

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

(THROUGH VIRTUAL MODE)

Reserved on: 31.12.2020
Pronounced on: 15.01.2021

**WP (C) No.2077/2020
CM Nos. 6569 and 6570 of 2020**

M/S Zahoor and Company ...Petitioner(s)

Through: - Mr. R. A. Jan, Sr. Advocate with
Mr. Taha Khalil, Advocate.

Vs.

UT of Jammu and Kashmir and ors. ...Respondent(s)

Through: - Mr. M. A. Chashoo, AAG.

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE.

JUDGEMENT

1. The petitioner, an “ AAY” Class registered Contractor is aggrieved and has challenged the action of respondent No.3 rejecting as ‘non-responsive’ the bid tendered by the petitioner in response to NIT No. PCD- RnB- 29 of 2020-21 dated 20th of August, 2020 on the ground that the assessment of Technical bids is totally arbitrary, irrational and *dehors* the norms/criteria prescribed in Clause 4.7 of the instructions to the bidders (ITB) in the Standard Bidding Document (SBD).

Factual matrix

2. Respondent no.5, vide NIT No. PCD- RnB- 65 of 2019-20 dated 20th of November, 2019, for and on behalf of Lieutenant Governor J&K UT, invited e-tenders (in two cover system) from approved and eligible contractors registered with the Government of Jammu and Kashmir, CPWD etc. for the work of construction of residential flats 2-BHK type four storied including sanitary fittings for government employees at Pampore Srinagar, **Block 1, 2 and 3** for estimated cost of ₹ 1313.50 lacs and the work was to be completed within a period of 550 days. Simultaneously with the aforesaid NIT, the respondent No.5 vide NIT No. PCD-RnB-66 of 2019-20 dated 20th of November, 2019 invited similar e-tenders on same terms and conditions for the work of construction of residential flats 2-BHK type four storied including sanitary fittings for Government employees at Pampore Srinagar, **Block 4, 5 and 6**. The petitioner along with others responded to the aforesaid NITs. On determination and evaluation of technical bids tendered by the competing tenderers, the technical bid submitted by the petitioner alone was found to be responsive. Since the bid of the single tenderer was found responsive, as such, a decision was taken by the respondents to invite fresh tenders for the said works.

3. Accordingly, fresh tender notices bearing NIT No. PCD-RnB-76 of 2019-20 and NIT No. PCD-RnB-77 of 2019-20 both dated 31st of December, 2019 were floated by the respondent No.5 on the similar lines. This time also the bid tendered by the petitioner alone was found responsive by the tender evaluation committee consisting of experts in

the field. The petitioner being single responsive tenderer was not considered for the financial bid and a decision was taken by the respondents to put the works to fresh tenders yet again.

4. In the aforesaid backdrop, the respondent No.5 invited fresh tenders vide NIT No. PCD-RnB-29 of 2020-21 dated 20th of August, 2020, this time reducing the quantum of work. The fresh tender was for construction of flats Block 1 and Block 2 and the estimated cost of the work as indicated in the tender was ₹ 942.05 lacs. The time of completion was fixed as 425 days. The petitioner once again responded and was considered for evaluation of technical bids. The petitioner was declared non-responsive. Two other contractors, M/S S. K. Integrated Consultants and M/S Muzaffar Ahmad Rather were declared responsive. It is this decision of the technical bid evaluation Committee, the petitioner is aggrieved of.

The grounds of challenge and the contention of the learned counsel for the petitioner:

5. On behalf of the petitioner, it is contended that the impugned action of the respondent No.3 rejecting the technical bid of the petitioner as ‘non-responsive’ is arbitrary, irrational and contrary to the terms and conditions of the NIT dated 20th of August, 2020. It is submitted that the petitioner was found responsive by respondent No.3 for the similar works of higher value which were notified twice on two earlier occasions. The petitioner was found responsive with reference to NIT No. 65, NIT No. 66, NIT No. 76 and NIT No. 77 and, therefore, there was no reason or justification to declare the petitioner ‘non-responsive’ for the similar work of comparatively lower

value. Referring to Clause 4.7 of the ITD in the SBD it is urged that respondent No.3 has deliberately miscalculated the available bid capacity of the petitioner and has erroneously declared the petitioner non-responsive. Applying the formula laid down in Clause 4.7 supra, the petitioner has worked out his bidding capacity quo Block No. 1 and 2 as ₹ 1806.72 lacs, which is admittedly higher than the estimated cost of the project. To elaborate, Mr. R.A. Jan, learned senior counsel appearing for the petitioner, argues that the formula laid down in Clause 4.7 to workout the bid capacity of the tenderer i.e. $(A \times N \times M - B)$ has been wrongly applied. The value of N which as per the formula is equivalent to number of years prescribed for completion of works for which bid are invited, has been wrongly applied. He submits that the time of completion of the work in question was 14 months and therefore, as per the consistent past practice, the value of N to be applied in the instant case ought to have been 1.5 and not 1.164, as applied by the respondents. He has invited the attention of this Court to a tender notice issued by the respondent No.5 bearing NIT No. PCD-RnB-61 of 2020-21 dated 7th of December, 2020 wherein the respondents have explicitly indicated as to how the value of N is to be worked out. Referring to Clause 4.7 of the NIT dated 07.12.2020 it is argued that the value of N is required to be worked out by taking into consideration the number of years prescribed for completion of works for which bids are invited and period upto six months to be taken as half year and the applicable multiple factor is 0.5. If it is more than six months but up to 12 months, multiple factor to be applied is 1, more than 12 months up to 18 months, the multiple factor to be applied is

