

Heard Mr. PK Goswami, learned Senior Counsel assisted by Mr. YS Mannan, learned counsel for the petitioners. Also heard Mr. UK Goswami, learned counsel appearing for respondent Nos. 1, 2 and 3 as well as Mr. GN Sahewalla, learned Senior Counsel assisted by Mr. D Senapati, learned counsel appearing for respondent No. 4.

2. The matter in issue relates to tender notice No. CE/CON/J-I/BLT/2016/03 (3 of 4) dated 08.03.2016, hereinafter referred to as Tender Notice No. 3 of 4. The approximate cost of work, i.e., the tender value is Rs. 56,32,51,551/-.

3. The above tender notice was a part of the four tender notices issued by way of NIT dated 08.03.2016 for construction of Broad Gauge Ballastless Track. The present tender notice No. 2 of 4 is for construction of Broad Gauge Ballastless Track in tunnel Nos. 12, 13, 14, 15, 16, 17 and 18 and all other ancillary work between station Khongsang to Noney in connection with construction of New BG Line in between Jiribam to Imphal. The other tender notices are CE/CON/J-I/BLT/2016/03 (1 of 4), CE/CON/J-I/BLT/2016/03 (2 of 4) and CE/CON/J-I/BLT/2016/03 (4 of 4).

A bidder can be a firm or a joint venture (JV) or a collaboration of firms from India/abroad who is the system provider and/or the designer and/or the construction executing Agency and have a written Agreement or Memorandum of Understanding (MOU) to this effect. The bidder may consist of maximum three members. It was further noted that in case of joint venture firm, technical eligibility shall be evaluated as per para 65.16.1 of the General Condition of Contract.

4. The issue at hand is as to whether Clause 1 Note (viii) of the tender notice would be applicable to the present case. Clause 1 Note (viii) is reproduced below:-

(viii) Sub-sectioning has been done with a view to expedite the work, only one tender will be awarded to one firm, if the same firm becomes L1 in all the sub-section, then evaluation of the firm for its fitness for award of all the works should be done for the works as a whole.

The petitioner herein was the lowest tenderer in respect of the present tender notice No. 3 of 4 pertaining to the present writ petition and also in respect of tender notice No. 1 of 4 and 2 of 4. The petitioner was recommended for the Award of the contract in respect of tender notice No. 1 of 4. The petitioner however is aggrieved with the letter dated 09.12.2016 issued by the Railways to the respondent No. 4 calling him for negotiation in respect of Award of the contract in respect of tender notice No. 3 of 4. The petitioner's case is that the petitioner being the lowest tenderer, the petitioner should have been called for negotiation instead of the respondent No. 4. The petitioner's further case is that Clause 1 Note (viii) of the tender notice can be made applicable only when the same tenderer is the lowest in all the four tender notices, i.e., 1 of 4, 2 of 4, 3 of 4 and 4 of 4. The tender notice No. 4 of 4 having been awarded to some other person, other than the parties herein, Clause 1 Note (viii) cannot be made applicable to the present case, as no one tenderer can be given the works for all the four tender notices (Sub-sections) as one whole work.

5. Learned Senior Counsel for the petitioner submits that the petitioner Joint Venture (JV) consists of Two Companies, namely, M/S Royal Infraconstru Limited having its registered office at Godrej Waterside Building, Tower No.-1, 4th Floor, No.-401, Plot No.-5, DP Block, Salt Lake, Sector-V, Kolkata and M/s Coastal Projects Limited having its registered office at # 237, Bapuji Nagar, Bhubaneswar-751009. Both these companies have experience of executing works under the department of Railways in various places of India including Railway Bridge, BG Line/Tunnel etc. and are highly qualified in the various works under the railways.

6. Learned Senior Counsel for the petitioner submits that the respo

ndent No. 4 does not have the qualification and expertise of the petitioner Joint Venture.

7. Learned Senior Counsel for the petitioner submits that the petitioner has emerged as the lowest tenderer in respect of tender notice No. 1 of 4, 2 of 4 and 3 of 4.

8. The learned counsel for the petitioner submits that while the petitioner was expecting to be issued the work order in respect of the tender notice No. 1 of 4, 2 of 4 and 3 of 4, the respondent authorities has called the respondent No. 4 for negotiation in respect of tender notice No. 3 of 4.

