MANU/HP/1842/2023

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No. 6658 of 2023

Decided On: 07.10.2023

Appellants: ABCI Infrastructure Pvt. Ltd. **Vs.** Respondent: Union of India and Ors.

Hon'ble Judges/Coram:
M.S. Ramachandra Rao, C.J. and Ajay Mohan Goel, J.

Counsels:
For Appellant/Petitioner/Plaintiff: K.D Shreedhar, Senior Advocate, Sameer Thakur and Sneh Bhimta, Advocates

For Respondents/Defendant: Balram Sharma, Deputy Solicitor General

DECISION

M.S. Ramachandra Rao, C.J.

1. Heard both sides and with the consent of both sides, this Writ petition is being disposed of.

2. The Writ petitioner is a Company incorporated under the Companies Act, 1956.

3. The Border Road Organization (2nd respondent), which is under the Ministry of Defence of the Union of India (1st respondent) had issued a notice inviting bids on 23.02.2023 for design and construction of Uni-Directional Two Lane Twin Tunnels at Shinkun La Pass of Length 4.1 km (Approximately) including Civil and Electrical/ Mechanical Work alongwith approaches connecting Darcha-Padam Highway to NHDL Specification in Himachal Pradesh and Union Territory, Ladakh through Engineering, Procurement and Construction mode.

4. The estimated cost of the work was ' 1504.64 crores and the same was to be completed within a period of 48 months.

5. The said Notice Inviting Tender (NIT) was accompanied by a Request For Proposal which contained the terms and conditions for making the bid. The bid had to be uploaded online and comprised of a technical bid as well as a financial bid.

6. The bid due date was extended and was ultimately fixed for 03.06.2023 upto 11.00 hours Indian Standard Time through Annexure P-4.

7. The technical bids were to be opened on 05.06.2023 as per the corrigendum and the date of opening of financial bids was to be published online after the declaration of the technical bids' result.

8. In response to NIT, 10 bidders, including the petitioner participated in the tender process by submitting their respective technical and financial bids.

9. The petitioner submitted its technical as well as financial bid on 03.06.2023 before 11.00 Hrs on the e-procurement portal of the respondents. It had also furnished a bank guarantee to the respondent of ' 15,04,64,000/-.

10. The petitioner uploaded its bid quoting ' 1569.00, though it claims that this was on account of system error which occurred during the online uploading of the financial bid and contends that it had actually intended to quote a bid price of ' 1569 crores for the said work. According to the petitioner the quotation of the bid price of ' 1569 was an inadvertent error as its actual intention was to quote ' 1569 crores.

11. According to the petitioner this fact came to its notice only at the time of declaring the result of financial bid on 24.08.2023 by respondents.

12. On 24.08.2023, financial bids of seven bidders, including the petitioner, who were declared technically qualified were opened, and the results were also declared. The petitioner was ranked as L-1 bidder, but with the bid price of ' 1569 only.

13. On 25.08.2023, vide Annexure P-8, the petitioner apprised the respondents that it actually had quoted ' 1569 crores and not ' 1569 and the said error must have crept in due to system error/server overload.

14. Vide Annexure P-9 dt.26.08.2023, respondent no. 2 wrote to the petitioner stating that as per the Evaluation Committee, the quotation of ' 1569.00 offered by the petitioner was unreasonably low and the petitioner should furnish detailed price analysis in relation to scope of work of each item, completion schedule, allocation of risks and responsibilities, safety requirements and demonstration of its capability to complete the work, and this should be done before 31.08.2023.

15. The petitioner responded to the same vide Annexure P-10 dt.30.08.2023 explaining that its intention was to quote ' 1569 crores and not ' 1569, that the discrepancy has crept in due to typographical error/critical technical snag and difficulty encountered while quoting the price. It was stated that computer system had not shown the complete value of work which was typed in and that web portal on the date of its uploading the bid was persistently hanging and was very slow.

It was also stated that the petitioner had not carried out any rate analysis for the price of ' 1569, and that since the BRO's estimated project cost itself was ' 1504 crores, tender document cost was ' 1,60,000/- and bid security was ' 15,04,64,000/-,it could never have been its intention to bid a low price of ' 1569 only.

It therefore contended that it was completely illogical for the respondents to consider its bid as a valid value bid, and such bid cannot be considered because it was not financially feasible to implement the project with the said figure.

It was mentioned that it has been a practice of respondents to consider such abnormally low bids as non-responsive, unreasonable, unworkable, and such bids were not considered for further evaluation and therefore the respondents ought to treat its bid as non-responsive.

16. This was again reiterated in Annexure P-11 dt.07.09.2023 and it was contended therein that the petitioner cannot be declared as L-1 bidder and ought to be declared as L-5 in view of its intended quotation of ' 1569.00 crores, and bid security of ' 15,04,64,000/- offered by it in the shape of bank guarantee may not be encashed and it should be returned to the petitioner and no other penal action may be taken against the petitioner.

