

Vidarbha Irrigation Development ... vs M/S Anoj Kumar Agarwala on 23 January, 2019

Equivalent citations: AIRONLINE 2019 SC 100, AIRONLINE 2019 SC 2396

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Bench: Navin Sinha, R.F. Nariman

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1049 OF 2019
(ARISING OUT OF SLP (C) NO. 26811 OF 2018)

VIDARBHA IRRIGATION DEVELOPMENT CORPORATION

Versus

M/S ANOJ KUMAR GARWALA

WITH

CIVIL APPEAL NO. 1050 OF 2019
(ARISING OUT OF SLP (C) NO. 27818 OF 2018)

J U D G M E N T

ROHINTON F. NARIMAN, J.

1) Leave granted.

2) A Tender was called by the appellant before us on 06.01.2018 for balance earthwork to be done in a canal. The Tender was ultimately replied to by three persons whose bids, respectively, were - Rs.39.53 crores by Respondent No.1, Rs.39.15 crores by Respondent No.2, and Rs.46.81 crores by Respondent No.3. There is no dispute that the bid of Respondent No. 2 was the lowest bid. At this stage, it is a little important to advert to some of the tender conditions:-

“Contract” is defined by the e-tender in question as follows:-

“1.3.9 CONTRACT :-

It shall mean and include following documents.

Tender Documents.

Specifications.

Drawings.

Tender document & information/data submitted by contractor Common set of conditions/Minutes of pre- Tender conference.” Clause 2.15 speaks of “Pre-tender Conference” as follows:-

“1) Pre-tenders conference open to all prospective tenderer will be held in the office as stated in this Section, wherein the prospective tenderer will have an opportunity to obtain clarifications regarding the work and the tender conditions.

2) The prospective tenderers are free to ask for any additional clarification either in writing or orally and the reply to the same will be given by the Chief Engineer/Superintending Engineer in writing and these clarifications referred to as common set of conditions, shall form part of tender documents and which will also be common and applicable to all tenderer.

3) The e-tender submitted by the tenderer shall be based on the clarification, additional facility issued (if any) by the Corporation and this tender shall be unconditional. Conditional tenders will summarily be rejected as non-responsive.

4) All tenderers are cautioned that the tenders containing any deviation from the contractual terms and conditions, specifications or other requirements and conditional Tenders will be rejected as non-responsive.” Clause 2.22 speaks of “Performance Security” as follows:-

“PERFORMANCE SECURITY in case of offer below the cost put to tender as per PWD Circular BDG-2016/BLD-2/Dt.:12/02/2016) & corrigendum on date 17/03/2016/ WRD Corrigendum No. Tender 0316/(189/16) Major Projects-1 dated 14.7.16 Condition Regarding payment of performance security (in place of condition for payment of additional security deposit) if offer quoted by the tenderer is below the cost put to tender.

i) If the tenderer quote upto 1% below the cost put to tender, no additional performance security is required. However, if the

tenderer quote his offer more than 1% below the cost put to tender to 10% below the cost put to tender, tenderer shall submit the demand draft or FDR or BG of the amount equal to 1% of cost put to tender towards performance security in Envelope No.2 of tender.

ii) If the tenderer quote his offer more than 10% below (offer below than 10%) the cost put to tender, tenderer shall submit the demand draft or FDR or BG of the cumulative amount which is equal to the amount by which offer is more than 10 % below plus the amount as per (i) above in the Envelop No.2 of tender. (For example, for 14% below rate, 1% + (14%-10%) i.e. 4%, then total 5% of the cost put to tender.

iii) The amount of performance security shall be calculated on rounding of contractors offer upto two decimal places. The offer in envelop No.2 without demand draft or FDR or BG of appropriate amount of performance security shall be treated as invalid offer.

iv) Demand draft/BG/FDR shall be drawn in the name of Executive Engineer, Ghodazari Canal Division Nagbhid.

v) Demand draft/BG/FDR/shall be drawn from Nationalised or scheduled banks.

vi) The BG/FDR shall be valid upto one month after defect liability period. Validity of demand draft shall be minimum 3

months from the date of submission of tender.

vii) Scanned copy of BG/FDR/demand draft shall be uploaded by the contractor at the time of e-tendering.

viii) Contractor shall submit the demand draft/FDR/BG in sealed envelope in the office of the Executive Engineer, Ghodazari Canal Division Nagbhid within 5 working days from the date of submission of tender. Name of work and e-

tender number shall be written on the envelope.

ix) On opening the tender, if papers in Envelop No.1 don't fulfill the essential qualification/documents requirements, the Executive

Engineer shall return the envelope of Demand Draft/BG/FDR to concerned Contractor within 7 days from the date of opening of tender.

x) The Executive Engineer shall refund the amount of performance security after completion of work successfully.

xi) Demand draft BG/FDR of the

second lowest tender shall be returned within 3 days after issuing works order to the lowest tender.

xii) EMD of the contractors

submitting false documents/demand draft/BG/FDR in above process shall be forfeited and the contractor shall be Black listed.