9. The learned counsel for the petitioner submits that negotiation could not have been done with the respondent No. 4, without calling the petitioner for negotiation as the respondent No. 4 is not the lowest tenderer in tender notice No. 3 of 4. He submits that if there is any scope for negotiation, it has to be done with the lowest tenderer, i.e., the petitioner.

10. The learned counsel for the petitioner submits that the actions of the State respondents points to an attempt to by the respondent authorities to award the contract covered tender notice No. 3 of 4 illegally to the respondent No. 4.

11. The learned counsel for the petitioner submits that submission of bids in respect of the tender notice was by way of a two-packet system. After the 1st packet containing the technical bid of the tenderers were opened, the 2nd packet containing the financial bids of the tenderers, who had qualified the technical criteria, were to be looked into.

12. The learned counsel for the petitioner submits that while looking into the technical criteria as per the 1st packet of the tender notice, Clause 1 Note (v) required that the tenderer should have executed at least one single work of ballast less track or construction of RCC structures such as bridges etc for a minimum 35% of advertised value of the work within the qualifying period, i.e., last three financial years and current financial year.

13. The learned counsel for the petitioner submits that Clause 1 Note (viii) also required that if one tenderer had submitted the lowest bid in respect of all the sub-sections, i.e., all the four tenders in respect of Tender Notice No. 1 of 4, 2 of 4, 3 of 4 and 4 of 4, then evaluation of the firm/tender for its fitness for award of all the all four works should be done for the works as a whole.

14. The learned counsel for the petitioner submits that Clause 1 Note (viii) had a condition precedent that a tenderer, to be eligible to be awarded all the four works had to be the lowest tenderer, in respect of all the four tender works (sub-section). In the present case, as no bidder/tenderer had the lowest bid for all the four tender works, Clause 1 Note (viii) could not be applied. Learned counsel for the petitioner submits that the petitioner has not been blacklisted but has been banned from doing business and the same has been clarified by RITES Ltd. He submits that the fact that the petitioner was banned from doing business with RITES Ltd. was known to the State respondents at the time of opening of the tender and communication had been made by the Railways with RITES Ltd. with regard to the same. Even after, knowing the fact that the petitioner had been banned from doing business with RITES Ltd., the petitioner's 1st packet containing technical bid was scrutinised and he was found qualified. Subsequently, the petitioner's 2nd packet, i.e., the financial bid was also opened. Learned counsel for the petitioner submits that in view of the above sequence of events, the question of whether the petitioner is banned from doing business with RITES Ltd. or even the question of alleged blacklisting does not arise.

15. The learned counsel for the petitioner submits that as the petitioner is the lowest tenderer in three out of the four tenders and as Clause 1 Note (viii) is not applicable to the present case, the respondents would have to allot the work orders to the lowest tenderer who fulfils the requirement of Clause 1 Note (v) and if required, call the lowest tenderer for negotiation. Mr. PK Goswami, learned counsel for the petitioner submits that the petitioner has done different contract works, wherein 35% of the value of the advertised values of the works mentioned in the tender notice has been done by the petitioner. He sub

mits that a reading of Clause 1 Note (v) does not require the petitioner to have done 35% of the composite value of the three tender works and the eligibility of the petitioner is secured if he does three different works, each amounting to 35% of the value of the estimates of each of the tender notices, where he is the lowest bidder, as Clause 1 Note (viii) is not applicable to the present case.

16. Mr. UK Goswami, learned counsel appearing for respondent Nos. 1 to 3 submits that besides the tenderers having to qualify the eligibility/technical criteria as per the 1st packet, the tenderer has to also qualify the financial criteria/financial bid and in this respect, Mr. UK Goswami, submits that Clause 1.2 of the financial criteria of the NIT requires that the total contract amount received by the tenderers during the last three years (i.e., the current year and three previous financial year) should be a minimum of 150% of the advertised tender value of work.