1.5 and so on. It is thus submitted that what was clarified in the subsequent notification was infact a practice in vogue and was made applicable even in reference to NIT No. 77 and NIT No. 76 dated 31st of December, 2019 in which the petitioner was the lone tenderer found responsive in the technical bids. He submits that in the NITs issued on 31st of December, 2019 for **Blocks 1, 2 and 3** and **Blocks 4 , 5 and 6**, the time of completion of each work was 600 days. Initially in the NIT, it was 550 days but the same was later substituted by 600 day by way of corrigendum issued vide NIT/Corr/5214-17 dated 04.01.2020. The respondent No.3 while evaluating the bid capacity of the competing tenderers applied the value of N as 2 and, therefore, there was absolutely no reason or justification to deviate for the tender in question except that there was *malafide* intention on the part of the respondents to somehow throw the petitioner out of competition.

Response of the respondents:

6. Apart from meeting the factual aspects of the case projected by the petitioner, the respondents have justified the rejection of technical bid of the petitioner primarily on the ground that N factor to be applied for working bid capacity as per Clause 4.7 has been worked by dividing the number of days for completion of work by 365 days and in the instant case the value of N is worked out to be 1.164. The petitioner's available bid capacity so worked out has comeout to be less than the estimated cost of work and, therefore, his tender has been rejected as 'non-responsive'. It is further brought to the notice of this Court that after opening of the technical bids, the respondents have

opened the financial bid and have found one M/S Muzaffar Ahmad Rather the lowest bidder. His bid has been accepted and the Chief Engineer, vide his communication No. CE/RBK/WS/22902-04 dated 24th of December, 2020 has issued letter of acceptance in favour of the said contractor. This is how respondents have justified their action and have urged that the writ petition, as it is, is not maintainable unless M/S Muzaffar Ahmad Rather, whose bid has been accepted for the work in question, is arrayed as party in the petition and is afforded an opportunity of being heard.

Conclusion:

7. Having heard learned counsel for the parties and pursued the record, it is necessary to first set out Clause 4.7 of the Instructions to the Bidders, contained in Standard Bidding Document, hereunder:-

“4.7 Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total estimated cost of the works. The available bid capacity will be calculated as under: **Assessed**

Available Bid capacity = (A x N x M-B)

A= Maximum value of civil engineering works executed in any one year during the last five years (updated to the current price level @ 8 percent a year) taking into account the completed as well as works in the progress

N= Number of years prescribed for completion of the works for which bids are invited= 14 Months

M= M factor shall have a value of 2.5

B=Value (updated to the current price level of the year indicated in appendix) of existing commencements and on-going works to be completed during the next 03 years (period of completion of the works for which bids are invited)

Note: The statements showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent. The certificate should be furnished as per format shown in qualification information (Section-2).”

8. From plain reading of the Clause it clearly transpires that the

bidders, who meet the minimum qualification criteria, will be qualified only if there available bid capacity is more than the total estimated cost of the works. The available bid capacity is to be calculated in the following manner:-

$$\text{“ Available bid capacity} = (\mathbf{A} \times \mathbf{N} \times \mathbf{M-B})\text{”}$$

9. There is no dispute with regard to the value of “A , M and B. The bone of contention, however, is with regard to the value of ‘N’. The Clause provides that ‘N’ is equal to number of years prescribed for completion of work for which the bids are invited. That being the position, if the time of completion of works is one year, two years, three years so on and so forth, there will be no difficulty in working out the value of ‘N’. Obviously the value of ‘N’ would be one if the time for completion of work is one year; 2 if the time of completion of work is two years so on and so forth. The difficulty may arise if the time of completion is one year and two months or one year and eight months. The SBD and the ITB contained therein, in particular, Clause 4.7 does not provide the mechanism or method to work out the value of ‘N’ in such eventuality. As per the past practice, the value of ‘N’ with regard to a fraction of a year was being worked as per Clause 4.7 of the ITB in the SBD issued in reference to NIT No. PCD-RnB-61 of 2020-21 dated 07.12.2020. At this juncture it would be appropriate to reproduce Clause 4.7 where it has been explained as to how value of ‘N’ is to be worked if the period of completion is upto six months; more than six months up to 12 months; more than 12 months up to 18 months. It is clearly provided that in such eventuality the multiple factor of 0.5, 1, 1.5 and so on respectively shall be applied. Clause 4.7

of the Instructions to the Bidder of SBD issued in reference to NIT dated 07.12.2020 (supra) is reproduced hereunder:-

“4.7 Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total estimated cost of the works. The available bid capacity will be calculated as under: **Assessed**

$$\text{Available Bid capacity} = (A \times N \times M - B)$$

A= Maximum value of civil engineering works executed in any one year during the last five years (updated to the current price level @ 8 percent a year) taking into account the completed as well as works in the progress

N= Number of years prescribed for completion of the works for which bids (Period upto 6 months to be taken as Half Year and Multiple factor is 0.5 and more than 6 months upto 12 months multiple factor is 1, more than 12 months to 18 months multiple factor is 1.5 and so on

M= M factor shall have a value of 2.5

B= Value (updated to the current price level of the year indicated in appendix) of existing commencements and on-going works to be completed during the next 03 years (period of completion of the works for which bids are invited)

Note: The statements showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent. The certificate should be furnished as per format shown in qualification information (Section-2)."

