* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 17th May, 2016
Judgment Delivered on: 23rd May, 2016

+ W.P.(C) 3360/2016 & CM No.14339/2016 (stay)

SOM PROJECTS PVT LTD ..... Petitioner

versus

RITES LIMITED ..... Respondent

<u>Advocates who appeared in this case:</u>

For the Petitioner: Mr Pankaj Batra, Advocate.
For the Respondent: Mr G.S. Chaturvedi, Advocate with Mr Anil Johri, Sr D.G.M.

<u>CORAM:</u>
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

<u>JUDGMENT</u>

<u>SANJEEV SACHDEVA, J</u>

1. The petitioner has filed the present petition seeking recall of tender issued in February, 2016 (hereinafter referred to as "the February tender") and quashing of the fresh tender issued in April, 2016 (hereinafter referred to as "the April tender"). Further, a direction has been sought for considering the petitioner for award of the contract in terms of the February tender.

2. The respondent had invited an E-tender for construction of

Traction Alternator Factory at Vidisha, Madhya Pradesh PKG-III in February, 2016. The tender was a two bid tender and required the bidders to submit a technical bid and a financial bid. As per the petitioner, the financial bids were opened on 30.03.2016 and the petitioner was found to be the lowest bidder.

3. It is contended that the petitioner wrote several letters to the respondent to award the contract to the petitioner since the petitioner was L-1. It is contended that the petitioner apprehended that the respondent would declare L-2 as L-1 by altering the numerical figure given in the financial bids. It is contended that on 14.04.2016 the petitioner learnt that the respondent had recalled the February tender and issued the April tender.

4. The contention of the petitioner is that since the tender was an E-tender, the financial bid was to be scrutinized automatically by the computer without any human intervention and when the financial bids were scrutinized by the computer, the petitioner was found to be L-1. It is submitted that the Tender Evaluation Committee altered the financial bids of the parties in respect of Bill of Quantity Item No. 63 and re-worked the financial bids of the other three bidders and accordingly the financial bid of the L-2 bidder was reduced below the bid of the Petitioner. It is contended that since the tender was an e-bid, there could not be any alteration/adjustment of the financial bids of the parties.

5. It is contended that the rates quoted were required to be filled up by the bidders in an Excel-Sheet against each item of the Bill of Quantities (BOQ). The respondent provided the Excel-Sheet and the same was to be downloaded alongwith the tender. It is contended that in respect of BOQ Item No. 63, the bidders were expected to give a credit to the respondent for the quantity of stone made available to the bidders. The rate quoted against item No. 63 was to be deducted from the total financial quote, as it was an amount the bidders were expected to pay to the respondent for the stones supplied.

6. It is contended that when rate was filled in the Excel-Sheet against Item No. 63, the system, instead of deducting the amount from the total financial bid, added the same thereby increasing the total. The petitioner on noticing this entered the amount with a minus (-) sign upon which a proper credit was provided to the respondent and the correct financial bid amount was reflected in the bid document.

7. It is contended that when the bids were opened, it transpired that out of the four bidders, only the petitioner had filled up the rate against BOQ Item no 63 with a minus (-) sign and the other three bidders had not entered any sign. It is thus contended that the bid of the petitioner was found to be the lowest by the computer and accordingly, the tender should have been awarded to the petitioner and the same could not have been cancelled.

8. Per contra, the respondents in their counter affidavit have contended that in terms of the bids invited, the structure of "BOQ" was such that it allowed the bidders to quote for an item (Stone masonary & WBM) involving stone and the full rates including the cost of stone machining and transportation besides cost of labour, material, machine overheads and profits. In the background of the aforesaid item, the respondent formulated credit item No. 63 asking each tendered to give credit against stone to be available by the respondent near the site itself.

9. It is contended that stone being the main component in the item of work (Stone masonary & WBM), the credit was expected to be substantial and by no stretch of imagination could the bidder ask for payment from the respondent for the stone that was made available by the respondent.

10. It is contended that the rate in credit item No. 63 was to be quoted on unit basis and the credit item was an exceptional case as in normal tenders, the possibility of recovered item is highly uncommon.

11. It is contended that in the tendered document, there was no stipulation as to the manner in which the credit item was to be mentioned. It was not specified as to whether a minus (-) sign or a plus (+) sign was to be given. It was anticipated that the bidders would quote rate in positive and while evaluating the bids of the

various bidders, the amount quoted for credit item No. 63 would be deducted.

