

* HIGH COURT OF DELHI

% Date of decision: August 13, 2008

+ **WP(C) 4729/2008 & CM.9121/2008**

Ramunia Fabricators Sdn Bhd & Ors : Petitioners
through
Mr.Neeraj K Kaul,Sr.Adv
with Mr.Ashok Sagar &
Mr.R.Vasanth,
Advs.

Versus

Oil and Natural Gas Corporation Ltd : Respondents
& anr through
Mr.Vikas Singh, Addl.
Solicitor General with
Mr.R.Chandrachud, Adv.

Coram :

Hon'ble Mr.Justice Manmohan Sarin.
Hon'ble Ms.Justice Veena Birbal

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| (1) Whether reporters of local paper may be allowed to see the judgment? | Yes |
| (2) To be referred to the reporter or not? | Yes |
| (3) Whether the judgment should be reported in the Digest ? | Yes |

Manmohan Sarin, J.

1. Petitioners have filed the present writ petition, challenging the rejection of the bid, submitted by petitioner No.1 in respect of B-22 Field Development Project. A

direction is further sought for quashing of decision dated 14th May, 2008, by

which the tendering process in respect of B-22 Field Development Project was annulled. Additionally, a direction is sought for award of contract in respect of project to petitioner No.1 in view of the fact that petitioner No.1 was the lowest bidder.

2. The facts giving rise to the present writ petition and the subsequent developments necessary for disposal of this petition may be briefly noted:

Petitioners challenge the decision of respondent No.1/ONGC to annul the tendering process as mala fide and detrimental to public revenue. It is assailed as contrary to the directions given in the judgment dated 11th April, 2008 of this Court in WP (C) No.9661/2007. It is urged that petitioners, whose bid was 108 million dollar less than that of respondent No.2, have been ousted from the bid process to the detriment of the revenue.

Respondent No.1/ONGC had invited bids for the Project vide Tender No.MR/OW/MM/B-22/04/2007. Petitioner No.2 was issued the tender documents by

respondent No.1/ONGC. The bids received from the petitioner No.1 as also respondent No.2/L&T Ltd. were forwarded to the Consultants for evaluation. Eventually, petitioners came to know that respondent No.1 only opened the price bid of respondent No.2 and called them for price negotiation and the petitioners' bid was not being considered by respondent No.1, on the ground that the tender documents had been purchased by one company while the bid was submitted by another. Petitioners were constrained to file WP(C).No.9661/2007, challenging respondent No.1's action in not considering the petitioners' price bid. In the event, writ petition was allowed by this Court vide judgment dated 11th April, 2008, quashing the decision of respondent No.1/ONGC rejecting the bid of the petitioners on the ground that tender documents had been purchased by one company, while the bid was submitted by another. Respondent No.1/ONGC was directed to consider the bid offered by petitioner No.1. It is the petitioners' case that petitioner No.3 was the holding company of petitioner Nos.1 and 2 and all of them constitute one single economic entity, combining their

respective experiences and resources for the tendered contract. Petitioners claim to have made a full disclosure of the relationship between them and the documents with the bid included a corporate guarantee issued by parent company petitioner No.3 to provide financial and technical support and expert manpower in procurement etc. Petitioner Nos.1 and 2 are the wholly owned subsidiary of petitioner No.3.

3. Following the decision of this Court respondent No.1 sought from the petitioner extension of the validity of the bid up to 31st May, 2008 and the bank guarantee and bonds, which were duly given. Respondent No.2/ L&T, the other bidder, filed a Special Leave Petition bearing No.13385/2008 against the judgment dated 11th April, 2008. On 13th May, 2008, notice was issued in the said Special Leave Petition. The Supreme Court directed maintenance of status quo. Respondent No.1/ONGC moved an application in the said SLP seeking directions. In the said application, it was stated that a decision had been taken not to award the contract to petitioners even though their price bid was 108 million dollar less than that of L&T.

The decision was said to be taken on the basis that ONGC having lost confidence in petitioners as it had failed to provide a performance bank guarantee and Certificate of Insurance etc., in respect of another Contract, which had been awarded to it, namely, B-193 Field Development Project, It was further stated that considering that there was only one competent bidder i.e., of L&T remaining, ONGC had decided on 14th May, 2008 to annul the tendering process under Clause 25 of the “Instructions to Bidders”. The contract relating to B-193, Field Development Project, which had been awarded to the petitioners had been terminated on 16th May, 2008.

4. L&T in view of the application moved by ONGC and the facts stated therein withdrew the Special Leave Petition. The order as passed by the Supreme Court is reproduced for facility of reference:

“Oil and Natural Gas Corporation, respondent No.4 has filed I.A.No.7/2008 stating the circumstances mentioned therein that in view of subsequent development, the Special Leave Petition © No.13385 of 2008 has become infructuous. The said statement has not been controverted.

In view of the fact that the Special Leave

Petition has become infructuous, as stated in the I.A., learned counsel for the petitioner seeks leave of the Court to withdraw this petition. Permission granted. The Special Leave Petition is disposed of as withdrawn. I.A., is, accordingly, ordered.”

