

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

OWP No.1281/2010

CMP No.1740/2010

CMP No.144/2011

Date of decision: **12-04 -2012**

Cube Construction Engineering

Vs.

State of J&K & ors.

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir

Appearing counsel:

For the Petitioner(s): Mr. D. S. Thakur, Sr. Adv. with
Ms. Aruna Thakur.

For the respondent(s): Mr. S. C. Gupta, Sr. AAG.

i) Whether to be reported
in Digest/Journal:

YES

ii) Whether to be reported
in Press/Media :

YES/OPTIONAL

1) Rural Development Plan initiated by the Government of India also provide for construction of roads in rural areas through a scheme popularly known as "Prime Minister's Gramin Sadak Yojna (PMGSY)" for which the funds are released by the Central Government and the works are executed by the State Government through Chief Engineer PMGSY of the concerned jurisdiction. In the instant case concerned is the Chief Engineer, PMGSY, Jammu who has issued notice inviting tenders from

eligible bidders for construction of road from Dera Baba to Tanda in Reasi Division, Package No.JK14-128 for an estimated cost of Rs.342.30 lacs. Petitioner has also responded to the said notice and has submitted the requisite technical bid as well as financial bid and has also submitted Bank Guarantee No.100 for Rs.6.86/ lac issued by the J&K Bank, SMGS Branch Jammu, as requisite earnest money deposit.

2) The technical bids, as were received, are stated to have been opened, in front of the bidders, on 25.06.2010 by the staff of the Chief engineer, PMGSY, Jammu, same were placed before the tender committee, as constituted by the Chief Engineer, for proper evaluation. Petitioner has been given to understand that his technical bid will be rejected on the ground that he does not qualify the requirement as envisaged in condition No.4.4A(b) of the Standard Bidding Document (hereinafter referred to as SBD), hence the present petition, wherein issuance of appropriate writ, direction or order has been prayed for i.e.:

- (I) *Prohibiting the official respondents from rejecting the technical bid of the petitioner;*
- (II) *Quashing the decision of rejecting the technical bid if any such decision has already been taken*
- (III) *Directing the respondents to consider the case of the petitioner for allotment of contract after opening the financial bid.*

3) In the reply, as filed by the respondents, it has been stated that the petitioner is not an eligible bidder as per the conditions laid down in NIT and the Competent Authority, upon due consideration, has declared the bid of the petitioner as non-responsive. It is also stated that pendency of the writ petition has hampered the process aimed at providing road connective to needy population. The bid of the petitioner has been stated to be non-responsive on the following counts:

- a) The petitioner firm was enlisted as “A” Class contractor on 06.02.2008;*

- b) Petitioner has not executed civil works between 2007-08 of the value of Rs.182.47/ lacs, as alleged by the petitioner.*
- c) The claim that the turnover of the petitioner firm for the period 01.04.2008 till February, 2009 was Rs.10,77,25,000/ is not correct as no contract was awarded to the petitioner for the said period.*
- d) It is also incorrect that the turnover for the period 2009-2010 was Rs.9,99,11,000/.*
- e) Copy of the Registration Card would indicate that the petitioner firm was registered in the year 2008, so the petitioner has only experience of two years whereas, as per requirement of SDB clause 4.2(b)(c), the petitioner should possess at least five years experience and turnover, as per Clause 4.4A(a) 50% of the turnover should be from civil engineering construction works so as to qualify for bidding in PMGSY.*
- f) The petitioner, on the same grounds, had filed writ petitions registered as OWP No.440/2009 and OWP*

No.441/2009 which were dismissed by this Court vide judgment dated 25.2.2010 and the appeals against the said judgments registered as LPA(OW) No.10/2010 and LPA(OW) No.11/2010 were withdrawn by the petitioner.

4) In the rejoinder filed by the petitioner it is pleaded that the petitioner possesses requisite experience and his technical bid is perfectly in accordance with SBD. The requirement of Clause 4.4A(a) was that the contractor should have achieved, in any one year, a minimum financial turnover equivalent to 75% of the tendered cost. The tendered cost was Rs.3,42,3000, 75% means Rs.2,56,72,500. The petitioner had achieved higher targets than the one required. In terms of Clause 4.4A(b) of SBD, petitioner was required to execute at least one similar work equal to 20% of the tender cost which approximately comes to Rs.68,46,000. The certificate of Paschim Developers and Construction, Bangalore clear suggests that the petitioner had executed a single work for approximately Rs.70,56,800/.

5) As per Clause 4.2(b)(c) of the tender document, the requirement of having five years experience as A-Class contractor is not prescribed. The said Clause in fact is for the purpose of accepting the tender of the tenderer who must have achieved the turnover in any one year as per Clause 4.4A(a).

