

GAHC010250232024



2024:GAU-AS:12100

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6228/2024

J INFRATECH PRIVATE LIMITED
FORMERLY KNOWN AS JANDU CONSTRUCTION INDIA PVT. LTD. A
COMPANY INCORPORATED UNDER THE COMPANIES ACT 1956 HAVING
ITS REGISTERED OFFICE AT J-HOUSE, B-103, SOUTH CITY-I, NEAR
SIGNATURE TOWER, SECTOR 30, GURUGRAM, HARYANA 122001 AND IS
REPRESENTED BY ITS DULY AUTHORISED REPRESENTATIVE SHRI BYAS
KUMAR SINGH, WORKING AS ASSISTANT GENERAL MANAGER

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY
OF RAILWAY, 256-A, RAISINI ROAD, RAJPATH AREA, CENTRAL
SECRETARIAT, NEW DELHI 110001.

2:THE GENERAL MANAGER (CONST.)
NF RAILWAY
MALIGAON
ASSAM 781911

3:THE CE/CON-1
OFFICE OF THE GENERAL MANAGER (CONTS.) NF RAILWAY
MALIGAON
ASSAM

4:THE DY. CE/CON/TENDER/MLG
OFFICE OF THE GENERAL MANAGER (CONTS.) NF RAILWAY
MALIGAON
ASSAM 78191

Advocate for the Petitioner : MR. P J SAIKIA, SR. ADV, MR K J SAIKIA,MS M NIROLA

Advocate for the Respondent : DY.S.G.I.,

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

27.11.2024

1. Heard Mr. P.J. Saikia, learned Senior Counsel assisted by Mr. K.J. Saikia, learned counsel for the petitioner, who submits that the petitioner participated in the Tender No.CECON-DMV-EPC-2024-01-RT2 and it's Technical Bid was found unsuitable, on account of the Bank Guarantee not being submitted in the prescribed form, besides the beneficiary not being mentioned, as required under Appendix-VII of the Request for Proposal (hereinafter referred to as the "RFP"). The petitioner's counsel submits that as per Clause 1.1.2 of the RFP which pertains to Key Information Table (KIT), the name of the beneficiary is provided in Sl. No.12 of the KIT, which is as follows:

“Name of Beneficiary : FA & CAO/CON/MLG
Name of the Bank : State Bank of India
Account No. :30106800062
Address of the Branch : Railway Headquarter MLG
IFSC Code : SBIN0000229.”

2. Mr. P.J. Saikia submits that as per Clause 1.2.2 of the RFP, the bid has to be valid as per the KIT and as per Clause 1.2.4, a bidder is required to submit along with his bid, a Bid Security as mentioned in the KIT. The Bid Security is to be submitted through e-payment Gateway of the Authority or by submitting a

Bank Guarantee Bond from a scheduled commercial Bank of India, which should be as per the Appendix-VII, besides being valid for a period of 90 days beyond the bid validity period. He submits that a bid can be summarily rejected if it is not accompanied by the prescribed amount of Bid Security, which implies that if there is any other lacuna with respect to the submission of the Bid Security, the same being an ancillary condition of the RFP, the same is a curable defect.

3. Mr. P.J. Saikia submits that though the petitioner has not inserted the name of the beneficiary at the start of the document in terms of Appendix-VII, the beneficiary's particulars has been inserted in Para 10 of the document submitted by the petitioner, in terms of Appendix-VII. He also submits that the Technical Bid of the tenderers had been opened on 01.08.2024 and on 09.11.2024, the petitioner had been requested by the authorities to extend the bid validity period of the petitioner up-to 08.01.2025. He accordingly submits that the subsequent impugned e-mail dated 18.11.2024 issued by the respondents, stating that the petitioner's Techno-Commercial Bid was found technically unsuitable due to the Bank Guarantee not being in the prescribed form, besides the beneficiary's name not being mentioned in the Appendix-VII of the RFP, was arbitrary and unreasonable. He accordingly submits that the impugned e-mail should be set aside and as the Financial Bids of the other tenderers have been opened, the petitioner's Financial Bid should also be opened.

