

\$~17

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

% Judgment delivered on: 24.08.2016

+ **W.P.(C) 6817/2016 & CM No. 27995/2016**

VISHAL KHARBANDA & ANR

.... Petitioners

versus

IRRIGATION & FLOOD CONTROL DEPARTMENT, GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Petitioners

: Dr S.N. Singh with Mr Vijay Kumar

For the Respondent

: Ms Prabhsahay Kaur, ASC for GNCTD with Mr M.K. Aggarwal, Executive Engineer (Flood & Irrigation Department)

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition concerns the work of Remodeling and construction of boundary wall on the left bank of Ali drain from RD 0 metre to RD 2780 metres. The Notice Inviting Tender (NIT) in respect of this work was issued on 25.06.2016. Several persons participated including the petitioner. The bids were opened on 11.07.2016. The petitioner was declared as L-1 as the rate quoted by him was Rs. 5,46,90,829/- which was 37.78 % below the estimated cost of Rs. 8,78,99,115/- based on the DSR 2014.

2. On 14.07.2016 the petitioner, however, wrote a letter to the Executive Engineer requesting that payment be made for the extra work for working in foul and unhygienic conditions. The said letter was as under:-

“To,

Dated: 14.07.2016

The Executive Engineer,
CD-5, I& FC Deptt.,
New Delhi.

Subject: Remodeling & construction of boundary wall
on left bank of Ali drain from RD OM to RD
2780M.

Dear Sir,

We are the participant in above mentioned work & lowest one. This is to say that Item no. 1 & 2 of "Earth work in excavation.....", we have to execute these items in foul conditions & unhygienic condition. But there is no such item is taken in the NIT i.e. "Extra for working in foul conditions....." So kindly make the payment for extra for working in foul conditions (the extra item) at the, market rates. Please consider this condition.

Thanks

Yours faithfully,

For-Munshi Ram Kharbanda

Partner”

3. Subsequent to this the bid submitted by the petitioner along with the request dated 14.07.2016 was forwarded to the competent authority by the Executive Engineer.

4. By a letter dated 23.07.2016, which is impugned herein, the said request was not accepted and furthermore the petitioner was informed that its bid was rejected by the competent authority in view of 'condition no. 12 & 18 of CPWD-6 read with para 19.8 of CPWD Works Manual 2014'.

5. Consequently, the petitioner was required to deposit 50% of the EMD amount, that is, Rs. 8,78,991/- in the shape of a demand draft in favour of the Executive Engineer within seven working days failing which the fixed deposit dated 06.07.2016 issued by the Oriental Bank of Commerce deposited as EMD for the above work was to be sent to the banker for encashment. The petitioner was also informed by the impugned letter dated 23.07.2016 that it would not be eligible to participate in the re-tendering process of the said work. We may point out that on 23.07.2016, itself, fresh tenders were invited in respect of the said work. By an interim order dated 05.08.2016 we had directed that the closing time for submission of tenders and opening of bids would be postponed till after the next date of hearing. The respondent has complied with that direction and the closing date of submission of tenders has been postponed.

6. The learned counsel for the petitioner submitted that the grounds on which the bid of the petitioner has been rejected are not sustainable. He submitted that the clauses condition 12 and 18 of CPWD-6 read with para 19.08 of CPWD Works Manual 2014 have no application in the present case. However, the learned counsel for the respondent has drawn

our attention to clauses 9 and 14 of the NIT which are in *pari materia* to condition 12 and 18 of CPWD-6. Clauses 9 and 14 are as under:-

“9. The description of the work is as follows; As per Schedule attached.

Copies of other drawings and documents pertaining to the works will be open for inspection by the tenderers at the office of the above mentioned officer.

Tenderers are advised to inspect and examine the site and its surroundings and satisfy themselves before submitting their tenders as to the nature of the ground and sub-soil (so far as is practicable), the form and nature of the site, the means of access to the site, the accommodation they may require and in general shall themselves obtain all necessary information as to risks, contingencies and other circumstances which may influence or affect their tender. A tenderer shall be deemed to have full knowledge of the site whether he inspects it or not and no extra charges consequent on any misunderstanding or otherwise shall be allowed. The tenderer shall be responsible for arranging and maintaining at his own cost all materials, tools and plants, water, electricity access, facilities for workers and all other services required for executing the work unless otherwise specifically provided for in the contract documents. Submission of a tender by a tenderer implies that he has read this notice and all other contract documents and has made himself aware of the scope and specifications of the work to be done and of conditions and rates at which stores, tools and plant, etc. will be issued to him by the Government and local conditions and other factor having a bearing on the execution of the work.”

XXXX

XXXX

XXXX

XXXX

XXXX

“14. The tender for the works shall remain open for acceptance for a period of Ninety days from the date of opening of tenders. If any tenderer withdraws his tender before the said period or issue of letter of acceptance,

whichever is earlier, or makes any modifications in the terms and conditions of the tender which are not acceptable to the department, then the Government shall, without prejudice to any other right or remedy, be at liberty to forfeit 50% of the said earnest money as aforesaid. Further the tenderer shall not be allowed to participate in retendering process for the work.”

