

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on 05.10.2010
% Date of decision: 08.10.2010

+ WP (C) No.5166 of 2010

DHOOT DEVELOPERS PRIVATE LIMITED
& ANR.

...PETITIONERS

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Vijay Nair, Mr. Rajat Joneja &
Mr. Sodhi Policap, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Sachin Datta, Adv. for R-1 to 3.
Mr. Alok Kumar & Mr. Mukti Bodh,
Advocates for R-4.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The Director General, Married Accommodation Project of the Ministry of Defence along with the Director (Contracts) of the same Ministry issued a pre-qualification notice No.1/2009-2010 in terms of letter dated 18.5.2009 inviting applications for pre-qualification for the bids, in response where to the petitioners submitted their pre-qualification bid on 8.7.2009 for construction of dwelling units at Army/Air Force/Navy Station for MAP Phase-II. A list of 139

contractors for MAP Phase-II, who were found fit for the pre-qualification of MAP Phase-II was displayed on the website of respondents 2 & 3 and the name of the Joint Venture of the two petitioners figures in the same.

2. We may note that petitioner No.1 is a private limited company while petitioner No.2 is a limited company incorporated and registered under the Companies Act, 1956 stated to be engaged in real estate development and construction work who are stated to have entered into a joint venture agreement on 15.3.2008 to explore business opportunities in India. Petitioner No.2 has been entrusted with the task of necessary steps for procurement of contracts though for its effective execution both the parties are to pool in their technical experience and resources. The Joint Venture is known as “Dhoot Developers Private Limited (JV) Bengal Silver Spring Projects Limited”.
3. Respondent No.3 addressed a letter dated 11.12.2009 to petitioner No.1 informing that the name of the Joint Venture had been approved for issuance of the tender documents in respect of construction of residential accommodation at Amritsar and Tibri. The letter called upon the petitioners to deposit a demand draft for ₹10,000.00 for supply of tender documents. This was complied with by petitioner No.1 and the tender documents were issued to the Joint Venture under the cover of the letter dated 25.1.2010. The Joint Venture submitted a bid under the cover of the letter dated 4.5.2010.
4. The letter dated 25.1.2010 forwarding the tender documents provided in para 2 that these should be submitted with “earnest money deposit”

as detailed in Appendix 'A' to the Notice Inviting Tender (for short 'NIT'). The manner in which the earnest money was to be submitted is stipulated in instruction 1 of the instructions for completing/filling tender documents and the same reads as under:

"1. Earnest Money

Tenderer's are required to submit Earnest Money Deposit as detailed in Notice Inviting Tender in the form of FDR/Demand Draft/Bank Guarantee Bond from any Nationalised/Scheduled Indian Bank drawn in favour of Director General, Married Accommodation Project, New Delhi as referred in Appendix 'A' to Notice Inviting Tender.

Note:- (a) Earnest Money in the form of Cheque etc or any other form, except as mentioned above will not be accepted.

(b) Non-submission of Earnest Money will render the tender as non-bonafide and consequently ignored.

(c) The proforma for Bank Guarantee Bond for Earnest Money is attached as Appendix 'G' to Particular Specifications. The Bank Guarantee Bond for Earnest Money shall be submitted on Non-Judicial Stamp Paper of appropriate value as per the proforma attached.

(d) The Bank Guarantee Bond/FDR/Demand Draft shall be valid for a period of not less than 6 months from the due date of receipt of tender failing which the tender will be treated as non-bonafide and will not be opened."

The NIT contains Clause 4(a) in respect of the aforesaid which reads as under:

"4(a) The 'Earnest Money' as detailed in Appendix 'A' to Notice Inviting tender, shall be submitted in the form of FDR/Demand draft from a Nationalized/Approved Scheduled Indian Bank drawn in favour of "Director General Married Accommodation Project, Kashmir House, Rajaji Marg, New Delhi A/c Name of Firm" payable at New Delhi/Bank Guarantee Bond from a Nationalized/Approved Scheduled Indian Bank in favour of "Director General Married Accommodation Project, Kashmir House, Rajaji Marg, New Delhi" valid for a period not less than six months from the due date of receipt of tender failing which tender will be treated as non-bonafide and will not be opened. It may be noted that if any firm revokes, withdraws, impairs or modifies his offer during validity period, his Earnest Money shall be forfeited and he shall be debarred from re-tendering if retendering is

resorted to. No claim whatsoever will be entertained at a later date on this account.”