4. Mr. K. Gogoi, learned CGC for the respondents submits that a reading of Clause 1.1.2, Clause 1.2.4, Clause 2.20.1 and Appendix-VII of the RFP clearly shows that the petitioner has not submitted his Bid Security as per the format provided in Appendix-VII. He submits that Appendix-VII requires the name of

the beneficiary to be recorded at the start of the document and the name of the Nodal Bank of the Indian Railways to be recorded at Para 10 of the Appendix-VII. However, the petitioner has not mentioned the name of the beneficiary at the start of the document modeled in terms of the Appendix-VII and under Para 10 of the Appendix-VII, the petitioner has incorporated the beneficiary's Bank details, instead of the required Bank details of the Nodal Bank of the Indian Railways. He submits that the beneficiary's Bank is located in Maligaon, Guwahati, while the Nodal Bank is located in Navi Mumbai. He submits that when the petitioner has changed the entire format of Appendix-VII, there was no infirmity in the Technical Bid of the petitioner being found unsuitable, as the unilateral change of the format by the petitioner was not in accordance with Appendix-VII, which was an essential condition of the RFP. He also submits that the petitioner "J. Infratech Pvt. Ltd", was not a tenderer and had not submitted any bid against the Tender No.CECON-DMV-EPC-2024-01-RT2. He further submits that no letter has been sent to the petitioner for extension of its Bid Security on 09.11.2024, though the same was sent to M/s Jandu Construction India Private Limited. Further, the letter dated 09.11.2024 issued to M/s Jandu Construction India Private Limited has been answered by M/s Jandu Construction India Private Limited and not by the petitioner, vide letter dated 12.11.2024.

5. Mr. K. Gogoi, learned CGC further submits that in terms of the decision of the Supreme Court in the case of ***Central Coalfields Limited & Another vs. SLL-SML (Joint Venture Consortium) & Others***, reported in ***(2016) 8 SCC 622***, the Supreme Court has held that if the employer prescribes that the Bid Security should be submitted in a particular form/manner, then a bidder ought to submit the Bank Guarantee/Bid Security in that particular format only

and not in any other format. He also submits that the words used in a tender document cannot be ignored or treated as redundant or superfluous and must be given their meaning and necessary significance, in terms of the judgment of the Supreme Court in the case of ***Vidarbha Irrigation Development Corporation & Others vs. Anoj Kumar Agarwala & Others***, reported in ***(2020) 17 SCC 577***. As the information required for the Bid Security has not been provided by the petitioner as per the format provided in Appendix-VII, the non compliance with an essential condition of the tender has correctly resulted in the disqualification of the petitioner's Technical Bid. He accordingly submits that the writ petition should be dismissed.

6. I have heard the learned counsels for the parties.

7. The petitioner herein is J. Infratech Private Limited, which was earlier known as "M/s Jandu Construction India Private Limited", who had formed a joint venture with M/s OJSC Euro-Asian Construction Corporation "EVRASCON" in the name and style of "M/s JCIPL-EVRASCON", wherein the petitioner was the lead partner having shareholding of 74%. As the petitioner J. Infratech Private Limited was formerly known as Jandu Construction India Private Limited, the correspondence had been made in the earlier known name.

8. As can be seen from Clause 1.1.2 of the RFP, Sl. No. 12 of the KIT provides the name of the beneficiary to whom the bid security is to be addressed, i.e., FA&CAO/CON/MLG, Name of the Bank: State Bank of India, Account No. : 30106800062, Address of the Branch: Railway Headquarter MLG, IFSC code: SBIN0000229.

9. Clause 1.2.2 of the RFP states as follows:-

“1.2.2 *The Bid shall be valid as per Key Information Table”, which is KIT in short.*

Thus, in terms of Clause 1.2.2 of the RFP, the bid has to be valid as per the KIT and Sl. No. 12 of the KIT provides the name of the beneficiary.

