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Court : Andhra Pradesh

Decided On : Jul-06-1998

Reported in : 1998(4)ALD502; 1998(4)ALT533

Judge : Krishna Saran Shrivastav, J.

Acts : [Constitution of India](#) - Article 226

Appeal No. : WP No. 10356 of 1998

Appellant : Sew Constructions Ltd. and anr.

Respondent : Superintending Engineer, Srbc Circle No. 2, Nandyal, Kurnool Dist. A.P. and ors.

Advocate for Def. : Government Pleader for Irrigation and ;Mr. C.V. Mohan Reddy, Adv.

Advocate for Pet/Ap. : Mr. M. Vijaya Sarathi Reddy, Adv.

Judgement :

1. In this writ petition under Article 226 of the [Constitution of India](#), the petitioners seek issuance of writ of mandamus restraining the respondent Nos. 1 to 4 and 6 from awarding the contract to the 5th respondent in pursuance of bid No.NCB 1 of

1997-98, dated 14-10-1997.

2. After obtaining loan from the International Bank for Reconstruction and Development (for short 'IBRD')/International Development Association (for short 'IDA') towards the cost of HI A.P. Irrigation Projects, the State of Andhra Pradesh has decided to apply part of the funds to the contract of work 'Earth work excavation, lining of canal and construction of structures on polur sub-branch and on polur major, Thogarchedu major and their minors and sub-minors in Block No.1 of Sri Sailam Right Branch Canal (for short 'Block No.1 of Sri Sailam Right Branch Canal'). The 1st petitioner/the 5th respondent and three others submitted their bids in answer to the invitation for submitting bids within the specified time, that is 21-11-1997. The bids were opened by the 1st respondent in the presence of all the five bidders in which the quotation of the 5th respondent was found to be the lowest while the quotation of the 1st petitioner was found to be second lowest. According to clause 4.5B read with Annexure 3.1 of page 3.53 of the tender documents, as against 8 dtc sel road rollers (6-8 T capacity), the 5th respondent owned only six such rollers, as against 10 tampers for compaction, 5th respondent had none and as against S water tankers (5000 ltr. capacity), he owned only 6 tankers. The respondent Nos.1 and 2 recommended the bid of the 5th respondent for award of the work to the 3rd respondent which has accepted the recommendation and has decided to award the work in question to the 5th respondent. The 6th respondent has given no objection for awarding the work in question to the 5th respondent by its letter dated 21-4-1998.

3. The petitioners have alleged that for awarding the work in question, three essential conditions were required to be complied with, which are (a) the bidders must be eligible as per clause (3), (b) the bidders must qualify in accordance with clause (4) and (c) the offer of the bid should be the lowest evaluated bid price as per instructions to bidders (IFB), dated 14-10-1997. The 5th respondent was not qualified as per clause (4) of IFB as he had not satisfactorily completed as prime contractor of at least one similar hydraulic work of value not less than 91.76 millions and had not admittedly possessed the requisite machineries as per clause 4.5(b) of IFB and Annexure 3.1 of page 3.53 of the tender documents and, therefore, his bid was not a substantially responsive bid. It is further alleged that

he was not qualified for the award of the contract as per clause 4.5(A)(a) and (b) of IFB. It is also alleged that with a view to favour the 5th respondent, though he was not duly qualified, the first and the 2nd respondents with ulterior motive and mala fide intention, had recommended the case of the 5th respondent and had misled the 6th respondent and as such their action is arbitrary and unreasonable. Therefore, the respondent Nos. 1 to 4 and 6 should be restrained from awarding the contract to the fifth respondent in pursuance of bid No.NCB 1/1997-98, dated 14-10-1997 of the work in question.

4. The 1st respondent through its counter has pleaded that, bids for the work in question were not invited by adopting pre-qualification system, that the bidders were to furnish the information and the documents with their bids as per clause 4.3 of IFB for examination and determining whether the bids were qualified or not, that was on the post-qualification system. There was a difference of Rs.1,91,19,6717- between the bid of the 5th respondent and that of the 1st petitioner. As per clause 29.1 of IFB, the employer was to compare only the bids substantially responsive in accordance with clause 26 of IFB. The 5th respondent had fulfilled the minimum qualifications in accordance with clauses 4,5(A) and (B) of IFB and, therefore, was taken into consideration and his bid was accepted by scrutinising and evaluating the same independently by the 3rd respondent. The IBDR was furnished in the form of booklet containing the entire material and after due verification it had given no objection to the proposal vide letter dated 21-4-1998. Clause 32 of IFB empowers the employer to accept or reject any bid.

5. The 5th respondent through separate counter has taken almost similar pleas as have been taken by the 1st respondent. He claimed to have possessed all the three required qualifications. He alleged that he had done the works of similar nature of value of 163.80 million out of 181,26 million, that is to say 90 per cent of the contract value of more than Rs.91.76 million which was executed by him in the last five years which is evident from the certificate issued by the Superintending Engineer, SRBC, Circle II, Nandyal. The 3rd respondent was satisfied that he possessed all the requisite and critical machineries. He has alleged that delay in completing the work would result in national loss.

6. At the outset, it is to be remarked that at page 3 of the annexure to the counter-affidavit of the 1st respondent, 1,86,000 Sq.M. has been mentioned which appears to be a typographical error as it has been clarified in the rejoinder of the 5th respondent that the figure is actually 181.26 millions and not 1810.26 millions and the learned Counsel of the petitioners has frankly conceded and rightly so that if this correct figure is taken into consideration, the 5th respondent appears to have completed 90 per cent of the contract value of the works of similar nature in the preceding last 5 years as required in clause 4.5(A) and (B) of IFB. It is not disputed before me that the description of the 5th respondent by mistake has been wrongly given. It is not M/s. Y.R. Reddy and Co., but it is Y.R. Reddy. This mistake in description should, therefore, be corrected by amending the cause title and in para 5 and serial No. 1 of the writ petition.

7. As noted above, the 5th respondent did not own requisite number of diesel road rollers, tampers for compaction and water tankers and the shortfall was 2 diesel road rollers, 10 tampers for compaction and 2 water tankers. Before I proceed further, it would be beneficial to reproduce clauses 4.5(A), 4.5(8), 26, 26.1, 26.2, 26.3, 31.1, 35 and 35.1 as under:

'4.5 A. To qualify for award of the contract, each bidder in its name should have in the last five years :

(a) Achieved a minimum annual financial turnover (in all classes of civil engineering construction works only) of *Rs.100 millions in any one year.

(b) Satisfactorily completed (not less than 90% of contract value) as a prime contractor of atleast one similar hydraulic work of value not less than Rs.91.76 millions.

(c) Executed in any one year, the following minimum quantities of work :--

--Cement concrete (including(RCCand PSC) 17,000 cum--earth work in both excavationand embankment (combinedquantities) 3,41,000 cum--cement concrete lining/cementconcrete slab lining 1.86,000sqm 4,5 (B) Each bidder should further demonstrate:

(a) availability (either owned or leased or by procurement against mobilisation advances) of the following key and critical equipment for this work, as per Annexure 3.1 at page 3.53. 26. Examination of bids and determination of responsiveness.

26.1. Prior to the detailed evaluation of bids, the employer will determine whether each bid (a) meets the eligibility criteria defined in clause 3; (b) has been properly signed; (c) is accompanied by the required securities and (d) is substantially responsive to the requirements of the bidding documents.

26.2. A substantially responsive bid is one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or performance of the works; (b) which limits in any substantial way, inconsistent with the bidding documents; the employer's rights or the bidder's obligations under the contract; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.

26.3 If a bid is not substantially responsive, it will be rejected by the employer, and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.

31.1. Subject to clause 32, the employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluated bid price, provided that such bidder has been determined to be (a) eligible in accordance with the provisions of clause 3, and (b) qualified in accordance with the provisions of clause 4.

35. Advance payment and security.

35.1. The employer will provide an advance payment on the contract price as stipulated in the conditions of contract, subject to maximum amount, as stated in the contract data."