6) The respondents filed supplementary affidavit in compliance to order dated 20.8.2011, wherein it is admitted that the scheme under PMGSY was approved by the Government of India, Ministry of Rural Development for execution in J&K to provide connectivity to far flung inhabitants as conveyed vide letter dated 21.04.2010 and accordingly same was put to tenders including two schemes in respect of: (I) Dera Baba to Tanda (Package No.JK14-128) for Rs.342.302/ lacs, and, (II) Malikote to Sarsote (Package No.JK14-146) for Rs.223.71/ lacs, in response, various bids were received and on opening the same by the Tender Opening Committee, in respect of Package No.JK14-128, ten(10) technical bids were received which include the bid of the petitioner but on scrutiny five were found responsive

whereas five were found non-responsive which include that of the petitioner. Vis-à-vis Malikote to Sarsote (Package No.JK14-146) five bids were received out of which two were found responsive and three were found non-responsive which include that of the petitioner. All the pre-requisites for fixation of the contract have been completed but allotment is not made in view of directions of this Court. It is further added that the petitioner, in the meantime, had applied for release of his bid security on the plea that the department has not accepted his bid, his request was accepted and same was returned to him on proper receipt which renders his bid invalid.

7) In opposition, petitioner has filed the objections stating therein that he, vide letter dated 31.03.2011, had requested the Chief Engineer that his bid for construction of road from Malikote to Sarsote (Package No.JK14-146) has not been accepted, therefore, his Bank Guarantee No.115 issued by J&K Bank Ltd. Branch SMGS Jammu may be returned, which would indicate that the petitioner

had withdrawn his tender vis-à-vis said work not vis-à-vis work under Package No.JK14-128.

8) Heard learned counsel for the parties.

9) The question for determination is “as to whether bid of the petitioner has been validly declared as non-responsive”.

10) SBD governs the procedure and qualification for bidding. Clause 4 provides for “Qualification of the Bidder”. Clause 4.2(b) provides for furnishing the information vis-à-vis total monetary value of civil construction works performed for each of the last five years whereas Clause 4.2(c) provides for furnishing the information vis-à-vis experience in works of a similar nature and size for each of the last five years and details of works in progress or contractually committed with certificates from the concerned officer of the rank of Executive Engineer or equivalent. Clause 4.4A(a) provides that the bidder should have, in the last five years, achieved in any one year a minimum financial turnover (as certified by the Chartered Accountant, and at least

50% of which is from Civil Engineering construction works) equivalent to the amount put to bid, in case the amount put to bid is more than Rs.200/ lacks but less than Rs.1000 lacks. Clause 4.4A(b) provides that, as prime contractor, the bidder must, at least, have completed one similar work and the requisite certificate should be from the officer not below the rank of Executive Engineer or equivalent. Clause 4.2(b) suggests that the bidder has to furnish the information regarding monetary value of civil construction works performed for each of the last five years. The said Clause is controlled by Clause 4.4A which would provide that in last five years, at least in any one year, the minimum financial turnover shall be 75% of the amount put to bid. It is an enabling clause and the requirement is that the bidder, in any of the five years, it may be first year or last year of the five years, must have achieved minimum financial turnover equivalent to 75% of the amount put to bid where the bid is for more than Rs.200/lacs and the satisfactory completion of the work is to be certified by the Executive Engineer.

11) Petitioner in his rejoinder has categorically stated that the cost of the tendered work was Rs.3,42,30,000/, 75% of which amounts to Rs.2,56,72,500/. The certificate issued by the Chartered Accountant, forming Annexure-H of the writ petition, would reveal that the petitioner during 2007-2008 had achieved turnover of Rs.182.47/ lacs, in the year 2008-2009 Rs.830.37/ lacs and in the year 2009-2010 had achieved Rs.999.11/ lacs which would mean that for the said period turnover was much more than required.

12) Clause 4.4A(b) of SBD would provide that the bidder must have completed at least one similar work equal in value to 1/5th of the estimated cost of work which, in the instant case, approximately comes to Rs.68.46,000. The petitioner has produced the certificate issued by Paschim Developers & Construction which would reveal that the petitioner, as a prime contractor, has satisfactorily completed the road construction project developed at survey No.86, 87 and 91 Madaku Hosalli village Nandi Hobli, Chikka Ballapur Karnataka for an amount of

Rs.70,56,800.00. The said certificate is issued under the signature of Executive Engineer which is in consonance with Clause 4.4A(b).

13) Contention of the learned counsel for the respondents is that the petitioner had earlier, on the same grounds, filed two writ petitions i.e. OWP No.440/2009 and OWP No.441/2009 and the contentions of the petitioner were not accepted, LPAs, as preferred, were withdrawn.