10. The plea of the respondents that they have worked out the value of factor ‘N’ by **dividing** the number of days for completion of work **by** 365 days is not borne out from the records. With a view to find out the past practice adopted by respondents in similar cases, this Court had called for the record of NIT 76 and NIT 77 both dated 31st of December, 2019 in which the petitioner had participated and found ‘responsive’ by respondent No.3. In both the works, the time for completion of work was 600 days and the value of ‘N’ applied by respondent No.3 to work the available bidding capacity of the competing tenderers was 2. That means in the instant case time of

completion of work i.e. 600 days would mean one year and eight months approximately. Going by the formula claims to have been applied by the respondents in the case on hand, the value of 'N' would come to 1.64 whereas respondents in reference to NIT No. 76 and NIT No. 77 have applied the value of 2. It clearly demonstrates that as per the past practice as also what is envisaged in future in reference to NIT No. 61 dated 07.12.2020 a uniform criteria has been applied and the deviation was only with regard to the work in question. In that view of the matter this Court has no option but to accept the plea of the petitioner that the deviation from the consistent practice adopted by the respondents to work out the value of factor 'N' was *mala fide*, arbitrary and with a view to throw the petitioner out of competition.

11. It is not disputed before me by the parties that had the respondents applied the value of 'N' as 1.5, the petitioner would have qualified to participate in the financial bid. The time for completion of work on hand, as indicated in the NIT is 14 months and, therefore, the value of 'N' that was applicable should have been 1.5 and not 1.164, as applied by respondent No.3. This faulty application of value of 'N' has denuded the petitioner of his right to participate in the financial bid.

12. Having said that, in the given facts and circumstances of the case this Court is of the considered view that no relief can be granted to the petitioner for the following reason:-

(1) As per the NIT the technical bids were opened on 8th of September, 2020 and the petitioner became aware that he has been declared non-responsive. He submits its objections to

the Chief Engineer on 22nd of September, 2020 and the Chief Engineer concerned disposes of his representation vide his communication dated 07.11.2020 informing him that his available bid capacity of ₹ 814.91 lacs is far less than the minimum requirement of ₹ 942.05 lacs. The petitioner waited for more than a month and approached this Court by way of instant petition after 18th of December, 2020. The petitioner thus allowed the tendering process to proceed further. The respondents had on 29.10.2020 opened the financial bids in which M/S Muzaffar Ahmad Rather had emerged successful for the work. Yet he was not arrayed as party respondent nor there is any whisper by the petitioner with regard to opening of financial bid and emergence of M/S Muzaffar Ahmad Rather as successful bidder. The letter of acceptance in favour of M/S Muzaffar Ahmad Rather too was issued on 24th of December, 2020, the day when the writ petition for first time came up for consideration before this Court. Be that as it may, the 3rd party rights have been created and there has been unexplained delay in approaching the Court. In the absence of M/S Muzaffar Ahmad Rather being party respondent and without affording him an opportunity of being heard, it is not legally permissible to accept this petition and grant the reliefs prayed for by the petitioner.

13. In the facts and circumstances narrated above, this petition is disposed of by holding that the rejection of technical bid of the

petitioner by respondent No.3 was illegal, arbitrary and violative of Article 14 of the Constitution of India. However, no relief is being granted to the petitioner for the reason that petitioner had been late in approaching the Court and guilty of allowing the tender process to proceed further as also suppressing from the Court that financial bid had already been opened and M/S Muzaffar Ahmad Rather had emerged successful. As a result whereof 3rd party rights have come to be created. Any order passed in favour of the petitioner in this petition would adversely affect the successful tenderer M/S Muzaffar Ahmad Rather, who is not a party respondent in this petition. The petitioner, however, shall be at liberty to file a fresh petition arraying M/S Muzaffar Ahmad Rather as party respondent or else claim compensation from the respondents for his wrongful exclusion from the tendering process and his participation in the price bid by availing appropriate remedy available under civil law.

(Sanjeev Kumar)

Judge

SRINAGAR

.01.2021

Anil Raina, Addl. Reg/Secy

Whether the order is speaking: Yes
Whether the order is reportable: Yes

The judgment is pronounced in terms of Rule 138 (3) of the Jammu and Kashmir High Court Rules, 1999.

**SRINAGAR:
January 15, 2021**

**(Sanjay Dhar)
Vacation Judge**

(Through Virtual Mode from Jammu)