8. Learned Counsel appearing for the petitioners has argued that each bidder must have possessed all the machineries as per Annexure 3.1 at page 3,53 of IFB which has been shown in the tabular form at page 3 of Annexure to the counter of the 1st respondent. It is not disputed that the 5th respondent did not possess all the machineries required. As per clause 26.1 IFB, the employer must, inter alia, determine whether the bid in question is substantially responsive to the total requirements of the bidding documents and a substantially responsive bid is one which conforms to the terms and conditions and specifications of the bidding documents without material deviation or reservation as per clause 26.2 of IFB, It has been further argued that because the 5th respondent did not comply the requirement of clause 4.5(B) read with Annexure 3.1, his bid cannot be said to be a substantially responsive bid and under these circumstances, the respondent Nos. 1 to 4 and 6 had to reject the bid of the 5th respondent as per clause 26.3 of IFB, Reliance has been placed on the case of Sri Shiva ShakthiConstructions (P) Ltd. and others v. the Superintending Engineer, : 1997(1)ALT247 . It has been lastly argued on behalf of the petitioners that loan was granted by IBRD and, therefore, its approval was a condition precedent for awarding the work in question. This condition must have been made known to the bidders by incorporating the same specifically in IFB/TTB so that (he aggrieved bidder may take up the matter with IBRD for proper decision. Relying on the case of Hindustan Construction Co., Ltd v. National Highways Authority of India and others, (1997) 90 Comp. Cases 372, it has been argued that the bid of the 5th respondent should be rejected because the direction of the Apex Court has not been followed by the 1st respondent.

9. On the other hand, learned Government Pleader appearing on behalf of the respondent Nos.1 to 4 and 6 has urged that in the remark column at page 3 of Annexure I to the counter of the 1 st respondent, it has been specifically mentioned that the 5th respondent has satisfied the criteria as most of the critical equipment was possessed by the bidder and the remaining equipment which were minor equipments could be deployed on hire basis and this fact was made known by the respondent Nos. 1 to 4 to the 6th respondent and, therefore, it cannot be said that along with the relevant material, this information was not brought to the notice of the 6th respondent. It has been further urged that the employer was to

see whether the bid was substantially responsive to the requirements of the bidding documents and in the considered opinion of the employer, the 5th respondent was found capable of arranging the shortfall machineries and, therefore, it cannot be said that his bid was not substantially responsive.

10. The learned Counsel of the 5th respondent has contended that as per clause 4.5B(a), each bidder was required to demonstrate the availability of the machineries shown in Annexure 3.1 at page 3.53 of ITB which machineries may be owned or leased or procured against mobilisation advances and provision for advance payment of the contract price has been made vide clause 35.1 of 1TB. Thus, according to him, it is apparent that the shortfall of the machineries could be made available after execution of the contract and on obtaining advance on the contract price. The employer was satisfied that the machineries which were less in number than required were minor equipments which can be deployed on hire basis and, therefore, it cannot be said that the 5th respondent, merely because at the time of submitting the bid did not possess the requisite number of machineries, was not eligible to be considered for awarding the work in question.

11. Clause 35.1 of ITB speaks that the employer will provide advance payment on the contract price on fulfilment of certain conditions mentioned therein while clause 4B(a) shows that each bidder should demonstrate the availability of the machineries either owned or leased or by procurement against mobilisation advances for this work as per Annexure 3.1 at page 3.53 of ITB. It is thus crystal clear that the bidder has to demonstrate as to how he will make available the machineries and he may demonstrate that against mobilisation advances he would inter alia procure them, which means that he is not required to possess all the machineries as per Annexure 3.1 of ITB, but should satisfy that he may procure the machineries after obtaining loan from the employer after execution of the contract. But, he must possess the major machineries and more in number, because, clause 26.1 of ITB shows that prior to the detailed evaluation of bids, the employer will determine, inter alia, whether each bid is substantially responsive to the requirements of the bidding documents. Clause 26.2 of ITB lends support to the aforesaid contention because it defines substantially responsive bid as one which conforms to all the terms and conditions and specifications of the bidding