(emphasis supplied)

The format of the bank guarantee for earnest money was provided in Appendix ‘G’.

5. In view of the aforesaid contractual stipulations, the Joint Venture while submitting its bid under the cover of letter dated 4.5.2010 submitted the bank guarantee dated 3.5.2010 issued by the Axis Bank Limited for a sum of ₹1.16 crore from the bank account of petitioner No.1. The letter dated 4.5.2010 of petitioner No.1 clearly stated in bold letters at the top “Joint Venture with M/s. Bengal Silver Spring Projects Limited”. The bank guarantee referred to the relevant tender.
6. It is the case of the petitioners that there were ten bidders and the tenders were opened on 4.5.2010. However, the bid of the Joint Venture was not opened as according to respondent No.3 the bank guarantee should have been issued from the account of the Joint Venture and not from an account of petitioner No.1. The bid of another company was also not opened for the same reason. The petitioners sought to explain their stand that the Joint Venture was pre-qualified and the bank guarantee was submitted by petitioner No.1 who is the lead member of the Joint Venture which was in accordance with the purpose of obtaining the earnest money bank guarantee. However, the petitioners were informed that the two bids of the two entities in question would be sent to the higher authorities of the Union of India/respondent No.1 for their opinion. Among the bids opened the lowest bid was of respondent No.4. Petitioner No.1

addressed a letter dated 4.5.2010 to respondent No.2 reiterating the absence of any irregularity. Not only that, it was emphasized in the letter that such bank guarantees had been submitted even for other tenders by the Joint Venture which were never objected to. The explanation in the letter is in the following terms:

“Our offer is not being opened with an advice that the BG should be from the JV and not from DDPL. In this connection we wish to inform you, sir, Dhoot Developers Pvt. Ltd., being one of the member of the JV, the BG is being issued by debiting to their account. The pre-qualification has been permitted to us based on the qualification of both the companies i.e. M/s. Dhoot Developers Pvt. Ltd. and M/s. Bengal Silver Spring Projects Limited. As per company law, both companies are having separate identity **AND NOT A SPV**, and based on our Joint Venture Agreement, the qualification has been done. As per Govt. Tender practice, the bank guarantees can be given by any of the members of the consortium/JV partners, strictly on the format of the tendering authority. In this case, since DG Map is insisting for the BGs to be issued by a Delhi based Bank, we have obtained the BG from Gurgaon and confirmed the clause as prescribed by you.”

7. The aforesaid letter was followed up with another letter dated 5.5.2010 which *inter alia* cited the participation of the Joint Venture in tenders of DG MAP/Phase-II in a similar manner, i.e. bank guarantee was prepared in the same format and from the account of the same company which was the lead member of the Joint Venture and from the same bank and all these bank guarantees were accepted and the tenders were opened without any objections. These tenders are relating to Kamptee Nagpur, Binnaguri & Cooch Behar and Meerut (East).
8. A positive response was received by the Joint Venture from respondent No.3 vide letter dated 16.6.2010 intimating that it had been decided by the Accepting Officer to open the unopened tenders at 1230 hours on 28.6.2010. These two tenders included the tender of

the Joint Venture. The sealed envelopes were accordingly opened on the designated date in the presence of all the bidders. On such opening the bid of the Joint Venture was declared to be the lowest (L-1) and the Joint Venture was informed that they could collect the Letter of Intent within a week.