14) Meeting this contention, learned counsel for the petitioner referred to the judgment as rendered in OWP BNo.440/2009. In the said case, vis-à-vis satisfactory completion of the work, petitioner had produced a certificate issued by Paschim Developers and Constructions which was issued by the Chief Executive Officer, not by the Executive Engineer or by an officer of the equivalent rank and it was not shown as to whether work was executed by the petitioner as a prima contractor but the certificate, as placed on record of this case, satisfies the requirement i.e. the certificate in categorical terms provides that the petitioner, as a prime contractor,

has executed the work and the same is signed by the Executive Engineer which is a requirement, therefore, contention of the learned counsel for the respondents, in view of said position, is not acceptable. The certificate as placed on record is reproduced here-under:-

“Paschim Developers & Constructions

Site Office Madaku Hosalli Project, Chikka Ballapur, Karnataka

CERTIFICATE

This is to certify that against Work Order dt. 01.05.2008 **M/S Cube Construction Engineering, 61D, D/C Gandhi Nagar, Jammu** having “A” Class Contractor Card PWD-J/R&B/A/66/2007-08 valid up to 31-03-2009 has **satisfactorily completed** entire Roads Construction Work as a **Prime Contractor** at Paschim Developers & Constructions Project developed at survey no.86, 87 and 91 Maddaku Hosalli Village Nandi Hobli, Chikka Ballapur District Karnataka. The property of the project is exclusively owned by the company.

Detail of works:

S. No.	Name of Work	Quantity	Rate (Rs.)	Amount (Rs.)
1.	Earth Work including Hard Rock	25350 M³	195.00	4943250.00
2.	Stone Massonary in Cement 1:6	1550M³	671.00	1040050.00
3.	RCC, M20	58M³	4500.00	261000.00
4.	Road Metaling and Black Toping	1250 M³	650.00	812500.00
			Grand Total	7056800.00

The above works has been executed by the contractor under my control and monitoring. Contractor had started the job on 5th May, 2008 and completed the same on 20th Nov. 2008 well within its stipulated time. Bill for the above job is assessed for Rs.7056800/- (Rupees Seventy Lacs Fifty Six Thousand Eight Hundred only).

**For Paschim Developers & Constructions
Project Engineer/Executive Engineer”**

The certificate clearly answers the contention as raised.

15) Clause 4, 4.1, 4.2 and 4.4A, when read together, do not provide that the bidder must have five years experience as an “A” Class contractor, instead Clause 4.2(b)(c) would provide that the bidder must have at least five years experience and also provides as to what should be the turnover. Petitioner has the requisite experience as a contractor, therefore, registration of the petitioner as “A” Class Contractor in the year 2008 is immaterial for the purpose of five years of experience. The requirement is that during last five years, the contractor should have, in any one year, achieved minimum financial turnover equivalent to 75% of the tendered cost which the petitioner has fully satisfied and the certificate issued by the Chartered Account clearly indicate that for the year 2008-2009 and 2009 – 2010 petitioner for civil construction works had achieved the turnover amounting to Rs.830.37 lacks and 999.11/ lacks.

16) The rights of the petitioner have been protected while LPA No.10/2010 was withdrawn. In the order recorded on 16.11.2010, while disposing of the said LPA, it has been recorded as under:-

“We accordingly, permit the appellant-Writ Petitioner to withdraw the Appeal observing that the observations made by the Writ Court would not operate as impediment with the authorities to consider the appellant for allotment of fresh contracts, as and when tenders are invited therefore, on its own merit and on the basis of the material including requisite certificate, justifying its eligibility to compete.”

Therefore, the judgment rendered in earlier disposed of writ petition and appeal does not deprive the petitioner from competing and from claiming consideration of his bid on the basis of the certificate as referred to hereinabove.

17) Now again question arises as to what shall be the effect of return of Bank Guarantee amounting to Rs.6.86/ lacs vis-à-vis package No.JK14-128.

Admittedly petitioner vide his letter dated 31.3.2011 had requested Chief Engineer PMGSY to return Bank Guarantee No.115 on the count that his tender for construction of road from Malikote to Sarsote (Package No.JK14-146) has not been accepted. The respondent Chief Engineer released Bank Guarantee No.115 but at the same time released Bank Guarantee pertaining to package No.JK14-128 relatable to construction of road from Dera Baba to Tanda. Petitioner has received the same but in his objections has highlighted that he never requested for return of Bank Guarantee pertaining to package No.JK14-128 and admittedly, as per his own letter, he has withdrawn from package No.JK14-146 and has added that Bank Guarantee was required to be re-validated, that was not done and without asking for its release it was delivered to the petitioner so as to keep him out of zone of consideration. Normally, on release of Bank Guarantee, petitioner after re-validation should have delivered it back which he has not done but since at the time he was required to furnish the Bank

Guarantee, he had furnished the same which is not denied, therefore, condition of the tender was satisfied. Return of the Bank Guarantee later on, without asking for the same, will not disentitle the petitioner from claiming the right when he has been contesting the matter right from the very beginning.

18) In the backdrop of the stated reasons and circumstances, the bid of the petitioner, relatable to Package No.JK14-128, is found to be responsive so should not have been declared as non-responsive. It being so, respondents shall consider the bid of the petitioner along with other responsive bidders and proceed ahead so as to finalize the tender process. The petitioner shall deposit the required Bank Guarantee afresh.

19) The respondents shall be free to take decision after considering all the responsive bids, including that of the petitioner, strictly in accordance with rules and regulations governing the tender process. Interim direction dated 04.11.2010 shall cease to be in operation.

20) Accordingly disposed of along with connected
CMPs.

(Mohammad Yaqoob Mir)
Judge

Jammu
12.04/2012
“Mohammad Altaf”