documents without material deviation or reservation and material deviation or reservation means which affects in any substantial way the scope or quality or performance of the work. Therefore, it is clear that if there is no material deviation or reservation in complying all (the terms including possession of the requisite machineries which may substantially affect the quality or performance of the works, it cannot be said that the shortfall, however small, will make the bid as not substantially responsive. If the aforesaid interpretation is not given, then, the clause of demonstration of availability of critical equipments by procurement against mobilisation advances, which could be made only after execution of the contract, would become redundant. Similarly, the definition of substantially responsive bid and the definition of material deviation given in clause 26.2(a) would become meaningless. Because the employer has found that deficiency of the machineries which are minor equipment may be deployed by the bidder on hire basis and he possessed most of the critical equipment, it appears that, according to it, the bid was substantially responsive because it did not materially deviate the terms of the contract as it would not in any substantial way affect the quality or performance of the work in question.

12. The case of Shri Shiva Shakthi Constructions, (supra) is distinguishable on facts. In that case in Appendix of Part I, list of essential plants and equipments was noted and Part n of the brochure schedule " refers to the plant and equipment proposed to be deployed for carrying out the work. Schedule I relates to the equipment to be procured through purchase/lease. This Court found that the brochures were only guidelines and were not binding because they were the brochures of 1994 whereas the latest instructions were issued in 1995 and it was found that it was always open to the State to change the tender conditions with a view to get the optimum results and in the public interest. It was also observed that the ownership of the concerned machineries was very much essential for execution of work. This Court also observed that the principle of judicial review is pressed into service in a very limited way and the Court can interfere only when the action is per se arbitrary or discriminator}'. The Contractor did not possess the equipment required and that he tried to demonstrate that he owned and possessed those machineries in question, but he failed to do so in spite of opportunities given to him. In that case, the employer found that the contractor did

not possess the plant and machineries for issuing the tender schedules. On the other hand, the employer, in this case, did not issue any other instructions contrary to the instructions mentioned in ITB and on assessment found that the 5th respondent was competent to arrange the minor equipments. These are the technical matters and should be left best to the employer to prescribe and to find whether the machineries already owned and possessed by the contractor would produce quality work or not within the specified time.

13. For the foregoing reasons, I am unable to agree with the submission of the learned Counsel of the petitioners that unless all the machineries in the required numbers were available with the 5th respondent as per Armexure 3.1 of ITB at the time of submission of the tender, his bid cannot be said to be substantially responsive to the requirements of the bidding documents and, therefore, his bid should have been rejected under clause 26.3 ITB, otherwise, the employer can always recommend, without proper justification, that a particular bid should be accepted. Had the 5th respondent possessed no critical equipment at all or very less in number than required, then, things would have been different, because, in those circumstances, it can be said that his bid was not substantially responsive. But, such is not the case here,

14. In the case of Hindustan Construction, (supra), it has been observed by the Supreme Court that, whenever contracts are to be awarded by the State or any of its undertakings, in respect of projects which are financed by International Financial Institutionssuch as the World Bank, ADB, care should be taken mention in the document inviting tenders that decision to award contract would be taken with concurrence of the financing agency if it is so required in the loan agreement. In this case, in the document inviting bids, it was not mentioned that the concerned project was financed by international financial institution, that is the World Bank or ADB and the decision to award the contract would be taken with the concurrence of the financing agency and under these circumstances, the Apex Court was pleased to make the aforementioned observations. Such is not the case here, because, in the opening paragraph of Invitation for Bid (IFB), it has been mentioned that the Government of India has received a credit from IDA for the A.P. Irrigation Project and the bid was open to all the bidders from the eligible

contractors as defined in IBRD guidelines for procurement. Thus, it cannot be said that in IFB, necessary required information was not supplied. Even if it is assumed that no such information was given in IFB/ITB in specific words, that by itself appears to be no ground to reject the bid by the employer.

15. From what is stated above, it appears the decision making process of the respondent Nos. 1 to 4 was transparent, fair and open.

16. In the result, I do not find any merit in this writ petition and, therefore, it is dismissed. No costs.

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