9. The Letter of Intent was, however, not issued to the Joint Venture but their representative was informed that respondent No.4 who had become L-2 as a consequence of the opening of the bid of the Joint Venture claimed that the tender process was vitiated on account of the same reason, i.e. the bank guarantee not being from the account of the Joint Venture. It was intimated that on this account respondents 2 & 3 shall cancel the tender and call for fresh tenders. This was protested to by the Joint Venture vide letter dated 26.7.2010 but to no avail. The petitioners, thus, filed the present writ petition under Article 226 of the Constitution of India seeking a writ of mandamus against respondents 2 & 3 to declare and issue Letter of Intent to the lowest bidder L-1, being the Joint Venture of the petitioners.
10. The writ petition was admitted on 3.8.2010 and interim orders were granted directing that the tender process be not scrapped without leave and liberty of the Court. Respondent No.4 entered appearance subsequently on 15.9.2010 and was granted opportunity to file counter affidavit, which opportunity has not been availed of by the said respondent.
11. The submission of the petitioners was that there was no stipulation specific or otherwise in the tender documents requiring the earnest

money deposit by way of bank guarantee to be made from the account of the Joint Venture. Another factor to be kept in mind was that the bank guarantee was not a performance bank guarantee but earnest money bank guarantee to be encashable in case the contractor committed any breach of the tender terms basically in revoking the tender before the fixed period pertaining to consideration of the tender documents. The bank guarantee had been furnished by one of the Joint Venture partners which was not contrary to the terms of the tender documents and in any case not in violation of the spirit and purpose of the same.

12. To substantiate the aforesaid contention our attention was invited to Clause 1 of the instructions for completing/filling of tender documents extracted aforesaid where “Tenderer’s are required to submit Earnest Money Deposit”. The bank guarantee was undisputedly offered by the tenderers, being the Joint Venture vide its letter dated 4.5.2010. The Clause 1 did not provide for the bank guarantee to be by debit to the account of the Joint Venture.
13. Clause 4 (a) of the NIT extracted aforesaid shows that in case of revocation, withdrawal, impairment or modification of the offer during the validity period, earnest money was liable to be forfeited and such a tenderer was liable to be debarred from re-tendering, if such re-tendering is resorted to. Thus, the object of the earnest money bank guarantee is explained as to secure the expenses and time spent in processing the tenders which may get affected by such acts of the tenderer and that the bank guarantee serves such purpose could not be effectively denied.

14. Learned counsel for the petitioners further strongly emphasized that the conclusion of respondents 1 to 3 was erroneous as “Contractor” was defined in clause 1 of chapter 1 of the general conditions, which is the Definition Clause to include persons other than the Joint Venture company. The relevant Clause 1(e) reads as under:

“1. Definitions, etc.

....
(e) The “Contractor” means the individual or firm or company, whether incorporated or not, undertaking the Works and shall include the legal personal representatives of such individual or the persons composing such firm or company, or the successors of such individual or firm or company and the permitted assigns of such individual or firm or company.”

15. It was, thus, emphasized that the definition itself is inclusive and includes persons composing such firm or company. Thus, the two entities forming the Joint Venture would certainly fall within the definition of a ‘Contractor’ which is the word used in the proforma bank guarantee.
16. Respondents 1 to 3 have set up their defence in the counter affidavit. It has been pleaded that the bank guarantee at nine different places uses the word “Contractor” and the contractor to whom the tender was issued is the Joint Venture. It was, thus, submitted that it is the name of the Joint Venture which should have been written in the bank guarantee. It was further submitted that petitioner No.1 as lead member of the Joint Venture does not become eligible for submitting tender documents and other related documents in their name and the *inter se* agreements between the constituents of the Joint Venture are not relevant insofar as the compliance with mandatory terms and conditions of tender documents are concerned. It is not disputed that

the letter of the petitioners dated 26.7.2010 was received but prior to that a decision to recall the tender is stated to have been taken. The examples of similar tender has again not been denied though it is pleaded that each case needs to be decided on the merits of the facts and the Accepting Officer does not bind himself to accept the lowest tender and thus the petitioners cannot force the answering respondents to accept the tender.

17. On examination of the submissions, it is apparent that the only reason for respondents 1 to 3 in treating the bid of the petitioners as non-responsive is the submission of the bank guarantee by the lead member of the Joint Venture, i.e. petitioner No.1 instead of by the Joint Venture. This issue was raised at the inception but subsequently a decision was taken to open the bids when the petitioners were found to be L-1. At that stage objections were raised by respondent No.4 who was earlier the L-1 in the bids opened but became L-2 as a consequence of the bids of the petitioners and a second party. Respondent No.4 protested and that protest seems to have found favour with respondents 1 to 3.
18. The first aspect to be kept in mind is the objective with which the earnest money bank guarantee is sought from the pre-qualified tenderers who are given the tender documents. This objective is clear from the tender documents themselves, more specifically Clause 4 (a) of the NIT while noting as under:

“It may be noted that if any firm revokes, withdraws, impairs or modifies his offer during validity period, his Earnest Money shall be forfeited and he shall be debarred from re-tendering if retendering is resorted to.”

19. The objective is, thus, very apparent that considerable effort and money goes towards processing the tender which must remain firm during the validity period and thus any endeavour of such tenderer to revoke, withdraw, impair or modify his offer during the validity period must invite the penal consequences of the earnest money to be forfeited coupled with debarment from re-tendering, if such re-tendering is resorted to. The bank guarantee is admittedly not a performance bank guarantee and a performance bank guarantee is given only after the contract is awarded.
20. We, thus, fail to appreciate as to how the objective of furnishing such an earnest money bank guarantee is in any manner effected by the bank guarantee being to the account of one of the members of the Joint Venture instead of the account of the Joint Venture itself. It is not a performance bank guarantee in any case.
21. We are reinforced in our view by the observations made by the Division Bench of the Orissa High Court in P.K. Constructions and S.N. Kanungo Vs. State of Orissa & Ors. 2003 (II) OLR 518 = MANU/OR/0443/2003 where a performance bank guarantee was furnished by one of the partners of the Joint Venture firm. It has been observed in para 7 of the judgement that the performance security is required by the department to protect borrower in case of breach of contract when the performance security can be invoked/encashed so that no loss is suffered. The purpose is stated to be met by submission of the bank guarantee by one of the partners of the Joint Venture.

22. The other important aspect is that learned counsel for respondents 1 to 3 has been unable to point out to us any specific clause which requires the earnest money bank guarantee to be submitted in the name of the Joint Venture or by debit to its account so long as the bank guarantee is in the prescribed format. The earnest money deposit has to be given by the tenderer vide Clause 1 extracted above. There are various forms of earnest money deposit. One of the forms is a bank guarantee bond. The submission of the bank guarantee is under the cover of the letter of the tenderer. Thus, conditions of the instructions for completing/filling tender documents contained in Clause 1 dealing with earnest money stands complied with.
23. If we now turn to the bank guarantee format, the only aspect emphasized by learned counsel for respondents 1 to 3 is that the word ‘contractor’ is used repeatedly in the same and the contractor cannot be mean petitioner No.1 but the Joint Venture. We, however, find that there is no satisfactory answer to the plea of the petitioners that the word ‘contractor’ is itself defined in definition clause 1(e) of the general conditions attached to the tender documents. A contractor “shall include” *inter alia* “the persons composing such firm or company”. Thus, the contractor as an entity can in turn consist of other entities including a company. In the present case there are two companies which are forming the Joint Venture and the contractor is the Joint Venture. Thus, the word ‘contractor’ would encompass the act of petitioner No.1 in submitting the bank guarantee with its name and the bank guarantee is, thus, in terms of the format of the bank guarantee.

24. The consequence of facts set out show that after due examination a decision was taken to open the bids *inter alia* of the petitioners but merely because of an objection raised by respondent No.4 the tender process is sought to be nullified contrary to the terms of the tender. This is not permissible.
25. We are clearly of the view that the bank guarantee submitted by the petitioner was according to the terms & conditions of the tender and thus the bid of the petitioners could not be treated as non-responsive and the same is L-1. The bidding process, thus, must be continued from that stage treating the bid of the petitioners as valid and L-1. The action of respondents 1 to 3 in scrapping the tender is, thus, wholly arbitrary and is accordingly liable to be quashed, for the aforesaid reason.
26. A writ of mandamus is, thus, issued quashing the decision of respondents 1 to 3 to treat the bid of the petitioners (Joint Venture) as non-responsive at the behest of respondent No.4 declaring that the bank guarantee submitted by petitioner No.1 on behalf of the Joint Venture is as per the terms & conditions of the bid and thus the process in pursuance to the bid be completed in accordance with law.
27. The writ petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

OCTOBER 08, 2010
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VALMIKI J. MEHTA, J.