12. It is submitted that the petitioner as against credit item No. 63 quoted the amount with a minus (-) sign and the other bidders did not put any sign and accordingly the computer took the amount quoted by them as a positive amount. Since the petitioner had put a minus (-) sign, the said amount was subtracted by the computer from the bid amount of the petitioner and for the other bidders the amount quoted was added. On account of this anomaly the amount of the petitioner was shown as the lowest. However, when this error was rectified by deducting the amount quoted by the other bidders for credit item No. 63 from their bid, the petitioner was not L-1.

13. It is contended that the Tender Evaluation Committee after appropriately adjusting the credit item No. 63 in the financial bids of the other bidders had recommended the name of M/s Envirad Projects Pvt. Ltd. for award of the contract and not of the petitioner.

14. It is further submitted that the respondent follows a tender evaluation system wherein the tender accepting authority, depending on the value of the work, nominates a committee of senior officers to assist and evaluate the bids and to make recommendations on the merits of the tenders. It is contended that the Tender Evaluation Committee in the present case consisted of three senior officials, who

after evaluation of the various bids recommended award of work in favour of M/s Envirad Projects Pvt. Ltd. and not in favour of the petitioner.

15. The Accepting Authority opted to take a decision, which was beyond any sort of controversy. In view of the anomaly pointed out above, the Accepting Authority decided to discharge the February tender and re-invite the tender and accordingly the April tender has been issued. It is contended that the respondent's decision of cancelling the February tender was in view of the anomaly and confusion that had occurred on account of lack of clarity in respect of credit item No. 63. It is contended that the respondent has acted fairly and with a view to avoid any complication.

16. To resolve the controversy, we need to examine the nomenclature of credit entry No. 63. Tender item No. 63 reads as under:-

> *"Credit for providing stone, which will be shaped/crushed by contractor to be used in random rubble and course rubble works or WBM works".*

17. The Quantity against this item is mentioned as 7773 cubic metres. From a reading of the nomenclature of credit item No. 63, it is clear that it envisages, the bidders paying an amount to the respondent and accordingly the rate has to be quoted for credit to be

provided to the respondent. The quantity is substantial i.e. 7773 cubic metres. Since the stone that was to be used in random rubble and course rubble works or WBM works was being supplied by the respondent for the work of the bidders, a credit was sought for from the bidders, it is clear that the credit item had to be deducted from the financial bids of the parties.

18. Learned counsel for the petitioner took us through the Excel-Sheet that was provided to the bidders for filling in the rates as against the BOQ items. Perusal of the Excel-Sheet shows that there is an anomaly. The amount against item No. 63 instead of being deducted from the financial bid of a bidder, is added to it thereby inflating the financial bid of the bidders. In the case of the petitioner since the petitioner had added the figure with a minus (-) sign, the computer deducted the amount. However, that was not the case with regard to the other bidders. The Notice Inviting Tender had not clarified whether a minus (-) sign or plus (+) sign was to be added in front of the amount quoted against item No. 63 which lead to a discrepancy in the bids submitted by the various bidders.

19. The Tender Evaluation Committee while evaluating the bids of the various bidders noticed that the computer had initially generated the bids of the various bidders and shown the petitioner's bid as the lowest. The Tender Evaluation Committee on noticing the anomaly, manually adjusted the amount quoted by the bidders against item No.

63 and found that the petitioner was not L-1. The minutes of the Tender Evaluation Committee Meeting with regard to the financial bid evaluation read as under:-

"3.0 Financial Bid Evaluation

3.1 Tender Committee perused the Briefing Note (Financial Bid) NO.1 dated 01/04/2016 (placed at folio Nos.C-1336 to C-1339 of Tender file, Vol. VI) alongwith the system generated comparative statement showing the amounts quoted by the bidders (placed at folio Nos. C-1256 to C-1298 of Tender file, Vol.VI) duly vetted by finance and noted that the price bids of all the qualified bidders were opened on 30/03/2013 at 11.30 hrs by the tender opening committee (Refer folio NO.C-873 of Vol. V of Tender File & N-9).

3.2 Tender Committee noted the prices quoted by the bidders in comparison to the estimated cost as per comparative statement generated by computer and vetted earlier by finance is as detailed below:

Estimated Cost put to Tender: Rs.23,25,32,000.00 (Refer N-1 of Tender File).