17. Mr. UK Goswami, learned counsel appearing for the respondent Nos. 1 to 3 also submits that as per Clause 1 Note (viii), after opening of the 2nd packet, if any tenderer is found to be the lowest in more than one sub-section, the evaluation of the eligibility of the tenderer would be made based on the combined advertised tender value of the sub-sections in which the tenderer is lowest vis-a-vis the experience of similar nature of works and turnover of the tenderer. In other words, the tenderer should have executed similar work of at least 35% and turnover of minimum 150% of the combined advertised value of all the tenders in which he is lowest. He thus submits that the petitioner being the lowest in the tender notice No. 1 of 4, 2 of 4 and 3 of 4, the petitioner has to have had one single work done, wherein the value of the work should have been at least 35%, of the composite value of the estimates of the above three tender notices added together. Mr. UK Goswami thus submits that as the advertised value of tender No. 1 of 4, 2 of 4, 3 of 4 and 4 of 4 is Rs. 183,47,19,343/-, the petitioner should have done one single work having value of 35% of Rs. 183,47,19,343/-. As the petitioner had not submitted any document showing that he had done one single work, the value of which is 35% of Rs. 183,47,19,343/-, the petitioner cannot be considered to be the lowest for the three tender notices as per Clause 1 Note (viii). He thus submits that the petitioner can be considered for only one tender notice in view of Clause 1 Note (v) and (viii). The counsel for the State respondents also submits that as the petitioner had submitted a document in respect of tender notice No. 1 of 4, which is to the effect that he had done 29.0 crores value of work, i.e., 35% of the advertised value of the work of the tender notice No. 1 of 4, and the petitioner being the lowest, the tender committee has recommended Award of the contract in respect of tender notice No. 1 of 4, i.e., the 1st Sub-section. The counsel for the respondent No. 4 submits that the petitioner is not considered eligible and entitled for any other Sub-sections, though he was found technically suitable, due to the above reasons. The counsel for the State respondents submits that though the petitioner may have done many works, each having the value of 35% of the three tender notices, in which he is the lowest tenderer, the same cannot be said to have made the petitioner to be eligible for allotment of all the three tenders, in which he is the lowest tenderer.

18. Mr. GN Sahewalla, learned counsel for the respondent No. 4, besides reiterating the submission of the counsel appearing for the respondent Nos. 1 to 3 has also stated that having been blacklisted by RITES Ltd., which is a public sector undertaking under the Ministry of Railways, the petitioner's tender has to be disqualified as it is in violation of Clause 15.4 of the tender notice. He also submits that the credentials of a tenderer has to be considered as per Clause 15.4 and as the petitioner does not pass the test of Clause 15.4, the Railway authorities have a right to consider the bid of the respondent No. 4 with regard to whether the contract should be allotted to the respondent No. 4 or not.

19. I have heard the learned counsels appearing for the parties.

20. The first question that has to be seen is whether the State respondents were correct in calling the respondent No. 4 for negotiations. Clause 11.0 of the tender notice states as follows:-

11.0 Negotiations with tenderer(s)

The Railway reserve the right to hold negotiations with lowest who should be low est, valid, eligible and technically acceptable tenderer considered for award of contract directly if the rates were not unreasonable high.

21. In the present case there is no dispute with regard to the fact that the petitioner's tender had passed the technical criteria required and that the petitioner's bid was the lowest. In view of the above, the calling of the respondent No. 4 by the State respondents for negotiations with regard to the contract works, while not calling the petitioner for negotiation, is in violation of Clause 11.0. Further, the calling of the respondent No. 4 by the State respondents for negotiations, is in violations of the Circular No. 4/3/7 dated 03.03.2007 and Circular No. 01/01/10 dated 20.01.2010, issued by the Government of India, Central Vigilance Department, which states that normally there should be no post tender negotiations. If at all negotiations are warranted under exceptional circumstances, then it can be done with the lowest tenderer unless the tender pertains to the award of supply orders.

22. The issue in the present case is as to whether Clause 1 Note (vi ii) of the tender notice would be applicable to a case where a tenderer is not the lowest in all the four tender notices. Admittedly, in the present case, the petitioner is not the lowest in all the four tender notices, i.e. tender notice No. 1 of 4, 2 of 4, 3 of 4 and 4 of 4. The question is whether Clause 1 Note (vi ii) would be applicable to the petitioner.

23. Assuming that this Court holds that Clause 1.1.(viii) would be applicable even to a tenderer, who is not the lowest in all the four tender notices, but is the lowest in more than one Sub-section it goes without saying that the tenderer would be required to have executed one single work which is having a value of atleast 35% of the advertised value of work of the tenders in which he has quoted the lowest, by adding the value of the tender works.

24. Clause 1, Note (v) and Note (viii) are reproduced below:-

(v) The construction firm should have executed at least one single work of ballast less track or construction of RCC Structures such as bridges etc for a minimum 35% of advertised value of the work within qualifying period, i.e, last three financial years and current financial year. For foreign firms, the tender value in Indian currency will be converted to equivalent foreign currency based on exchange rate prevailing on the date of publishing of the tender.