17. The petitioner also quoted in another representation Annexure P-12 dt.12.09.2023 the case of another party, which had also wrongly quoted the bid price on account of

system error, and contended that the bid security of said firm was not forfeited.

18. However, vide Annexure P-13 dt.16.09.2023, the respondent addressed the 4th respondent-bank informing that the petitioner had been declared as defaulter, that its bid security has to be forfeited, and the Bank should encash the bank guarantee dt.25th April, 2023 given by the petitioner for ' 15,04,64,000/- and transfer the amount to the 2nd respondent.

19. The petitioner has therefore approached this Court in this Writ petition to quash the financial bid result dt.24.08.2023 to the extent that it has been shown as the selected bidder/L-1 bidder, and also prayed that the letter dt.16.09.2023 for forfeiting and encashing its bank guarantee should also be quashed, that it should be declared as L-5 bidder by considering the bid price of ' 1569 crores, and the tender process be carried forward from that stage onwards.

The stand of the respondents

20. When the matter was listed on 19.09.2023, the learned Deputy Solicitor General of India appearing for the respondent-Union of India was asked to produce the letters dt.14.09.2023 and 15.09.2023 referred to in Annexure P-13 dt.16.09.2023 addressed by the 2nd respondent to the 4th respondent-Bank and the matter was posted to 20.09.2023.

21. On that date, the learned Deputy Solicitor General of India appearing for respondents No. 1 to 3 placed before this Court the following documents:-

(a) Letter dt.24.08.2023 addressed to the petitioner by the 2nd respondent naming the petitioner as a successful bidder/L-1 after opening of the financial bids on that date.

(b) E-mail dt.31.08.2023 of the 2nd respondent addressed to 3rd respondent pointing out that the claim of the bidder i.e. the petitioner cannot be accepted as online bidding process is being practiced to establish transparency in the bidding process, that the system would never manipulate or modify any data entered by bidder and would reflect the facts and figure being entered by the bidders only.

The said e-mail also stated that the system displays the value both in figure as well as in words, and both the values quoted by the bidder figured as ' 1569 only, and there is willful default by bidder and the reason is known only to the bidder.

It was denied that there was malfunction of web portal and it was stated that the said portal was also being used by most of the Government departments to bring transparency in tendering system; and irrespective of reason to quote abnormally low rate by bidder, it would cause delay in commencement of the work which would definitely lead to cost escalation.

It was also stated that besides cost escalation, delay of a strategic project is detrimental to national security and there should be re-tendering as per the BRO contract manual section 3.19.1.

It was also recommended to forfeit the EMD/Bid Security amount and black list the petitioner for at least six months.

(c) Proceedings dt.04.09.2023 enclosing the minutes of meeting of evaluation committee for price bids, which occurred on 13.09.2023 inviting fresh bids on account of the petitioner's quoting unreasonable low rate and recommending bid security given the petitioner to be forfeited in terms of clause no. 2.20.4 and 2.20.5.

A perusal of this document shows that the plea of system error being taken by the petitioner (which is alleged to have occurred during online uploading of its financial bids reflecting ' 1569.00 instead of ' 1569 crores as contended by the petitioner), is denied by the respondents.

Consideration by the Court

22. We have noted the contentions of the parties.

23. Having noticed the stand of the respective parties, we shall now consider if the plea of the petitioner that there was a system error/ glitch during online uploading of its financial bid on 3.06.2023 reflecting ' 1569.00 instead of ' 1569 crores, is correct or not.

24. If really this plea is correct then none of the other bidders who submitted online quotations on the very same date would have been able to upload their financial bids in crores. We are also of the view that if really there was a system glitch, no bidder's bid would get uploaded. Also the system would never manipulate or modify any data entered by the bidder as rightly contended by the respondents.

25. So we do not accept the plea of petitioner that the petitioner's bid alone got manipulated and instead of ' 1569.00 crores, the system reflected ' 1569.00 only.

26. In West Bengal Electricity Board versus Patel Engg. Co Ltd. MANU/SC/0024/2001 : (2001) 2 SCC 451 it was held that when arithmetical mistakes were detected in bid documents, and the High Court had taken a view that because such mistakes are unintentional and occurred due to fault of the computer, such mistakes can be allowed to be corrected later, the Supreme Court set aside the order of the high Court observing as under:-

"24. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos. 1 to 4 to correct the same before submission of the bid. Had they been vigil in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of ITB.

25. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of the care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant respondent Nos. 1 to 4 and respondents Nos. 10 and 11 are all bound

by the ITB which should be complied with unscrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules. It has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest."