Sl. No.	Name of the Bidder	Amount quoted by the bidder in Rs.	Rebate quoted by the bidder in Rs.	Amount quoted by the bidder after Rebate in Rs.	Total Amount as worked out by RITES after arithmetic check (Rs.)	%above or below the Estimated Cost	Status
1	M/s. Som Projects Pvt. Ltd.	224945496.05	Nil	224945496.05	224945496.05	3.26% below	L-1
2	M/s Garg Builders	246851717.52	Nil	246851717.52	246851717.52	6.16% above	L-4
3	M/s Envirad Projects Pvt. Ltd.	225679556.53	Nil	225679556.53	225679556.53	2.95 % below	L-2
4	M/s Gupta Enterprises	232164202.83	2762754.0 (@ 1.19%)	229401448.83	229401448.83	1.35% below	L-3

3.3 Further, Finance has written on Note N-11 that credit item No-NS-63 should have been in minus. After considering the minus rates of these items for the contractors who have quoted positive rate, the comparative position of bidders get changed and L-1 bidder as per computer statement becomes L-2 and L-2 bidder becomes L-1 as per vetted table placed at N/12 and reproduced below:-

Sl. No.	Name of the Bidder	Amount quoted by the bidder in Rs.	Effect of credit item No.63	Net revised landed cost after credit of item of NS-63	Statu
1	M/s Som Projects Pvt. Ltd.	224945496.05	Nil	224945496.05	L-2
2	M/s. Garg Builders	246851717.52	(-) 3109200	243742517.52	L-4
3	M/s Envirad Projects Pvt. Ltd.	225679556.53	(-) 1,63,23,300	209356256.53	L-1
4	M/s Gupta Enterprises	232164202.83	(-) 2331900	227069548.83	L-3

4. Tender committee noted the following:

4.1 Tender committee noted that item No-63 is credit item. It is also noted that as per technical sanction Folio-C-202, the rate adopted for this item is negative. However, one bidder has quoted the rate in negative and three bidders have quoted the rates in positive. Accordingly the amount of this item has automatically got subtracted in case of one bidder and added to the total cost of the other three bidders. The position of bidders is as per above comparative table in para 3.2.

4.2 The item in tender states "Credit for providing stone..... or WBM works". It is, therefore, obvious that the contractor has give credit to the Employer for getting excavated stone at site and utilizing it in the work. Although it is not mentioned anywhere that credit rate *shall be negative or credit amount shall be deductible but the intention, as derived from the Technical Sanction, is that the rate of this item is to be treated as 'negative. Therefore, as per remarks of finance and as per intention of the tender, this amount needs to be deducted from the total. Thus, irrespective of whether a bidder has quoted a positive rate or a negative rate for this item, being an item of 'giving credit, the effect of this item should be taken as 'negative'.*

4.3 As a result of what is stated in para 4.2 the inter-se position of bidders becomes as given in para 3.3 above. However, when we take negative rate for all the bidders, the new lowest bidder, after award of work to him, may later claim that he had quoted positive rate and he would rather than giving credit will charge for this item since he has quoted positive rate. To obviate such a claim at a later date, the Tender Committee suggests that before award of work to him, an undertaking may be taken from him that for Item No.63 that he will pay the Employer at the rate quoted by him for this item. In case the bidder refuses to give such an undertaking the tender may have to be discharged. While re-inviting the tenders it should be made clear in the BOQ through a footnote under the item that whatever rate is quoted for this item will be taken as 'negative'.

5.0 Tender Committee Recommendations

5.1 Based on above deliberations, the Tender Committee recommends that the work may be awarded to M/s Envirad Projects Pvt. Ltd. for a sum of Rs.209356256.53 after obtaining an undertaking from them that for Item No.63 they will pay the Employer at the rate quoted by them for this item. In case the bidder *refuses to give such an undertaking the tender may be discharged.*

5.2 In accordance to para 8.9.2.4 of RITES Guidelines on Construction Management, December 2015 all the members of Tender Committee hereby certify that none of them has any personal interest in any of the tenderer who have participated and none of the provisionally qualified bidders are in the negative list of contractors of RITES.