10. Clause 1.2.4 of the RFP states as follows:-

“1.2.4 *A Bidder is required to submit. along-with its Bid, a Bid Security as mentioned in the KIT (the" Bid Security"), refundable nor later than 200 (Two hundred) days from the Bid Due Date, except in the case of the I Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security and Additional Performance Security (if any) as per the provision of this RFP and LOA. The Bidder will have to provide bid Security through [e-payment Gateway of Authority or submitted as Bank Guarantee Bond from a scheduled commercial bank of India The Bank Guarantee bond shall be as per Appendix-VII and shall be valid for a period of 90 days beyond the bid validity period. The Bid shall be summarily rejected if it is not accompanied by the prescribed amount of Bid Security. The Bid document shall be available free of cost through e-portal (IREPS.gov.in).”*

11. A reading of Clause 1.2.4 and Appendix-VII of the RFP shows that the Bid Security in the form of a Bank Guarantee requires the name of the beneficiary to be mentioned at the start of Appendix-VII, in terms of Clause 12 of the KIT. Further, Bank Guarantee Bond is to be as per Appendix-VII. However, the petitioner has not made a mention of the beneficiary at the start of Appendix-VII. Instead, the petitioner has mentioned the name of the beneficiary at Para 10 of the Appendix-VII, though Para 10 of the Appendix-VII required the petitioner to record the name of the nodal bank of the Indian Railways and not the beneficiary.

12. In the case of **Vidarbha Irrigation Development Corporation**

(supra), the Supreme Court has held that a material deviation is one which limits, in any substantial way, or is inconsistent with the bidding documents or the employer's rights or bidder's obligations under the Contract. It has further held that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance.

13. In the case of ***B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd.***, reported in **(2006) 11 SCC 548**, the Supreme Court has held that if there are essential conditions of a tender, the same must be adhered to. If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied. In the present case, Clause 1.2.4 of the RFP requires that the Bank Guarantee Bond shall be submitted as per Appendix-VII. The petitioner has however not adhered to Appendix-VII while submitting his Bank Guarantee Bond.

14. In the case of ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***, reported in **(2016) 16 SCC 818**, the Supreme Court has held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts, but that by itself is not a reason for interfering with the interpretation given.

15. In the present case, the respondents' case is that the submission of the Bank Guarantee Bond has to be done in terms of Appendix-VII, which is reflected in Clause 1.2.4 of the RFP. On applying the law laid down by the Supreme Court in ***Afcons Infrastructure Ltd. (supra)***, this Court would have to defer to the understanding, appreciation and interpretation given by the State respondents to Clause 1.2.4 and Appendix-VII of the RFP, inasmuch as, there is no allegation of mala fide or perversity made out in the present writ petition.

16. In the case of ***Tata Motors Ltd. Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors.***, reported in ***2023 SCC OnLine SC 671***, the Supreme Court had held in para 48 as follows:-

“48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts

must also not interfere where such interference will cause unnecessary loss to the public exchequer."

17. In the case of ***Central Coalfields Limited (supra)***, the Supreme Court has held that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. This would be in terms of the principle laid down by the Supreme Court in the case of ***Nazir Ahmad Vs. King Emperor***, reported in ***AIR 1936 PC 253(2)***, wherein it was held that "*Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.*"

18. In ***Central Coalfields Limited (supra)***, the Supreme Court has also held that any decision taken by the employer in accepting or rejecting a particular bank guarantee in a format not prescribed by it could lead to (avoidable) litigation, requiring the employer to justify the rejection or acceptance of each bank guarantee. This is hardly conducive to a smooth and hassle-free bidding process. It was in the above backdrop that the Supreme Court further held that a procedure should be evolved for acceptance of bank guarantees and once it is evolved, adherence to these principles should be made, to virtually eliminate subjectivity on the part of the employer.

19. In the present case, as the respondents have evolved the procedure to be followed for acceptance of a bank guarantee, that is, by submitting the Bank Guarantee Bond in terms of Appendix-VII, which is a standard format required to be submitted by all bidders, the disqualification of the petitioner's technical

bid due to non-adherence to the prescribed format by the petitioner does not suffer from any infirmity.

20. In view of the reasons stated above, this Court does not find any ground to exercise it's discretion in the present case. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant