

GAHC010024722022



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

Case No. : WP(C)/843/2022

VIJAYA POLYMERS INDIA PVT LTD CONSORTIUM AND ANR
HAVING ITS REGISTERED OFFICE AT 1-98/9/3/52 PLOT NO 54 1FT FLOOR,
SILICON VALLEY, IMAGE GARDENS ROAD, MADHAPUR, HYDERABAD
500081

2: D. VIRAL RAJ
S/O D.T. VINOD KUMAR
R/O 157/7 KAMALA
ROAD NO. 4 GUNROCK ENCLAVE
SECUNDERABAD 500009 AUTHORISED REPRESENTATIVE OF VIJAYA
POLYMERS INDIA PVT. LTD. CONSORTIUM

VERSUS

ASSAM GAS COMPANY LTD AND ANR
A GOVT. OF ASSAM UNDERTAKING, REPRESENTED BY ITS MANAGING
DIRECTOR AND DGM (GMB), P.O DULIAJAN, DIST. DIBRUGARH, ASSAM,
PIN 786602

2:VCS QUALITY SERVICES PVT. LTD.

B-10
2ND FLOOR
BAJAJ BHAWAN
SECTOR-3
NOIDA 201301(UP)

Advocate for the Petitioner : MR. S RAVI G.

Advocate for the Respondent : MR S N SARMA SENIOR ADVOCATE

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

ORDER

Date : 14.02.2022

Heard Mr. S. Ravi, learned Senior Counsel assisted by Mr. A. Gogoi, learned counsel for the petitioners and Mr. S.N. Sarma, learned Senior Counsel assisted by Mr. K. Kalita, learned counsel for the respondent no. 1. The learned Senior Counsel are also heard on the interim prayer.

2. The petitioners in this writ petition filed under Section 226 of the Constitution of India has *inter alia* assailed the rejection of its bid at the un-priced bid evaluation stage on the ground that the Bid Security submitted by it was not in conformity to the terms and conditions of the Bid Document. The petitioners have also sought for a direction to the respondent authorities to accept the Bank Guarantee [BG] submitted by them in the physical form and to accept the un-priced bid of the petitioner no. 1.

3. By a notice dated 09.11.2021, the respondent no. 1 invited bids for a contract work viz. 'Annual Rate Contract for Procurement of Prepaid Gas Meters' ['the Contract-Work', for short]. The respondent no. 2 is the Engineering Consultant appointed by the respondent no. 1 for the up-gradation/development project.

4. The petitioner no. 1 participated in the said competitive bidding process as a consortium and submitted its bid. According to the petitioners, the consortium submitted all the requisite documents as per the terms and conditions of the Bid Document floated by the respondent no. 1.

5. Mr. Ravi, learned Senior Counsel for the petitioners, by referring to Clause 10.2, more particularly, to Clause 10.2.6 of the Bid Document, has

submitted that the Earnest Money Deposit [EMD]/Bid Security for the Contract-Work which was Rs. 58,11,500/-, was permitted to be submitted in the form of Bank Guarantee. The specific conditions were that the Bid Security in the form of Bank Guarantee should be valid for 60 [sixty] days beyond the validity of the bid and the original copy of the Bank Guarantee was to be submitted at the Consultant's office i.e. the respondent no. 2 within 7 [seven] days of un-price bid opening. The petitioner had submitted its bid on or before the last date of submission of the bids i.e. 14.12.2021 by uploading the same online. In compliance of Clause 10.2.6, it had uploaded a copy of the Bank Guarantee which it had already obtained, with the un-priced bid apart from sending the original copy of the Bank Guarantee to the office of the respondent no. 2 within the stipulated time period. He has submitted that there is no dispute on the fact that the envelope containing the original Bank Guarantee had reached the office of the respondent no. 2 within the stipulated time period. It was on 18.12.2021 the respondent no. 2, by an E-mail, had informed the petitioner no. 1 consortium that the respondent no. 2 was not conducting any physical tender. The petitioner was, thereby, requested to re-collect the courier containing the original Bank Guarantee. Correspondences through E-mails exchanged between the petitioner no. 1 consortium and the respondent no. 2 during the subsequent period. It was on 06.01.2022, the Bid Evaluation Committee evaluated the un-priced bids of the three bidders who had participated in the bidding process. The Bid Evaluation Committee rejected the bid of the petitioner no. 1 consortium on the ground that it did not comply with the technical specifications. Mr. Ravi has submitted that the only ground for rejection of the bid was relatable to the submission of the Bid Security in the form of Bank Guarantee. Since the Bid Security submitted by the petitioner was in conformity

with the Bid Document, the bid of the petitioner could not have been rejected on that ground. He has further submitted that as per the scope of supply stated in the Bid Document, the period of contract would be for 10 [ten] years and supply may be awarded to 2 [two] vendors. In support of his submissions, he has relied upon the decision of the Hon'ble Supreme Court of India in *Poddar Steel Corporation vs. Ganesh Engineering Works and others*, reported in [1991] 3 SCC 273, and a judgment of a Division Bench of the Hon'ble High Court of Gujarat in *Rakesh Construction Company vs. Ahmedabad Urban Development Authority and others*, reported in MANU/GH/0080/2018.

6. Mr. Sarma, learned Senior Counsel has submitted that the decision of rejection of the un-priced bid of the petitioner no. 1 consortium was taken in the meeting of the Bid Evaluation Committee held on 06.01.2022 and the same was uploaded in the portal on that day itself. Additionally, the petitioner no. 1 consortium was informed about the rejection of its un-priced bid due to submission of Bid Security in physical form i.e. Bank Guarantee instead of online mode by the respondent no. 2 through E-mail on 12.01.2021. The Tender Summary Reports uploaded on 06.01.2022 had also indicated that out of the 3 [three] participating bidders, the un-priced bids of two bidders were rejected and only one bidder was declared technically qualified in the un-priced bid evaluation stage. It was also made clear that price bid would be opened at 02-30 p.m. on 06.02.2022. It has been further submitted by him that the priced bids of the sole technically qualified bidder was opened thereafter, on 06.01.2022. On 09.02.2022, a Letter of Intent [LoI] has already been issued in favour of the successful bidder. The successful bidder has also accepted a Letter of Intent [LoI] on 09.02.2022. It is his preliminary objection that the writ petition is not maintainable on the ground of non-joinder of necessary parties as

the successful bidder has already been identified and also on the ground of delay. In support of his submissions, he has placed reliance on a decision of the Hon'ble Supreme Court of India in *Udit Narain Singh Malpaharia vs. Additional Member Board of Revenue, Bihar and another*, reported in *AIR 1963 SC 786*. Mr. Sarma has further submitted that during the bidding process, queries were received from the interested bidders and the respondent no. 1 replied to the bidders' pre-bid queries on 01.12.2021. The replies were also uploaded in the website. Clause 22 of the replies to the bidders' pre-bid queries dated 01.12.2021 made specific reference on the aspect of Bid Security. He has submitted that the bidders were notified thereby that no Bid Security would be accepted in physical form and, thus, submission of the Bid Security by the petitioner no. 1 consortium had to entailed rejection.

7. I have considered the submissions of the learned counsel for the parties and have also gone through the terms and conditions in the Bid Document issued by the respondent no. 1.

8. Clause 10.2 of the Bid Document has provided for Bid Security. Clause 10.2.2 has mentioned that EMD/Bid Security can be paid as per Options 1 or 2 which are :

10.2.3 Option 1: Internet banking through State Bank of India [SBI] or any other Banks listed at State Bank Multi Option Payment System [SBMOPS] on <http://assamtenders.gov.in>

10.2.4 Option 2: In case of non-availability of net banking facility, bidders may submit tender processing fee using NEFT/RTGS option from any bank against system generated prefilled challan.

9. That apart, Clause 10.2.6 has provided that the EMD/Bid Security may also be submitted in the form of Bank Guarantee and the same shall have to be

valid for 60 [sixty] days beyond the validity of the bid. The original copy of the Bank Guarantee has to be submitted by the bidder at the Consultant's office within 7 [seven] days of un-priced bid opening. Further, Section II of the Bid Document i.e. Instructions to Bidders [ITB] contains Clause 18.3 which has mentioned that the Bank Guarantee submitted by the bidder would be accepted. It is further mentioned that EMD/Bid Security may be paid online as per Option 1 or Option 2, which are already quoted above. Clause 18.4 mentions that any bid not secured in accordance with ITB Clauses may be treated as non-responsive and rejected.