xiii) Executive Engineer shall issue the work order only after encashing the demand draft of the lowest tenderer.” “Important Note” “If any of the documents required as per Technical-Envelope-1 is not submitted on- line or/and Financial Bid: in Envelope-II (Commercial) is not properly uploaded, or/and information given in various Undertakings, Proform’s, Forms, Formats, Appendices etc, in various Sections-II, III, IV, VI is missing, incomplete/misleading/false tender of the bidder shall be liable for out-right rejection and shall not be considered for further process.” Clause 2.35 speaks of “Acceptance of Tender” as follows:-

“2.35 x x x 2.35.1 A substantially responsive Bid is one which conforms to all the terms, conditions, and specifications of the Bidding documents, without material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or performance of the Works, (b) which limits in any substantial way, inconsistent with the Bidding documents, the employer’s rights or the Bidder’s obligations under the Contract; or (c) whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive Bids. 2.35.2 If a Bid is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.”

3) On the facts in this case, it is undisputed that the bank guarantee that was furnished for Rs. 42.14 lakhs by Respondent No. 2 before us was initially furnished only for a period of six months on 12.03.2018, in response to the tender. It is common ground between the parties that the period ought to have been 40 (forty) months. The bids were opened on 06.04.2018, and on 07.04.2018, one day later, Respondent No. 2, sought to make up this deficiency by adding a period of 34 months to the bank guarantee which was valid for 6 months only. The aforesaid bid made by Respondent No. 2 was accepted initially on 03.05.2018.

A Tender Evaluation Committee then evaluated all the bids on 07.07.2018, and finally, the bid of the Respondent No. 2 was accepted as it was the lowest bidder among the three bids that had been received. The bone of contention between the parties is whether it is possible for the appellant before us to condone the initial bank guarantee being given for an admittedly incorrect period of 6 months.

4) Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the appellant, has taken us through the Government Resolution (GR) dated 12.4.2017 in order to contend that the term of bank guarantee, if originally wrongly given, and which makes a tenderer ineligible, does not disqualify him as a clarification can be sought from the bidder after which the term may be extended in conformity with the tender conditions. Apart from the above, he argued that, ultimately, the moment the deficiency was pointed out, this deficiency was made good by Respondent No. 2 and it is only thereafter that the bid of the Respondent No. 2 was accepted, being the lowest bid. He also added that the difference between the bid of Respondent No. 1 and Respondent No. 2 would amount to roughly Rs. 37 lakhs which again would be a saving to the public exchequer. He went on to add that given the parameters of judicial review and that a bona fide decision has been taken by the authority, this could not have been interfered with and was wrongly interfered with by the judgment under appeal. Mr. Raju Ramachandran, learned senior counsel appearing on behalf of Respondent No. 2, broadly adopted these submissions.

5) Mr. R. Basant, learned senior counsel appearing on behalf of Respondent No. 1 has taken us through the tender conditions and has argued that a period of six months for a bank guarantee, which admittedly should have been 40 months, is a material deviation which cannot be condoned later. He further pointed out that in point of fact, objections were taken at a pre-tender stage by certain would be tenderers, and after considering those objections, the authority made it clear that the PWD Circular dated 12.02.2016, together with corrigenda issued thereafter, would make it clear that this is a material condition which cannot be changed. He, therefore, argued that it was known to the Respondent No. 2, right from the beginning, that this particular condition was both material and has to be satisfied, and, admittedly, on the facts, it was not satisfied. He very fairly stated that the impugned judgment could not stand on its own legs but could be supported with the arguments that had been made by him.

6) At this stage, it is important to analyse the tender conditions. As was correctly pointed out by Mr. Basant, Clause 2.15, as set out hereinabove, makes it clear that it is only at a pre-tender stage that a clarification may be obtained regarding tender conditions. Sub-clause 4 of Clause 2.15 is important because all tenderers are cautioned by this Clause that tenders containing any deviation from the contractual terms and conditions, specifications or other requirements, will be rejected as non-responsive.

7) At this stage, it is important to advert to the pre-tender meetings that took place between the Chief Engineer and prospective parties on 30.01.2018. Entry 46 of the document that is produced by the appellant reads as follows:-

S.No. Provisions of Modification/clarifications Modification/ Tender sought by contractor Clarification sought by the Department 46 2.22 Performance 2.22 Performance Security: The clause of performance Security: The B.G./F.D.R's validity security is included

vi) The is upto 3 months at the based on G.R. dt.

B.G./F.D.R. time of tender submission 12.02.2016 & Corrigendum shall be valid & if work is awarded this on date 17.03.2016 and upto one month B.G./F.D.R.'s validity 14.07.2016. As policy after defect extended according to the decision, modification in liability tender condition. If this Clause cannot be period, should be taken after the made.

award of work as general
procedure in other
departments.

