 9.10.2014. By virtue of communication dated 9.10.2014 the petitioner acknowledged the fact that a typographical error had crept in the bank guarantee and accordingly submitted along with the said letter an amended bank guarantee. In the amended bank guarantee, it carried out the necessary amendments which the petitioner thought would suffice.

2.6 I may only note that the amendment was carried in paragraph 4 of the bank guarantee, wherein it was inter alia stated that the bank guarantee will remain enforceable till all amounts under the bank guarantee were paid. The error was in the date of validity indicated therein, which was 9.4.2014. By way of the amendment, the petitioner corrected the said date to 9.4.2015.

2.7 The respondent, it appears, did not send any response to this communication. As the events transpired, the petitioner's bid was not considered and, I am told, it is for the reason that its bid was construed as a "non-responsive bid".

2.8 The petitioner, evidently, on 5.12.2014 wrote to the respondent for the return of its bid security, which was furnished, as indicated above, in the form of a bank guarantee. To this communication, the petitioner did not receive any immediate response.

2.9 For the first time, the petitioner received a response to the said communication on 23.12.2014. The respondent's communication dated 23.12.2014, was accompanied by a letter dated 22.12.2014 which, the respondent had sent to the bank that had furnished the bank guarantee, i.e. the Bank of India. In sum, the respondent communicated to the petitioner that the bank guarantee furnished, had been encashed.

3. Aggrieved by this action of the respondent, the petitioner wrote to the respondent vide its letter dated 25.12.2014. By this letter, the petitioner, inter alia, brought to the notice of the respondent the decision of this Court, which was rendered on 10.3.2011, in the case of: IVRCL Infrastructures and Projects Ltd. v. National Highways Authority of India.

3.1 To be noted this decision of the Division Bench, was rendered in W.P. (C) No. 235/2011.

3.2 Despite, the aforesaid position of law being brought to the notice of the respondent, the respondent did not relent. The petitioner left with no option, had to approach this Court by way of the instant writ petition.

4. Notice in this writ petition was issued on 16.1.2015. While the petitioner was represented by Mr. Deshmukh, the respondent entered appearance on the said date via Mr. Bhatta.

4.1 Since then, pleadings in the matter stand completed.

5. Mr. Deshmukh, learned counsel for the petitioner has largely relied upon the assertions made in the writ petition and the rejoinder. It is the learned counsel's submission that the action of the respondent in declaring the petitioner's bid "non-responsive" should be declared illegal and, consequently, it should be asked to return the money, which was secured, by encashing the bank guarantee on a patently unsustainable ground.

6. Mr. Bhatta, learned counsel for the respondent, contends to the contrary. According to the learned counsel, the error which was pointed out in the communication dated 8.10.2014 persisted, inasmuch as, in the first subparagraph of paragraph 13 of the bank guarantee the period for validity ended on 8.2.2015 resulting in actual validity period being less than 180 days.

6.1 Mr. Bhatta relied upon clause 1.2.4 of the RFP to buttress his submission that the bank guarantee had to remain alive for a period not less than 180 days from the bid due date. Accordingly, it was the contention of Mr. Bhatta that the bank guarantee could not have a validity period which would end prior to 11.3.2015.

6.2 It is also the contention of Mr. Bhatta that the encashment of the bank

guarantee in issue was done under the terms of clause 2.20.7 of the RFP.

7. Before I proceed further, I may only note that at the hearing held on 28.1.2015, I had directed the respondent to keep the sum of Rs.5.67 crores, which it had received upon encashment of the bank guarantee, in an interest bearing fixed deposit. It was also indicated that the fixed deposit so created, would abide by the final orders of this Court.

8. I have heard learned counsels for the parties and perused the record. What clearly comes through is that the period of validity comes to an end (in respect of which there is no dispute raised before me) with the expiry of 180 days; a period which is to commence from the bid due date.

8.1 What is not disputed before me, is that, the provision for the validity period in the bank guarantee is made in clause 1.2.4 of the RFP. This clause being most crucial from the point of view of the issue raised in the instant writ petition, the same is extracted hereinbelow for the sake of convenience:

".... 1.2.4 A bidder is required to deposit, along with its BID, a BID security of Rs. 5.67 crore (Rupees five crores and sixty seven lakhs only) (the "BID Security"), refundable not later than 60 (sixty) days from the BID Due Date, except in the case of the Selected Bidder whose BID Security shall be retained till it has provided a Performance Security under the Agreement. The Bidders will have an option to provide BID Security in the form of bank guarantee acceptable to the Authority, and in such event, the validity period of the bank guarantee, shall not be less than 180 (one hundred and eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. The BID shall be summarily rejected if it is not accompanied by the BID Security...."