(underlining added)

7. We are in agreement with the submission made by the learned counsel for the respondent that reference to a wrong number of the applicable condition would not enable the petitioner to take benefit of the same inasmuch as *pari materia* conditions are contained in the NIT. However, we have to examine as to what clauses 9 and 14 entail. On reading clause 9 which has been extracted above it is evident that the tenderer is required to fully satisfy himself before submitting his bid as to the nature of the ground and sub-soil and all other conditions of the site. Therefore, the bid submitted by the tenderer would have to take into account the conditions which would also include the foul and unhygienic conditions. The bid would therefore have to cater to all aspects of the work and a bidder would not be entitled to claim anything extra. A reading of clause 14 of the NIT is also clear that in case a bidder withdraws his bid before the acceptance period or the issuance of letter of acceptance whichever is earlier or “makes any modifications in the terms and conditions of the tender which are not acceptable to the department” then the government would have the right to forfeit 50% of the earnest money and the bidder would also not be allowed to participate in the retendering process for the work.

8. It appears that it is this clause which has actually been pressed into service for rejecting the bid of the petitioner and forfeiting 50% of the EMD as also from debarring the petitioner from participating in the bidding for the re-tendered work.

9. According to the learned counsel for the petitioner, the petitioner has not withdrawn his bid. The letter dated 14.07.2016 was only a request for extra payment for executing the work in foul and unhygienic conditions. According to him if the department did not agree with the same, it could have very well rejected the request made by the letter dated 14.07.2016 but could not have rejected the bid of the petitioner which the petitioner never withdrew. The learned counsel for the petitioner also submitted that the tenor of the letter dated 14.07.2016 is also not of the kind which would suggest that in case the request made by the petitioner was not accepted then he would not be in a position to carry out the work at the quoted rate. He submitted that if that was the situation then the respondent would have been within its right to reject the bid and forfeit 50% of the EMD and also debar the petitioner from participating in the bidding process for the re-tendered work. The learned counsel for the petitioner also drew our attention to a letter dated 27.07.2016 wherein the letter dated 14.07.2016 was sought to be withdrawn and it was clarified that the said letter was not moved along with the tender nor made part and parcel of the tender. In the said letter the petitioners had made it clear that their earlier letter dated 14.07.2016 was not to be treated as the “*sine qua non*” of their tender to the effect that the petitioner would not execute the contract in case the demanded extra payment was not paid.

However, this letter dated 27.07.2016 was received after the impugned decision of 23.07.2016 and, therefore, the respondent cannot be faulted for not considering this letter. Consequently, we are deciding this case without considering the effect of the letter dated 27.07.2016.

10. The learned counsel for the respondent submitted that the letter dated 14.07.2016 has been considered by the competent authority to be a modification of the bid of the petitioner and therefore the competent authority was well within his right to direct the rejection of the bid and the forfeiture of 50% of the EMD as also in debarring the petitioner from participating in the re-tendered work in terms of clause 14 of the NIT. The learned counsel for the respondent also placed reliance on the decisions of the Supreme Court in **West Bengal Electricity Board v. Patel Engg. Co. Ltd. And Ors.: AIR 2001 SC 682** and **Maa Binda Express Carrier and Anr. v. North-East Frontier Railway and Ors: (2014) 3 SCC 760**. Reliance was also placed on a Division Bench decision of this court in **United Telecom Limited v. MTNL & Anr.: 120 (2005) D.L.T. 575 (DB)**. At this stage itself we may point out that these decisions would not have any application to the facts of the present case. All these decisions related to cases where the bidder sought correction of its bid. The present case does not concern any request for correction in the bid. Therefore, these cases on which reliance has been placed by the learned counsel for the respondent would not come to her aid.

11. After having considered the arguments advanced by the learned counsel for the parties, we are of the view that clause 14 of the NIT

cannot be pressed into service in the circumstances of this case. This is so because the letter dated 14.07.2016 was merely a request made by the petitioner for considering extra payment for working under foul and unhygienic conditions. It was not at all contended by the petitioner that in case the request is rejected, the petitioner would not be in a position to carry out the work at the quoted L-1 rate. Had that been the case, the respondent would have been within its rights to take the action which it has by virtue of the impugned letter dated 23.07.2016.

12. Our attention had also been drawn to clause 1 of the General Conditions which reads as under:-

“1. Before tendering the rates, the contractor shall inspect the site of work and fully acquaint himself about the site conditions, with regards to its difficult accessibility and space restrictions. No claim what so ever shall be entertained by the Department /Govt. due to any such difficult site conditions over and above the rates quoted by the contractor given in the Schedule of Quantities of the tender. The quoted rates shall be inclusive for all the working conditions like carriage of material to construction site including its re-handling, maintenance & defect liabilities of 01 years for which nothing extra shall be paid on this account. The contractor shall not be entitled for any additional rate beyond the percentage rates quoted/negotiated rates against the tender.”

(underlining added)

On going through the said condition it is evident that before tendering, the contractor is required to inspect the work site and fully acquaint himself about the site conditions as also with regard to its difficult accessibility and space restrictions. It is made clear that no claim

whatsoever would be entertained by the Department/Government due to any such difficult site conditions over and above the rates quoted by the contractor given in the schedule of quantities of the tender. It is, therefore, clear that the claim that was made by the petitioner by virtue of its letter dated 14.07.2016 was one such claim which the respondent was clearly within its right to reject. But, at the same time, this did not entail that the entire bid of the petitioner was liable for rejection. We have already pointed out that such liability of rejection could have arisen had the petitioner made the request in such a manner that would have made the earlier bid conditional upon the acceptance of the request. That was clearly not the case and, therefore, in our view the rejection of the petitioner's bid was not warranted.

13. Consequently, the impugned letter dated 23.07.2016 is quashed. The bid submitted by the petitioner shall be processed in accordance with law. The subsequent decision of re-tendering is also quashed.

14. The writ petition is allowed as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

AUGUST 24, 2016

kb