10. A query was received from the interested bidders with regard Clause 10.2 relating to Bid Security, more particularly, to Option 1 or Option 2 with the further query as to whether the EMD/Bid Security in the form of Bank Guarantee would also be an acceptable mode of submission. To the said query, the respondent no. 1 replied by uploading in the portal as under :

"EMD/Bid Security in physical form is not acceptable. Same must be paid online as per Clause 10.2.3 and 10.2.4 of IFB Vol – I & II. The tender conditions shall prevail."

11. In view of the said reply, this Court is of the considered view that an ambiguity has arisen in view of the words, "The tender conditions shall prevail" in the said reply to the bidders' pre-bid queries. Whether such reply amount to an amendment in terms of Clause 9.0 of the ITB of the Bid Document is an issue which will require further examinations.

12. This Court is of the view that since the Bid Document has envisaged also selection of two vendors for supply of the gas meters which are substantial in number and the likely contract period is of 2 years, extendable for another year, the contentions raised by the petitioner will be considered at the appropriate

stage after receipt of the counter affidavit[s] from the respondents.

13. Issue notice, returnable on 14.03.2022.

14. As Mr. Sarma, learned Senior Counsel for the respondent no. 1 has appeared and accepted notice on behalf of the respondent no. 1, no formal notice need to be issued to the said respondent.

15. Mr. Gogoi, learned counsel assisting Mr. Ravi, learned Senior Counsel for the petitioner shall furnish extra copies of the writ petition along with all the annexures to Mr. Kalita, learned counsel for the respondent no. 1 within 2 [two] working days from today.

16. The petitioner shall also take steps for service of notice upon the respondent no. 2 by registered post with A/D within 2 [two] working days from today.

17. From the copy of the Letter of Intent [LoI] dated 09.02.2022, placed before the Court today by Mr. Sarma, it has *prima facie* emerged that the bidding process initiated by the notice dated 09.11.2021 has resulted in a successful bidder and the successful bidder has already accepted the Letter of Intent [LoI] by communicating its acceptance by its letter dated 09.02.2022, a copy of which is also placed before the Court by Mr. Sarma.

18. The subject-work pertains to supply of smart gas meters and the Annual Rate Contract would be valid for a period of 2 years and the same can be extended for a further period of 1 year on agreed terms and conditions.

19. I have taken note of the issue dealt in *Poddar Steel Corporation* [supra] wherein the issues were whether submission of tender fee either in cash or in Bank Draft was an essential condition or an ancillary condition and a banker's cheque can be accepted in lieu thereof for tender fee. The decision in *Poddar*

Steel Corporation [supra] has been considered in various subsequent decisions in the Hon'ble Supreme Court of India.

20. In *Central Coalfields Limited and another vs. SLL-SML [Joint Venture Consortium and others]*, reported in [2016] 8 SCC 622, the Hon'ble Supreme Court of India by referring from the decisions in *Ramana Dayaram Shetty vs. International Airport Authority of India*, (1979) 3 SCC 489 and *G.J. Fernandez vs. State of Karnataka*, (1990) 2 SCC 480, has gone on to observe that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it all together inapplicable. As regards contours of judicial review in relation to tender process, it has been held that the issue of acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned. However, the decision-making process can be subjected to judicial review. At this stage when no counter affidavit tendering authority i.e. the respondent no. 1 traversing the contentions advanced by the petitioners has not been received, the issue whether the decision to reject the un-priced bid of the petitioner no. 1 consortium was irrational or mala fide or intended to favour someone or a decision that no responsible authority acting reasonably and in accordance with relevant law could have reached is not possible to be answered. Whether with the emergence of a successful bidder the writ petition without impleading such successful bidder as a party-respondent is maintainable or not on the ground of non-joinder of a necessary party would be considered at the appropriate stage.

21. It has been observed in *Raunaq International Limited vs. I.V.R.*

Construction Ltd. and others, reported in [1991] 1 SCC 492, that before entertaining a writ petition in a contractual matter and passing any interim order in such a writ petition, the Court must carefully weigh conflicting interests. An interim order should be passed only when it comes to a conclusion that there is an overwhelming public interest. An interim order could delay a project, disturb the financial arrangements and escalate costs. This Court is of the *prima facie* view that the Contract-Work is also important from the point of view of the public as it is the citizens who are to be supplied the small gas meters.

22. In view of the above discussion, the Court is not inclined to pass the interim order to stay the further proceeding of the bidding process initiated pursuant to the notice dated 09.11.2021 and to stall the execution of the Contract-Work at this stage.

List the case on 14.03.2022.

JUDGE

Comparing Assistant