(emphasis is mine)

9. A perusal of the said clause would show that the bidder (in this case the petitioner) had the option to provide a bid security in the form of a bank guarantee acceptable to the respondent, and if, such a route was adopted, the validity period of the bank guarantee could not be less than 180 days from the bid due date. However, to this was added a caveat which was that this period of 180 days would include a claim period of 60 days. The said clause also made a provision for extension of this period if, it was, mutually agreed to between the parties concerned, i.e. the bidder and the respondent herein.

10. Concededly, the petitioner had submitted a bank guarantee which, as indicated above, is dated 11.9.2014. The bank guarantee contained two clauses which are the subject matter of contention in the present matter, i.e. clause 4 and 13.

11. For the sake of convenience, clause 4 of the unamended bank guarantee and clause 13 of the bank guarantee which is identical both, in the amended and unamended bank guarantee are set forth below.

"4. This Guarantee shall be irrevocable and remain in full force for a period of 210 (two hundred and ten) days from the BID Due Date 12-09-2014 inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Authority and the Bidder, and agreed to by the Bank, and shall continue to be enforceable till all amounts under this Guarantee have been paid on or before 09- 04-2014."

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"13. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to Rs.5.67 Crores (Rupees five crores and sixty seven lakhs only). The Bank shall be liable to pay the said amount or any part thereof only if the Authority serves a written claim on the Bank in accordance with paragraph 8 thereof, on or before 09th April, 2015.

Notwithstanding anything contained herein before, our liability under this guarantee is restricted to Rs.5.67 Crores (Rupees five crores and sixty seven lakhs only) in the aggregate and it will remain in force till the 08- 02-2015. Unless a claim or demand in writing is made against us under this bank guarantee before the expiry that is before the 09-04-2015 all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liability here under, irrespective whether the original guarantee together with all extensions if any, returned to us."

12. As would evident upon perusal of clause 4 of the unamended bank guarantee, the error which had crept in was that it indicated that the bank guarantee shall continue to be enforceable till all amounts under the bank guarantee were paid on or before 9.4.2014. This was an obvious error; the date ought to have been 9.4.2015.

12.1 There is also no dispute raised before me that the petitioner carried out the necessary amendments in clause 4 of the bank guarantee by submitting an amended bank guarantee; a fact to which I have made a reference above. The amended bank guarantee corrected the date in clause 4 from 9.4.2014 to 9.4.2015.

12.2 Therefore, the area of discord, in a sense, gets narrowed down to clause 13.

12.3 A perusal of clause 13 would show that the first sub-paragraph of paragraph 13 contains two dates. The first date is indicative of the fact that the bank guarantee in issue was to remain in force till 8.2.2015, while the second date makes a provision for the period within which a claim or a demand in writing had to be made for the bank guarantee amount to be paid to the person who invoked the bank guarantee, which in this case was the respondent. The second date referred to in the said clause is: 9.4.2015.

12.4 Therefore, the net effect of clause 13 would be that while it was valid and enforceable till 8.2.2015 the person invoking the bank guarantee was given further time to lodge a claim or make a demand on date prior to 9.4.2015.

13. Mr. Bhatta has argued that the petitioner could not have provided that the bank guarantee will remain in force till 8.2.2014.

13.1 As indicated above, this argument proceeds on the basis that 180 days from the bid due date, i.e. 12.9.2014 would end on 11.3.2014 and not on 8.2.2015.

13.2 According to me, the respondent, in a sense, has been its own enemy. The reason for coming to this conclusion is the language of clause 1.2.4. The language is plainly indicative of the fact that while the bank guarantee had to remain valid for a period of 180 days from the bid due date, the said validity period was to include the claim period of 60 days. Therefore, if one were to work backwards from 9.4.2015, the validity period of the bank guarantee would end on 8.2.2015, which is what was provided in the bank guarantee.

