

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) 391/2022

SLT Infracon Pvt. Ltd.

..... Petitioner(s).

Vs.

The State of Tripura and others

.....Respondent(s)

For Petitioner(s) : Mr. G.N. Sahawalla, Sr. Advocate.
Mr. H.K. Sarma, Advocate.
Mr. D. Senapati, Advocate.
Mr. S. Bhattacharjee, Advocate.

For Respondent(s) : Mr. S.S. Dey, Advocate General.
Mr. B. Majumder, Asst SG
Mr. D. Bhattacharya, G.A.
Ms. A. Chakraborty, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. INDRAJIT MAHANTY
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY**

Order

01/06/2022

(Indrajit Mahanty, C.J.)

Heard learned counsel for the respective parties.

This writ petition has come to be filed by the petitioner namely, SLT Infracon Pvt. Ltd. seeking to challenge the decision taken by the tender committee under Annexure-6 at page 49 whereby the bid made by the

petitioner to the respondents was held to be non-responsive for the following reason:

“Technically non-responsive due to submission of bid security in the form of FD instead of BG. This does not fulfil the Clause No.2.20.1 of DNIT (RFP)”

Learned counsel for the petitioner drew the attention of the Court to a corrigendum issued by the tenderer dated 15th March 2022 (at Annexure-3) whereby, various modifications were made to the original bid clauses and in particular drew our attention to serial No.7 of the said corrigendum relating to RFP: Clause 2.20.1, which reads as follows:

“RFP: Clause 2.20.1: The Bidder shall furnish as part of its BID, a BID Security referred to in Clause 1.2.4 herein above in the form of a bank guarantee issued by nationalised bank, or a Scheduled Bank in India having a net worth of at least Rs.1,000 crore (Rs. One thousand crore), in favour of the Authority in the format at Appendix-II (the “Bank Guarantee”) and having a validity period of not less than 180 (one hundred eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. This Bank Guarantee shall be transmitted through SFMS Gateway to [Ministry/NHAI/NHIDCL/State PWD/BRO]’s Bank. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalized bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934. A scanned copy of the Bank Guarantee shall be uploaded on e-procurement portal while applying to the tender.”

In terms of the aforesaid corrigendum, the above quoted clause was deleted.

Therefore, learned counsel for the petitioner submitted that at the outset, the bid made by the petitioner company was held to be non-responsive *inter alia* for non-compliance of a clause which stood deleted by the corrigendum dated 15th March, 2022.

Apart from the aforesaid contention, learned counsel appearing for the petitioner drew our attention to the corrigendum dated 15th March, 2022 and in particular to serial No.4 of the said amendment at page 40 relating to RFP: Clause No.1.2.4, which is quoted hereunder:

“RFP: Clause No.1.2.4 A Bidder is required to submit, along with its BID, a BID Security of Rs. 1.610 Cr. (Rupees one point six one zero Cr.) ***5 (the “BID Security”), refundable not later than 210 (One hundred & fifty) days from the BID Due Date, except in the case of the Selected Bidder whose BID Security shall be retained till it has provided a Performance Security and Additional Performance Security (if any) as per the provision of this RFP and LOA. This Guarantee shall be transmitted through SFMS Gateway to State PWD. The Bidders shall also submit Demand Draft for Rs.10,000 (Ten thousand only) **6issued from a scheduled Bank in India in favour of “Executive Engineer, NH Division kumarghat, Kumarghat, Unakoti Tripura” payable at Kumarghat.”**

And the modification made by the corrigendum in serial No.4 is on the right-hand column, which reads as under:

“RFP: Clause No. 1.2.4 A Bidder is required to submit, along with its BID, a BID Security of Rs.1.610 Cr. (Rupees one point six one zero Cr.) *** 5 (the “BID Security”), refundable not later than 240 (Two Hundred and Forty) days from the BID Due Date, except in the case of the Selected Bidder whose BID Security shall be retained till he has provided a Performance Security and Additional Performance Security (if any) as per the provision of this RFP and LOA. Bid Security is to be paid through offline mode using any of the offline payment instrument like “Deposit at Call receipt or, Demand Draft or,**

Banker's Cheque or Bank Guarantee drawn in favour of the "Executive Engineer, NH Division Kumarghat, Kumarghat, Unakoti Tripura" i.e. Tender Inviting Authority (TIA) from a well-recognized scheduled / commercial Bank guaranteed by the Reserve Bank of India having branch at Agartala, Tripura.

The Bidders will have to upload the scan copy of the drawn offline payment instrument (as a single PDF file of 75-100 dpi resolution), against the related Bid Security, along with the bid/technical bid documents in the time of real time bidding.

The Bidders will also have to submit (to be delivered in person or by post) the original copy (physical form) of the offline payment instrument related to the Bid Security as stated above, in a Sealed Envelope super-scribing the DNIT No, & Tender ID, at the office of the Tender Inviting Authority (TIA), positively before the Technical Bid opening time & date as mentioned in the NIT. Offline payment instrument of Bid Security as submitted by the bidder, shall be valid for a period of 60(sixty) days beyond the bid validity period. While submitting the bid online (for Bid Security amount more than Rs.25.00 lakh), the bidder will find that the "Bid security Amount" is showing as "0" (zero) in the payment window of e-procurement portal. The bidder shall ignore this "0" (zero) bid Security Amount in the e-procurement portal & pay the full amount of Bid Security (using any of the offline payment instrument as permitted).

The Bidders shall also submit Demand Draft for Rs.10,000 (Ten thousand only) **6 issued from a scheduled Bank in India in favour of "Executive Engineer, NH Division Kumarghat, Kumarghat, Unakoti Tripura" payable at Kumarghat."