(viii) Sub-sectioning has been done with a view to expedite the work, only one tender will be awarded to one firm, if the same firm becomes L1 in all the sub-section, then evaluation of the firm for its fitness for award of all the works should be done for the works as a whole.

25. The other question is whether the petitioner has been blacklisted and whether Clause 15.4 and Clause 16.1.(a) would entail disqualifying the petitioner's bid, especially after the petitioner's financial bid has been opened.

26. A perusal of the tender notice No. 1 of 4, 2 of 4, 3 of 4 and 4 of 4 clearly points to the fact that the four tender notices are a part of one section and that each of the tender notices are one Sub-section. This is clear from the use of the numbers in the four tender notices, which are 1 of 4, 2 of 4, 3 of 4 and 4 of 4. Clause 1 Note (viii) states that one tender will be awarded to one firm, if the said firm becomes L1 in all the Sub-section. The words used in continuation of the sentence in Clause 1 Note (viii) further states that evaluation of the firm for its fitness for award of all the works should be done for the works as a 'whole'. The use of the emboldened words clearly point to the fact that Clause 1 Note (viii) would be applicable only when a tenderer is the lowest bidder for all the Sub-sections and where work was to be awarded as a whole. As tender notice Nos. 1 of 4, 2 of 4, 3 of 4 and 4 of 4 make up the Sub-sections of one whole section, Clause 1 Note (viii) would have to be applied only if a tenderer is the lowest in all the four Sub-sections/tenders. It is an admitted fact that the contract for the tender notice No. 4 of 4 has already been awarded to a different tenderer. In respect of tender notice No. 1 of 4, the State respondents in their affidavit-in-opposition have categorically stated that the petitioner has been recommended for Award of the work. Also the tenderer, who had been allotted the contract in respect of tender notice No. 4 of 4 is not a tender

er in tender notice of 3 of 4, i.e., the present tenderer. As such, no one tenderer can be allotted all the tender works, i.e. 1 of 4 to 4 of 4. Further, the very fact that the petitioner is being recommended for Award of the contract in respect of tender notice No. 1 of 4 clearly shows that Clause 1 Note (viii) is not applied in the present case. Consequently, there is no question of the application of Clause 1 Note (viii), as all the four tender works cannot be given to one tenderer as one whole contract. Accordingly, the respondents have to consider the case of the tenderers separately in respect of each individual tender notice and by keeping in mind Clause 1 Note (v) in respect of each tender notice.

27. With respect to the contention of the counsel for the respondent No. 4 that one of the partner of the petitioner's joint venture, i.e. M/s Royal Infra Constru Ltd. is a black listed contractor, which was concealed by the petitioner at the time of submission of bid, the records shows that the NF Railway have written letters to the petitioner and also to RITES Ltd. with regard to the alleged black listing. The petitioner has written a letter dated 12.10.2016 to the NF Railways stating that the banning order by RITES Ltd. relates to discrepancies in the tender documents, while processsing the tender and does not relate to performance during execution of any works. The letter by RITES Ltd. dated 28.10.2016 also shows that the grounds for banning M/s Royal Infra Constru Ltd. was due to one credential submitted being false during the certification process. Thus, the above dispute is not with regard to performance, but with regard to the genuineness of a document. Be that as it may, the State respondents having examined the technical bid of the petitioner, they have subsequently opened his financial bid. Thus, the State respondents having known about the banning order by RITES Ltd., against one of the partner of the petitioner's joint venture, they have allowed the petitioner to participate in the tender process. The same is not under challenge by any of the parties herein. The said question of whether the petitioner would be effected due to being banned from doing business with RITES Ltd. is a different aspect altogether and is not the subject matter of dispute in the present writ petition, especially, when the petitioner's technical bid has already been found to have fulfilled the required criteria by the State respondents.

28. In view of the fact that this Court finds that Clause 1 Note (vi ii) of the tender notice No. 3 of 4 would not be applicable to the case in hand and that negotiations could not have been made with the respondent No. 4 as he was not the lowest tenderer, the impugned letter of negotiation dated 09.12.2016 issued to the respondent No. 4 and any subsequent process for allotment of the tender works to the respondent No. 4 is hereby set aside. The State respondents are hereby directed to consider the matter afresh and take a decision in the matter for selection of the successful tenderer, keeping in mind the observations of this Court.

29. Writ petition stands allowed.