13.3 It is, in fact, the argument of the learned counsel for the petitioner that in the instant case the period provided is more than 180 days as the period for lodging a claim or making a demand is extended till a date prior to 9.4.2015 and not 11.3.2015.

13.4 I tend to agree with the learned counsel for the petitioner on this score.

14. Having regard to these facts, could the respondent have declared the petitioner's bid as non-responsive? In my view, the answer has to be in the negative. If that is the conclusion reached, then the action of the respondent in declaring the bid as "non-responsive" was illegal and, therefore, the consequent action of invoking and encashing the bank guarantee can also not be sustained.

15. In this context, I may only note the decision of the Division Bench of this court, of which I was a member, rendered in the case of IVRCL Infrastructure's case (*supra*). The relevant observations of the Division Bench in this case are extracted hereafter:-

"30. There is no doubt about the proposition that the terms and conditions of a tender document must be strictly adhered to. However, the legal position in this behalf is enunciated in *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, AIR 1991 SC 1579 : (1991) 2 ARBLR 94 : (1991) 2 CompLJ 275 : (1991) 2 JT 577 : (1991) 1 SCALE 928 : (1991) 3 SCC 273 : (1991) 2 SCR 696 : (1991) 2 UJ 181 . It was held that deviations from non-essential or ancillary / subsidiary requirement being a minor technical irregularity can be waived. The issue, thus, arises whether the discrepancy in the present case can be stated to be of such minor technical nature.

31. We must keep in mind the objective of execution of the Power of Attorney, which is to give authority to the person to bind the bidder. The petitioner had already suo moto given a clarification. The Power of Attorney was in the proper format. It was only the supporting Board Resolution which created some doubts in the mind of the respondent, which could have easily been clarified. There was no modification sought in the sense of some additional material sought to be incorporated in the bid.

32. We are further fortified by two judgments of this Court both of the Division Bench. In *Ramunia Fabricators SDN BHD and Others Vs. Oil and Natural Gas Corpn. Ltd. and Others*, (2008) 150 DLT 1 : (2008) 103 DRJ 223 , the distinction between essential and non-essential conditions in a contract was emphasized. In the facts of the case, the bids were submitted by a subsidiary on the basis of the documents purchased by another subsidiary of a single parent company. The petitioner not only submitted the requisite Memorandum of Understanding, but also answered other queries and clarifications. The bid submitted by the petitioner was held to be perfectly in tune with the terms of the bid. T.S. Thakur, J. (as he then was) observed that whether or not a condition is an essential would depend upon the fact situation of each case and the nature of the conditions while relying upon the judgment in *Poddar Steel Corporation's* case (*supra*).

33. In another judgment in *Kapsch Metro JV Vs. Union of India (UOI) and Another*, (2007) 2 CTLJ 64 : (2007) 140 DLT 378 : (2007) 95 DRJ 668 , it was emphasized that public interest requires a wider participation of bidders to ensure healthy competition especially keeping in mind the dictum laid down in *Poddar Steel Corporation's* case (*supra*). The deficiency of 17 days" period in the EMD of 180 days" validity period which too was subsequently altered in order to conform to the prescribed requirement was held to be a technical irregularity of little significance and worthy of being waived.

34. We are, thus, of the view that the bid of the petitioner could not have been treated as non-responsive on account of the absence of the seal of the Company Secretary on the Power of Attorney. Since the petitioner has itself set out that it would not be the L-1, the only consequence would be that the amount of the bid security amount to the extent of 5% amounting to Rs.70 lakhs be refunded by the respondent to the petitioner forthwith."

16. I am also informed that this matter was carried in appeal to the Supreme Court. The Supreme Court disposed of the matter with a batch of appeals involving the same issue. There is no dispute that the civil appeal in *IVRCL Infrastructure* case, was dismissed.

17. Having regard to the aforesaid position, the writ petition has to be allowed. It is ordered accordingly. The respondent's action in holding the bid as non-responsive is declared illegal. Respondent will, accordingly, refund the amount of Rs.5.67 crores to the petitioner along with interest accrued thereon during the period it was kept in a fixed deposit. The respondent, will do the needful, within one week from today.

18. I am told by Mr. Bhatta that the fixed deposit was created on 16.2.2015. The said statement is taken on record.

19. No further orders are called for in the writ petition. The writ petition is, accordingly, disposed of.