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

Date of Decision:-22.02.2021.

\+ W.P.(C) 2362/2021 & C.M.Nos.6899/2021, 6900/2021

M/S SEEMA ENTERPRISES ..... Petitioner

Through Mr.Ravi Bhushan Singhal, Sr.Adv. with Mr.Priyadarshi Gopal & Mr.Abhas Mishra, Advs.

versus

IRCON INTERNATINAL LTD & ANR. ..... Respondents

Through Mr.Manoj Kumar Das with Ms.Geeta Das & Mr.Deepak Kumar, Advs for R-1.
Ms.Kaadambari Puri, S.C. with Ms.Dipika Sharma, Adv for R-2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present petition under Article 226 of the Constitution of India has been preferred against the decision of the respondent no.1 to reject the bid of the petitioner, on the ground of non-submission of requisite documents, specifically, the TDS certificate.

2. The respondent no.1 issued a Notice Inviting Tender (NIT) on 10.12.2020 for works pertaining to the four laning of the Shivpuri-Guna Bypass section of National Highway-3 (NH-3), falling between chainage 319.700 KM and 332.100 KM. The respondent then issued three corrigenda to the NIT dated 10.12.2020; Corrigendum-I issued on 22.12.2020 revised certain aspects of the eligibility criteria contained in the

original NIT, Corrigendum-II issued on 05.01.2020 extended the last date of submission of the bid from 06.01.2021 to 11.01.2021 and Corrigendum-III issued on 11.01.2020 revised the conditions relating to the Bill of Quantities. Now, Annexure-V contained in Section 3 of this NIT made it mandatory for all bidders, who were submitting certificates issued by public limited company/concessionaire company/private company/JV company in support of the plea that they had previously effected similar works, to ensure that they attached TDS certificates which corroborated the value of this similar work that they claimed to have done in the past. It appears that on 09.01.2021, when the petitioner submitted its bid, it did not furnish the TDS certificate for the entire value of the similar work it claimed to have carried out in the past, which rendered it eligible under the NIT, rather it furnished a work completion certificate from a private entity, being one M/s Ravi Infrabuild Projects Pvt. Ltd., as proof of its work experience. Consequently, on 16.02.2021, the petitioner received an e-mail from respondent no.1 stating that its Technical Bid had been rejected for failing to fulfil the Eligibility and Qualification Criteria (EQC). On the very same day, the petitioner shot off a letter to the respondent no.1, seeking reasons for the rejection of its bid, and got in touch with the officials of respondent no.1 as well. Although the petitioner did not receive a formal communication in this regard, it claimed to have been verbally informed that its bid had been rejected since it had not attached any TDS certificate in respect of the 2nd and 3rd quarters of the FY 2019-20, which corresponded with the work completion certificate issued by M/s Ravi Infrabuild Projects Pvt. Ltd. It is in these circumstances that the present petition came to be filed assailing the decision of the respondent no.1 to reject the petitioner's bid.

3. In support of the petition, learned senior counsel for the petitioner submits that the petitioner could not be faulted for failing to submit, with its bid, the TDS certificates for a part of the work that the petitioner had carried out for Ms/ Ravi Infrabuild; it was this company which was supposed to provide the TDS certificate to the petitioner in corroboration of its claim of having done the work as required by the EQC contained in the NIT, did not provide the same for the 2nd and 3rd quarters of 2018-19 on time. He submits that, however, the petitioner had duly submitted the work completion certificate issued by M/s Ravi Infrabuild at the time of submitting its bid on 09.01.2021 and, later, when the TDS certificate came to be issued by the company, it promptly filed the same with the respondent no.1 on 16.02.2021. He, thus, submits that there can be no question of the petitioner being declared ineligible for failing to submit the documents required, since the same stood filed with the respondent no.1 as soon as it was in receipt thereof. Furthermore, once the NIT specifically permitted the bidders to submit experience certificates of ongoing works, there was no reason as to why a TDS certificate filed after the submission of the bid, was a ground for rejecting the petitioner's bid.

4. Learned senior counsel further submits that even the manner in which the petitioner's bid was rejected, completely violated Clause E.18.2 of Section-3 of the NIT which stated the following:

> *"18.2 Prior to the detailed evaluation, Employer shall determine whether each bid is of acceptable quality, is generally complete and is substantially responsive to the bidding documents. For purposes of this determination, a substantially responsive bid is one that conforms to all the*

terms and conditions and specifications of the bidding documents without material deviations, objections, conditionality or reservation. A material deviation, objections, conditionality or reservations is one;
i) that affects in any substantial way the scope, quality or performance of the contract.
ii) that limits in any substantial way, inconsistent with the bidding documents, the Employers' rights or the successful Bidder's obligations under the contracts; or
iii) whose rectification would unfairly affect the competitive position of other Bidders who are presenting substantially responsive bids."

5. He submits that this provision explicitly required the respondent no.1 to examine the submitted bids on a preliminary basis before embarking on a final evaluation, and flag any instances of incompleteness. Therefore, if the petitioner's bid was actually deficient, for want of the TDS certificate, it was incumbent on the respondent no.1 to inform the petitioner of this and provide it an opportunity for correction. Yet, the respondent no.1, in complete ignorance of this provision, outrightly rejected the petitioner's bid and denied it any chance for a rectification. For these reasons, he prays that the present petition be allowed, by setting aside the decision of the respondent no.1 to reject the petitioner's bid, and stay any further action in respect of the award of the bid under the NIT in question.

6. Rebutting the petitioner's stand, learned counsel for the respondent no.1 submits that the last date to submit the Technical Bid was initially 06.01.2021, which was later revised to 11.01.2021 by way of Corrigendum-I. He also submits that Clause 12.2 of the NIT dated 10.12.2020 clearly stated that all tender related documents were required to be submitted with the bid, and any documents received after the opening of

the bid were liable to be rejected. Now, notwithstanding the fact that it submitted its Technical Bid on 09.01.2021, the petitioner provided the TDS certificate–submission of which was a prerequisite to a valid technical bid, only a month later on 16.02.2021 – on the date of opening of the financial bids. This was decidedly belated and meant that the petitioner's Technical Bid submitted on 09.01.2021 was incomplete, thus, rendering its Technical Bid invalid at the time of submission. He submits that, therefore, at the very threshold, the petitioner's bid was invalid and any submission of the documents after the time for bid submission had ended on 12.01.2021, was immaterial. Not to mention, the petitioner, while submitting its bid, did not even indicate in the forwarding letter that it was unable to file the TDS certificate for the entire amount of similar work it had carried out, since the same had not been received from M/s Ravi Infrabuild. He further submits that even if the petitioner had any queries as regards the documentation which was to be submitted along with the bids, it had the option of attending the pre-bid meeting held by the respondent no.1 at 11:30 AM on 18.12.2020, as per Clause 6 of Section 1 of the NIT – but it chose not to.

7. Learned counsel for the respondent then draws our attention to Section-3 of the NIT which contained Instructions to Tenderers along with Annexures and Formats, specifically Clause 1.2 of Annexure-V which required all bidders to furnish proof of their prior specialised work experience. As per the NIT, initially, the bidders had the option of proving that within the last 7 years, they had taken part in the construction of a highway/expressway/railway/runway, in a single contract, and successfully carried out (i) 3,90,000 cubic metres of earthwork, or (ii) 38,000 cubic metres of granular sub-base/base course work, or (iii) 10,650 cubic metres

of asphalt work or, they could prove that they had effected 2000 cubic metres of concrete work in the construction of RCC box culverts/RCC girder/ PSC bridge/underpass/flyover in a single contract. When Corrigendum-I was issued, the aforesaid was amended and the bidders were now required to prove that they had, previously, taken part in the construction of a highway/expressway/railway/runway and had successfully carried out (i) 4,30,000 cubic metres of earthwork in formation/granular sub-base/base course, or (ii) 4,30,000 cubic metres of asphalt work, or they could prove that they had effected (iii) 2000 cubic metres of concrete work in construction of RCC box culverts/RCC girders/PSC bridge/underpass/flyover in one single contract. It was further added that these specialised prior work experience requirements could be met through either ongoing or completed projects. He submits that a perusal of the table in Annexure-A of the petitioner's bid document shows that it had claimed prior specialised work experience under amended Clause 1.2 (iii) of Annexure-V of the NIT, particulars whereof were furnished in Point 5(c) to (e) in the table titled Statement of Year-Wise Quantities Executed. The details provided by the petitioner showed that it had only claimed having prior work experience of 1533.65 cubic metres of concrete work, when the requirement was 2000 cubic metres. He submits that even on this count, the petitioner's bid fell short of the Qualification Criteria. Moreover, Clause 4 of the EQC in Annexure-V clearly required the bidders to furnish the letter of award in reference to the project through which they were claiming prior specialised work experience, which the petitioner did not append to its bid. For these reasons, he prays that the present petition be dismissed.

8. We have learned counsel for the parties and find no merit in the contentions of the petitioner. To begin with, the estimated cost of the project was slated to be INR 83.61 crore and all bidders were required, under Clause 1.1 of the EQC set out in Annexure-V to the NIT dated 10.12.2020, to show that they had, in the last 1-7 years, executed similar works. To that end, the bidders could show that they had executed:

i. Three similar completed works, each costing not less than the amount equal to 30% of the estimated cost, or;

ii. Two similar completed works, each costing not less than the amount equal to 40% of the estimated cost, or;

iii. One similar completed work costing not less than the amount equal to 65% of the estimated cost.

9. The petitioner had submitted its bid by claiming that it had previously executed one similar completed work, whose value was over and above 65% of the estimated cost. This project was the one that it had executed for M/s Ravi Infrabuild. Now, the petitioner has not denied having known that Clause 4 of the EQC set out in Annexure-V of Section 3 of the NIT required it to furnish TDS certificates from M/s Ravi Infrabuild, in support of its claim as regards the value of the works it had carried out for them. However, the petitioner's sole defence is that since M/s Ravi Infrabuild, despite its repeated representations and requests, had failed to provide, in a timely manner, the TDS certificates for the 2nd and 3rd quarter of the year in which it had worked for them, the petitioner cannot be faulted for the failure to furnish the same to the respondent no.1 at the time of submitting its Technical Bid on 09.01.2021.

10. In order to appreciate this plea, it is apposite to consider the same

against the backdrop of the following stipulations in the NIT dated 10.12.2020:

(i) Clause 6, Section 1 of the NIT

"6. Pre bid meeting
6.1 A pre bid meeting of the interested prospective bidders shall be convened as per date sheet in the NIT in the office of General Manager/Highway/IRCON International Limited, C-4, District Centre, Saket, New Delhi-110017 through video conferencing. The link will be shared through e-mail to the interested bidders.

6.2 The purpose of the pre-bid meeting is to clarify issues and to answer questions on any matter that may be raised."

(ii) Clause C.7 of Section 3 of the NIT

"7. Deviations
7.1 The tenderers should clearly read and understand all the terms and conditions, specifications, drawings etc. mentioned in the original tender document. If the tenderer has any observations, the same may be indicated in his forwarding letter along with the tender."

(iii) Clause D.12.2 of Section 3 of the NIT

" 12. Deadline for submission of tender
12.2 Any tender related document received after opening of the tender shall be rejected.
Tenderers must upload the good scanned copy of relevant documents required to be submitted on e-procurement website as mentioned in the tender documents*. The document which is not readable or legible will not be given cognizance. E-bids which are not supported by relevant documents shall not be considered during evaluation of the bid." (emphasis supplied)*

(iv) Clause 4, Annexure V of Section 3 of the NIT

> *"4. The contractor should submit performance certificates and Letter of Award in reference to S.No.1 (minimum 3 nos., 2 nos. or 1 no. as the case may be) above issued by Government Organizations/ Semi Government Organizations/ Public Sector Undertakings/ Autonomous Bodies/ Municipal bodies/ Public Limited Company/Concessionaire company/Private company/JV company for having successfully completed similar works in the last 7 years.* ***Certificates issued by such Public Limited Company/ Concessionaire company/Private company/JV company must be supported by Tax Deducted at Source (TDS) Certificates(Form l6A/26AS) in evidence of the value of work executed****."(emphasis supplied)*

11. A perusal of Clauses D.12.2 and 4 of Annexure V contained in Section 3 of the NIT makes it clear that it was incumbent for the petitioner to file, alongwith its bid, all documents in support thereof; this included filing documents to substantiate its claim of having previously carried out works of similar nature, by furnishing TDS certificates from M/s Ravi Infrabuild–a private company, for whom it had claimed to have carried out the same. This would have verified the value of these works it had claimed to have previously carried out for M/s Ravi Infrabuild, thereby determining its fulfilment of the EQC set out under the NIT. In any event, a joint reading of Clauses 6 of Section 1 and C.7.1 of Section 3 of the NIT make it evident that even if the petitioner had any difficulty in obtaining and filing the relevant TDS certificates, it was required to state so in its forwarding letter accompanying the bid, or take up this issue in the pre-bid meeting held on 18.12.2020. The petitioner, admittedly, did neither.

12. Having failed to do so, the petitioner can neither nit-pick the

conditions in the NIT, nor abdicate its personal responsibility to adhere to the terms thereof at the time of submitting its bid. While it has its own grievances in respect of the delayed provision of the TDS certificates against M/s Ravi Infrabuild, the petitioner's prayer to have itself accommodated in the tender process, despite its failure to produce the relevant TDS certificate, and to have its bid entertained by the respondent no.1 are liable to be rejected solely on the express stipulations contained in the tender documents.

13. In our considered view, the only way to assess the validity of the petitioner's bid at this stage is to consider it from the vantage point of the committee evaluating the technical bids, and not how it looks before us today after the belated submission of the relevant TDS certificates on 16.02.2020. Evidently, on 14.01.2021, when the technical bids were opened, the petitioner's bid was lacking the requisite TDS certificate and, therefore, was not in compliance of Clauses 4 of Annexure V and D.12.2 of Section 3 of the NIT dated 10.12.2020. Since we are of the view that the aforesaid deficiency in the petitioner's bid was sufficient to reject the petitioner's Technical Bid, we need not go into other deficiencies pointed out by the respondents.

14. For the aforesaid reasons, we find no merit in the present petition, which is dismissed with no order as to costs.

REKHA PALLI, J

VIPIN SANGHI, J

FEBRUARY 22, 2021/sr