5. The learned Additional Solicitor General on behalf of respondent/UOI submits that in view of the failure of the petitioner to submit the performance guarantee in a contract awarded to it in respect of Project B-193 for 683 million dollar, they have lost confidence in the petitioner and accordingly they decided that they could not entrust the present strategically important project to the petitioners and have accordingly cancelled the tender process. In the aforesaid background of facts, learned counsel for the petitioner submitted that respondent ONGC, which is an instrumentality to the State, has acted in a discriminatory manner. Firstly, petitioners were sought to be disqualified and made ineligible on the specious ground of the tender having been purchased by one entity and the bid having been submitted by two other petitioners, ignoring the relationship between petitioner No.3, who is the holding

company of petitioner Nos.1 and 2. Respondent ONGC had ignored the documents, including the corporate guarantee and other documents placed on record and the fact that petitioners were single economic entity and petitioner Nos.1 and 2 were wholly owned subsidiary of petitioner No.3.

6. Petitioner was, therefore, constrained to file WPC.No.9661/2007 to vindicate its position as to its eligibility for the bid. Petitioners having succeeded there and their bid being 108 million dollar less, respondent/ONGC have chosen to annul and cancel the tender process itself to the detriment of the revenue. Mr.Neeraj Kaul submitted that there was no justification in denying the award of the present contract to the petitioner on the ground that petitioners had failed to furnish a performance guarantee in respect of another contract i.e., B-193 Field Development Project. Mr.Kaul further submitted that considerations of public revenue itself should have outweighed lapses in performance of another contract, which deserved to be condoned. Petitioner should have been given the chance to perform this contract after furnishing the requisite guarantees in terms of this contract

as its bid was 108 million less. Mr.Kaul also assailed the contemplated issuance of notice, whereby petitioners were sought to be blacklisted for all the tenders as a draconian measure.

7. We have heard Mr.Vikas Singh, learned Additional Solicitor General in opposition. Learned Additional Solicitor General submitted that respondent/ONGC had moved the application, referred to earlier, seeking directions in the pending SLP, filed by L&T, challenging the order of High Court of Delhi, holding the petitioners eligible and directing considerations of their bid. In the said application, respondent/ONGC had duly placed before the Supreme Court the circumstances in which the decision to annul the tender process covered by the present writ petition, namely, B-22 Field Development Project was taken. Respondent/ONGC had duly placed on record the failure of the petitioners to furnish the performance guarantee and certificate of insurance despite opportunity and time being given in respect of B-193, Field Development Project. Petitioners in the writ petition had set out in detail the circumstances, namely, the process of under-going a

reverse take over and resultant negotiations with other major construction groups and the efforts made to submit the performance bank guarantee and Certificate of Insurance. The fact remains that despite this petitioner was unable to do so and this is the admitted position. In these circumstances, respondent/ONGC contended that there was loss of confidence in the petitioners and it had taken a decision to annul and cancel the tender process in respect of B-22, Field Development Project. Learned Additional Solicitor General submits that ONGC was fully justified in nurturing bona fide doubts on the performance and capability of the petitioners to execute the contract in respect of B-22, Field Development Project, if awarded to them. This strategic contract had already been delayed over 9 months and it could not afford to take any risk or chances in respect thereof. In these circumstances, it was decided to cancel and annul the tender process and invite fresh bid. He submitted that the allegation of ONGC having acted mala fide with a view to favour L & T stands repelled with the decision to call fresh tender and not awarding the work to the sole surviving bidder that is L & T.

8. The Supreme Court after hearing the parties including the petitioners' counsel, who was present, passed the order, reproduced in para 4 hereinabove. From the order passed, as aforesaid, by the Supreme Court, it was clear that the Supreme Court acted on the submissions in the application, filed by L & T and SLP was held to have become infructuous. Further, this position was not controverted by the parties, as recorded in the order. Thus, the decision to annul the tender process had been duly brought to the notice of and placed on record before the Supreme Court in the SLP also and whereafter the aforesaid petition was permitted to be dismissed as withdrawn.

9. We may also note that during the course of proceedings in this writ petition on 9th July, 2008 itself, we had put to the learned counsel for the petitioners that even in these proceedings, petitioners could prima facie demonstrate their capacity and financial capability to perform the contract by furnishing of performance/bank guarantee, as required for the purposes of this Project to allay the fear and apprehension of the respondent/ONGC. Learned counsel for the petitioners after obtaining

instructions on 5th August, 2008, submitted that they were unable to do so in the absence of formal award of contract, as their Bankers insist on formal award of contract prior to issuance of any performance or bank guarantee and are not willing to furnish the performance guarantee in the absence of deposit being made or formal order being placed. It would, thus, be seen that unfortunately petitioners were not able to avail of this opportunity to demonstrate their financial capacity to perform the contract.

10. In view of the foregoing discussion and the decision to annul the tender process and the contemplated issuance of show cause notice to the petitioners, it would be for them to challenge the said show cause notice in separate proceedings. The present writ petition has become infructuous in view of the decision to call fresh tenders and in particular the decision not to award the contract to the petitioners due to loss of confidence on its failure to furnish the performance guarantee and insurance certificate in respect of B-193, Field Development Project.

We are of the view that the Supreme Court having permitted the SLP, challenging the judgment in

favour of the petitioners, to be withdrawn as having become infructuous on being informed by the ONGC of its decision to cancel the tendering process, the challenge by the petitioners to the same in these proceedings would not be maintainable. Moreover, we are prima facie of the view that the plea of loss of confidence taken by the respondent/ONGC in the petitioners for having failed to furnish the performance guarantee appears to be justifiable deserving credence. However, we refrain from expressing any final opinion in the matter lest it affects the petitioners' case in challenging any contemplated show cause notice debarring them from participating in tenders in future.

Writ petition is, accordingly, dismissed.

Manmohan Sarin, J.

Veena Birbal, J.

August 13, 2008
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