(emphasis supplied)

27. Also admittedly, the petitioner had uploaded its bid on 03.06.2023 and only on 25.08.2023, more than 2 months later, after the financial bids were opened on 24.08.2023 and it was declared as a successful bidder (L-1), it took the plea that it had never any intention to quote ' 1569.00 as the bid amount for the project, and that the respondents ought not to consider its bid for the purpose of evaluation as it was non-responsive and reiterated the same in its letter dt.30.08.2023 (Annexure P-10).

28. Thus the petitioner itself indicated that its bid should be treated as virtually withdrawn.

29. Clause 2.20.4 and 2.20.5 of the Request for Proposal mentions about the circumstances in which the respondents are entitled to forfeit and appropriate the bid security as damages are reproduced as under:-

"2.20.4 The Authority shall be entitled to forfeit and appropriate the BID Security as Damages inter alia in any of the events specified in Clause 2.20.5 herein below. The Bidder, by submitting its BID pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its BID or for any other default by the Bidder during the period of BID validity as specified in this RFP. No relaxation of any kind on BID Security shall be given to any Bidder.

2.20.5 The BID Security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and/or under the Agreement, or otherwise, under the following conditions:

(a) Deleted

(b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 4 of this RFP:

(c) If a Bidder withdraws its BID during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority.

(d) In the case of Selected Bidder, if it fails within the specified/extended time limit by Authority-

(i) to sign and return the duplicate copy of LOA:

(ii) to furnish the Performance Security / Additional Performance Security within the period prescribed thereof in the Agreement;

OR

to sign the agreement"

(emphasis supplied)

30. Thus as per clause 2.20.4, the petitioner, by submitting its bid pursuant to Request For Proposal shall be deemed to have acknowledged and confirmed that the Authority would suffer loss and damage on account of withdrawal of its bid; and if it were to withdraw it's bid, as per clause 2.20.5(c), the bid security would have to be forfeited.

31. Therefore, it is not open to the petitioner to contend that its bid security cannot be forfeited in terms of Clause 2.20.5(c), which expressly permits the bid security to be forfeited and appropriated if a bidder wants to withdraw its bid within the period of its validity.

32. In our opinion, the project in question is floated by the Ministry of Defence through the BRO, and had the bidding process proceeded as per the NIT dt.23.02.2023 to its logical conclusion, the project itself would have commenced on time.

33. In view of the necessity to start a fresh bidding process, undoubtedly, it would delay in commencement of work, and also lead to cost escalation, and delay of such a strategic project would be detrimental to national security. Thus the withdrawal of petitioner's bid is prejudicial to public interest.

34. If in such situation the bid security is not forfeited, there would be serious prejudice to public interest which would far outweigh any loss caused to petitioner by such forfeiture.

35. As observed by Supreme Court in Andhra Pradesh Pollution Control Board versus CCL Products (India) Limited MANU/SC/1013/2019 : (2019) 20 SCC 669, absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee; this is because the bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction; and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and

irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee.

36. Similar view has also been expressed in Himadri Chemicals Industries Ltd. versus Coal Tar Refining Company Limited MANU/SC/3256/2007 : 2007 (8) SCC 110'' paragraph 14 thereof reads as under:-

> "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit:
>
> (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
>
> (ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
>
> (iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.
>
> (iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.
>
> (v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.
>
> (vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

37. In the instant case we do not find any special equity in favor of petitioner warranting grant of any relief to petitioner as in our opinion, the prejudice to public interest is higher than any loss to petitioner.

38. The learned counsel for the petitioner has cited the decision of the

(a) Supreme Court in Civil Appeal No. 224 of 2022 [@ Special Leave Petition (c) No.19089 of 2017] titled M/s. Shrushti Works and Constructions versus The State of Maharashtra and others,

(b) decision of High Court of Judicature at Bombay Civil Appellate Jurisdiction in Writ Petition No. 11818 of 2022 titled as M/s. RKD SCPL (JV) versus Ministry of Road Transport and Highway & Anr.,

(c) decision of High Court of Delhi in W.P.(C) 4083/2023 and CM APPL.

15889/2023, 15890/2023 titled PNC Infratech Limited versus National Highways Authority of India, and

(d) decision of High Court of Chhattisgarh, Bilaspur in Writ Petition (c) No. 1030 of 2019 titled Arun Kumar Gupta vs. State of Chhattisgarh and others.

39. In none of these cases, the Supreme Court or the High Courts were dealing with the Defence projects of strategic importance like the project in question and the consequent loss to the tax payer on account of the delay in execution of the project by cost escalation.

40. For all the aforesaid reasons, we do not find any merit in this Writ petition. The same is accordingly dismissed. No costs.

41. All pending applications stand disposed of accordingly.

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