What is important to note is that questions were raised as to the period of bank guarantee, and the Department specifically relied upon a GR dated 12.02.2016, together with the corrigenda thereto, and stated that as a policy decision, modification in this Clause cannot be made. It is clear, therefore, that a modification to this very tender condition was suggested at the pre-tender stage, and was rejected to the knowledge of all prospective tenderers. Sub-clause 4 of Clause 2.15, therefore, becomes important in this context as the Respondent No. 2 was put on notice from the beginning itself that if there is any deviation in terms of the period of bank guarantee, its bid would be treated as non-responsive.

8) Clause 2.22, extracted herein above, also makes reference to the self-same PWD Circular dated 12.02.2016 with the corrigenda. A reading of this Clause would also show that a bank guarantee that is to be furnished has to be valid up to one month after the defect liability period which, admittedly, is for a period of 40 months.

9) Mr. Naphade's argument that had a demand draft been drawn instead of a bank guarantee, its validity would only be a minimum of three months from the date of submission of tender, which would show that a deviation from the 40 months period would certainly be permissible, (had a demand draft given instead of a bank guarantee), cannot be countenanced. On the facts of this case, no demand draft was given. Only a bank guarantee was given, and clearly for a much lesser period than that mandated by this Clause.

10) We may now come to Clause 2.35 which makes it clear that a substantially responsive bid is one which conforms to all terms, conditions and specifications without any material deviation. Inter alia, 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 cannot be gainsaid that a bank guarantee, which is for a period of six months and not for a period of 40 months, would not only be directly inconsistent with the bidding documents but would also be contrary to the employers' right to a bank guarantee for a longer period. This being the case, since a material deviation from the terms and conditions of the tender document was made by Respondent No. 2, when it furnished a bank guarantee for only six months initially, it would be clear that such bid would have to be considered as not substantially responsive and ought to have been rejected by the employer. Clause 2.35.2 also makes it clear that such a bid would have to be rejected outrightly and may not be subsequently made responsive by correction.

11) It is important to note that the Government Resolution dated 12.04.2017, which applies to the PWD Department, has superseded the PWD Circular dated 12.02.2016 and corrigenda dated 17.03.2016 and 14.07.2016. However, so far as the tender conditions of the tender in question are concerned, Clause 2.18 is material and is set out hereunder:-

“Earnest Money:

All tenderers shall pay entire E.M.D. & the mode of payment is indicated as specified at Sr. No. 4, 6, 4 of Section IV.

As per GR PWD 12.04.2017 – E.M.D. shall be paid online through bank account of own by contracts, contractor shall submit the undertaking that the EMD has been paid through his bank account and he will be responsible for any legal action under IPC if it is found false.” As against this, when it comes to performance security, the PWD Circular of 12.02.2016 and its corrigenda have alone to be followed in the case of performance security. This being the case, it is not possible to advert to the GR dated 12.04.2017 for the purpose of performance security as it applies only in respect of earnest money, as is clear from Clause 2.18 of the Tender.

12) The fact that a superseded Government Resolution continues to be utilised for the purpose of performance security may raise eyebrows. However, insofar as the tendering public is concerned, they have been put on notice that the performance security that is to be furnished, will only be as per the GR dated 12.2.2016 and corrigenda and not as per the GR dated 12.04.2017.

13) The law on the subject is well settled. In *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors.*, (2016) 8 SCC 446, this Court held:

“14. The law is settled that an essential condition of a tender has to be strictly complied with. In *Poddar Steel Corpn. v.*

Ganesh Engg. Works [*Poddar Steel Corpn. v. Ganesh Engg. Works*, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6) “6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.”

15. Similarly in *B.S.N. Joshi & Sons Ltd.*

v. Nair Coal Services Ltd. [*B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66) “(i) if there are essential conditions, the same

must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;...”

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.”

14) However, learned counsel appearing on behalf of the appellant strongly relied upon *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

“14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add 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) It is clear even on a reading of this judgment 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. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.

16) A subsidiary contention has been raised that even the bank guarantee subsequently furnished was for a period of 39 months and not for 40 months. This need not be gone into in view of our finding on the first point.

17) We may hasten to add that the judgment under appeal leaves a great deal to be desired. It did not advert to the main point in question, but instead focused on supposed contradictions made in an affidavit filed by the appellant in the High Court. Having gone through the affidavit, we find no such contradiction. It is also necessary to advert to the final relief given by the High Court. If, for the reason given by the High Court, the bid of the Respondent No. 2 had to be rejected, it cannot be understood as to how Respondent No. 2 can be brought back in the event that Respondent No. 1 does not agree to carry out the work for the lower bid amount of Respondent No. 2. For all these reasons, even though the reasoning of the Division Bench in the impugned judgment does not commend itself to us, yet, for the reasons contained in this judgment, the appeal will have to be dismissed.

18) We may record that Mr. Basant very fairly submitted before us that he will match the amount of Rs. 39.15 crores that was the bid of Respondent No. 2 before us. We record this statement and order, therefore, that the work now be performed by the Respondent No. 1 at this bid amount. The judgment of the High Court, insofar as para 8 is concerned, is set aside.

19) With these observations, the civil appeals are disposed of.

.....J. (R.F. Nariman)J. (Navin Sinha) New Delhi, Dated: January 23, 2019