5.3 Recommendations are submitted for the acceptance or otherwise please.

5.4 As per SOP, GGM/CP-SBU Head is competent in this case.

(Shri R.K. Goel) (Shri J.S. Yadav) (Dr. B.R. Singh)

GM/CP GM/F AGM/GT

GGM/CP-SBU Head"

20. Perusal of the minutes of the Tender Evaluation Committee shows that the committee based on the deliberations recommended that the work be awarded to M/s Envirad Projects Private Limited subject to their furnishing an undertaking that they would pay the employer at the rate quoted by them against item No. 63 and on refusal of furnishing such an undertaking to discharge the tender.

21. When the Minutes of the Tender Evaluation Committee were placed before the Accepting Authority, the Accepting Authority noticed the anomaly and instead of accepting the recommendations of

the Tender Evaluation Committee decided to discharge the February tender and invite a fresh tender after rectification of the financial bid format. The note of the Accepting Authority dated 11.04.2016 records as under:-

> *"Careful examination of TC minutes and the background contained in the documents referred by Tender Committee reveals that on the date of opening the system generated positions of bidders are altered due to consideration of non-schedule credit item no.63 wherein three out of four bidders have quoted positive figures. Tender Committee after due deliberation has made a recommendation that the positive figure quoted against item no.63, by bidders should be deducted from their sum total. TC recommendations are further pondered upon as under:*
>
> 1. *The tender has been invited through e-tendering procedure.*
>
> 2. *The item no.63 of BOQ is a credit item which implies that contractor has to pay RITES the amount as per the quoted rate and quantity executed.*
>
> 3. *For such items, the financial bid prepared is given a negative pre-fix (in amount column) so that the amount quoted by bidders will appear as negative and the amount so quoted will be deducted from the total sum. Further, as a safeguard bidders are advised about application of such items in the form of a note/instruction.*

4. *However, in the present case, the negative prefix was not given nor there was any such instruction in the bid document.*

5. *This leads to the ambiguous situation where apparently, there is a scope for interpretation.*

6. *However, the TC has recommended that "the work may be awarded to M/s Envirad Projects Pvt. Ltd. after obtaining the undertaking from M/s Envirad Projects Pvt. Ltd. that they will pay the employer at the rate quoted by them for this item". This itself, is an indirect admission by TC that they are not sue about their interpretation and goes to show that the recommendation are conditional. Further the recommendation is incomplete as the TC has not addressed the eventuality in case, M/s Envirad Projects Pvt. Ltd., doesn't accept to pay the amount quoted against item no.63 as credit, especially the consequences of bidder not accepting the LoI make him liable for forfeiting EMD and placing him in negative list for future works.*

7. *Thus, it is concluded that the recommendations of TC are not specific and these are based on presumption that the rates quoted by the three out of four bidders are credit.*

8. *Bidder, who has quoted a negative figure against item no.63 and emerged as the lowest on the due date of opening has already registered his objection (C-1343 to 1363) based on his apprehensions.*

9. *With above in background, accepting authority is of the considered opinion that:*

a) There is need to review the tendering procedure and incorporate safeguards covering such eventualities as part of system improvement for such credit/deduction items.

b) It would not be prudent to ask for any clarification/confirmation on financial bids from the bidder who have quoted positive rate for item no.63.

c) Terminate this process as the firm recommendations are not possible because of shortcomings in the basic tender structuring.

In view of the foregoing, it is decided that the tender is to be discharged and fresh tenders are to be invited after rectification in the financial bid format.

Not to mention that accepting TC recommendation in its present version may lead to litigation/ complication which may adversely affect the project objectives.

GGM CP
SBU head"

22. The above facts clearly demonstrate that there was an anomaly in the tendered document itself. The tender was silent as to how credit item No. 63 was to be dealt. It did not specify whether the rates to be quoted were to be with a minus (-) sign or a plus (+) sign. Out of the four bidders, it was only the petitioners who had submitted the bid with a minus (-) sign, the other bidders had quoted the bids with plus (+) sign on account of which there was discrepancy in the rates

quoted. If the rates quoted against item No. 63 by the other bidders were to be taken in the right perspective and deducted from their financial bid, the petitioner did not become L-1.

23. To avoid any controversy and to rectify the anomaly that had occurred in the February tender, the Accepting Authority decided to discharge the same and invite a fresh tender after rectifying the error in the tender. The action of the respondent in cancelling the tender because of the anomaly and inviting a fresh tender cannot be faulted.

24. In view of the above, we find no merit in the Writ Petition. The same is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

May 23, 2016 **BADAR DURREZ AHMED, J.**
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