While placing the reference to the aforesaid clause, learned counsel for the petitioner contended that the petitioner in fact submitted a Fixed Deposit made out in the name of the Executive Engineer, NH Division Kumarghat for an amount of Rs.1,61,00,000/- from the HDFC Bank, copy of which was annexed at Annexure-5 to the writ petition.

Learned counsel contended that the clarification issued by the tenderer specifically allowed the bidders to bid securities to be paid through off-line

mode using any of the off-line payment instruments like deposit at call receipt or demand draft or Banker's Cheque or Bank Guarantee.

Learned counsel for the petitioner contended that submission of the fixed deposit made out in the name of the Executive Engineer, Kumarghat sufficed the requirement for providing security in terms of the bid and holding that the petitioner was non-responsive for having furnished a fixed deposit towards EMD is wholly unlawful and hence, no foundation at all.

Learned Advocate General appearing for the State on the other hand, submitted that the petitioner was correctly held to be non-responsive since they had failed to submit their security amount in this specific manner as specified in Clause-1.2.4 i.e. either deposit at call receipt or demand draft or Banker's Cheque or Bank Guarantee. Learned Advocate General contended that once the word 'like' is followed by a description of 4 types of instruments, a bidder had to make their choice among any four of the said instruments and was not entitled to make any other type of security offer other than one of the four as contained in Clause 1.2.4.

Apart from the above, learned Advocate General submitted that in the decision taken by the Bid Evaluation committee on 30th April, 2022 finding against the petitioner that they were non-responsive is correct but the reference to Clause 2.20.1 of DNIT(RFP) is a typographical error and in fact, it should be referring to Clause 1.2.4.

There has been an interim order passed in this case dated 05.05.2022 on account of which learned Advocate General prays for early hearing and disposal of the matter since there would be delay in consequence of carrying out of the public work.

Learned counsel for the petitioner was fair enough to also cooperate with the Court and therefore, hearing commenced to this matter yesterday and the matter stood adjourned till today. Yesterday, the petitioner was also granted liberty to file an additional affidavit. In the additional affidavit, the petitioner has appended the communication dated 02.04.2022 addressed to the HDFC Bank which contains the request made by the petitioner-company for issue of FD in the name of the Executive Engineer, NH Division Kumarghat under Annexure-5.

They have also furnished at Annexure-2, the form in which application was made to the HDFC Bank for issuing of the necessary FD in favour of the tenderer.

In our considered view, the question that arises in the present case is as to whether the Fixed Deposit submitted by the petitioner-company was in consonance with Clause- 1.2.4 of the tender document.

Learned counsel for the petitioner vehemently submitted that where a provision uses the term 'like', it becomes open for a bidder to offer security

in a like manner i.e. akin to the four instruments mentioned in the tender clause i.e. Clause No.1.2.4.

The learned Advocate General contends to the contrary and submits that even though the word 'like' has been used in the tender condition, it is to be interpreted in a restricted manner and a bidder could only make an offer of security in the form of the one of the four types of securities enumerated in the said clause.

Upon hearing the learned counsel for the respective parties and applying our judicial mind to the contention advanced, we are of the considered view that essentially Earnest Money Deposit (EMD) is sought from a bidder in order to prove the earnestness of the desire to participate in a bid. In other words, requiring a bidder to make an EMD deposit is essentially to keep out non-serious bidders from the scope of participation in a bid and for such purchases, an EMD is required and/or called for. While it is true that a Fixed Deposit is not specifically mentioned in Clause 1.2.4 but it is also true that the said clause contained the word 'like' which in our considered view being anything akin to one of the four instruments mentioned in the clause.

Upon perusing the Fixed Deposit under Annexure-5 as well as the request made by the petitioner-company to the HDFC Bank for issuing Fixed Deposit i.e. Annexure-1 to the additional affidavit filed by the

petitioner in Court today as well as the further request made by the petitioner-company under Annexure-2 to today's affidavit, it is clear that the Fixed Deposit has been made in the name of the Executive Engineer, NH Division Kumarghat. Certain contention was raised by the learned Advocate General that the instruments had not been made out in the proper manner. In other words, although a Fixed Deposit reflected in the designation of the Executive Engineer, NH Division Kumarghat, the name of the district and State is missing.

We are of the considered view that omission of the name of the district or the State does not change the nature and character of the identity of the person in whose favour the Fixed Deposit has been made. Consequently, we are of the considered view that the determination by the Bid Evaluation committee of finding the petitioner-company to be non-responsive is wholly erroneous on the face of the tender clauses floated in the case at hand.

We are further of the considered view that the Fixed Deposit ought to be accepted by the tender committee since it provides the security for which the EMD had been sought for and all rights of the tenderer over the Fixed Deposit can be exercised in accordance with the clauses of the agreement.

Therefore, we do not find that the determination made by the Bid Evaluation committee that the petitioner was non-responsive for not

complying with Clause 2.20.1 of DNIT (RFP) nor of Clause 1.2.4. We further need to note that Clause 2.20.1 has no application since it stood deleted by the corrigendum and as determined by us, the Clause 1.2.4 in our considered view has been satisfied. Consequently, we set aside the order of the tender committee dated 30th April 2022 under Annexure-6 declaring the petitioner-company to be responsive and direct the tenderer to accept the Fixed Deposit submitted and proceed in the matter in accordance with law. Once the petitioner is held to be responsive, nothing stands in the way of the Bid Evaluation committee from opening the commercial bid and proceeding to determine the matter at an early date.

Writ application stands allowed to the extent indicated hereinabove.

Pending application(s), if any, shall also stand disposed of.

(S.G.CHATTOPADHYAY), J

(INDRAJIT MAHANTY), CJ