

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) NO. 7012/2008**

Reserved on: 3rd November , 2008

Date of Decision : 18th December, 2008

TRIVENI ENGINEERING & INDUSTRIES LTD. Petitioner

Through Mr. Jayant Bhushan, Sr. Advocate with
 Mr. Ajay Kumar Tandon,
 Ms. Gunjan, Mr. Varun Singh, Advocates.

Versus

DELHI JAL BOARD & ANR. Respondents

Through Mr. Suresh Tripathy, Advocate for R 1.
 Mr. Aman Lekhi, Sr. Advocate with
 Mr. Ajay Digpal, Advocate for R 2.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE MANMOHAN

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| 1. | Whether the Reporters of local papers
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 |

% **J U D G M E N T**

MUKUL MUDGAL, J.

1. The present petition arises against the impugned actions, orders and communications of Respondent no.1 including the impugned communications dated 28th August 2008 and 16th September 2008 wherein the Petitioners bid in respect of the tender for the design, construction, supply, installation, testing & commissioning successfully, 1 year Defect Liability Period (DLP) and 3 years Operation and Maintenance (O&M) of 1 Million Gallon per Day (MGD) Water Treatment Plant for Common Wealth Games Village near Akshardham Temple (hereinafter referred to as the “Tender for the 1 MGDWTP for CWG”) was rejected.

2. The brief facts of the case which led to the present writ petition as per the petitioner are as follows:-

(a) The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 having its office at 8th Floor, Express Trade Towers 15-16, Sector 16-A, NOIDA.

(b) The Respondent no.1 Delhi Jal Board issued a brief Press Notification

inviting bid applications from interested bidders for the “design, construction, supply, installation, testing and commissioning successfully, 1 year Defect Liability Period and 3 year operation and maintenance of 1 Million Gallon per Day Water Treatment Plant for Common Wealth Games Village near Akshardham Temple.” The last date for receipt of the Bid Document was 16th July 2008 which was later extended by Respondent No.1 upto 31st July 2008.

(c) As per the detailed Notification Inviting Tender (NIT) being NIT No.4 (2008-09) the work was to be carried out on a design, build and operate (DBO) basis as per conceptual scheme, design parameters, drawing and specifications of tender documents/DJB to be all complete. It was further clarified that the completion period (12+3 months trial run=15 months) indicated was for Civil and E&M construction complete.

(d) The NIT also provided for minimum eligibility criteria in respect of financial parameters and project experience to be fulfilled by the bidders. It was further mentioned in the NIT that complete eligibility criteria, other terms and conditions/ requirements for qualification and bid conditions were

mentioned in the “Bid Document”.

(e) On 31st July 2008, the Petitioner submitted its bid along with all annexures, including the performance certificates to fulfill the conditions of clause 2.1.5.1 of the Tender Documents.

(f) In response to the NIT, three bids were submitted by three parties, including the Petitioner. The technical proposals were opened in presence of the representatives of the bidders. The bid of one of the bidders was disqualified on technical grounds leaving only two bidders, the Petitioner and Respondent no.2, for opening of the final price bid.

(g) Subsequent to the opening of the technical proposal, on 18th August 2008, the Respondent no.1 called the Petitioner for a meeting. The Petitioner attended the meeting at the office of the Respondent no.1 wherein the Respondent no.1 sought certain clarifications.

3. One of the clarifications sought by Respondent No. 1 was “experience details not clear” and it required the Petitioner to cite specific project references against each of the experience requirement in the said clause

B.1(i)(a) to (e) of the Tender Documents. Another query raised by Respondent No. 1 was “details of the project, Water pre-treatment plant for Simhadri Thermal Power Plant not given in certificate” and it required the Petitioner to obtain the required certificate from the client giving all required details like capacity per day treated, water quality produced, start and commissioning date, etc. for testing eligibility of the project.

4. The Petitioner by the letter dated 18.08.2008, provided the clarifications to the said queries raised by Respondent No. 1. By the letter dated 28th August 2008, sent by fax to the Petitioner, the Respondent no.1 rejected the bid of the Petitioner on the grounds of not meeting the eligibility criteria. The Respondent no.1 opened the price bid of the sole remaining bidder, the Respondent no.2 M/s VA Tech Wabag Ltd. The said letter dated 28th August 2008 rejecting the petitioner's bid reads as follows:-

“Sub.:- Design, Construction, supply Installation, testing and commissioning successfully, 1 year DLP and 3 year O&M of MGD WTP for Commonwealth Games near Akshardham Temple on DBO basis. (NIT No. 4(2008-09)).

Sir, With reference to your bid for the above mentioned project, received on 31.07.2008 & subsequent clarification dated 18.08.2008. It is to intimate that your bid has been rejected on the grounds of not meeting the eligibility criteria. This is for your kind information please.”

5. The Petitioner was informed that the bid of the Petitioner was rejected as it did not fulfill the minimum experience criteria as mentioned under clause 2.1.5.1 B.1 (i) (a) of the Tender Documents including the time stipulation as to the work having been executed in the last 7 years and that the work should preferably have started after 30.05.1998. It was further informed to the Petitioner that with respect to the said clause 2.1.5.1 B.1 (i) (a) the experience of Petitioner for 'Water Treatment Plant of capacity 14.4 MLD commissioned in Sikandra, Agra under World Bank Unit, UP Jal Nigam' was considered and its experience for the Simhadri Project was not considered.

6. The learned Counsel for the Petitioner contended as follows:-

(a) Despite repeated requests and reminders of the Petitioner, no reason, whatsoever, has been given by Respondent No. 1 as to why and how the Petitioner did not meet the eligibility criteria. The Petitioner not only fulfills all the eligibility criteria of the Tender Documents but after opening of the technical bid it has also satisfactorily clarified all the queries raised by Respondent No. 1 and submitted all relevant documents to the satisfaction of Respondent No. 1, and as such the petitioner was fully qualified to be considered for opening of final price bid.

(b) The Petitioner, immediately after the rejection of its technical bid, made representations to Respondent No. 1 that the bid of the Petitioner was fully in conformity with the eligibility criteria laid down for the work. The petitioner further pointed out that the bid of the sole remaining bidder i.e. Respondent No.2 was not conforming to the eligibility criteria even though Respondent No. 2 was considered as a qualified party by relaxing/diluting the eligibility criteria. The petitioner also pointed out that opening the price bid with only one bidder would neither be in the interest of Respondent No. 1 nor in the

larger public interest.

(c) To have a competitive price, the Respondent No. 1 ought to have ensured enough number of bids at the time of opening of price bid. By deliberately rejecting the bid of the Petitioner, Respondent No. 1 had not only acted detrimental to its interest but also in a manner which was detrimental to the larger public interest.

(d) The Petitioner had submitted the bid in accordance with the tender pre-condition alongwith supporting documents, as also further clarifications along with more supporting documents, including the Experience Certificate of the Petitioner regarding its Simhadri Project.

(e) Respondent No. 1 ought to have concluded that the bid of the Petitioner fully satisfied all the minimum eligibility criteria and ought not to have rejected the bid of the Petitioner, ignoring the documents on record.

7. The learned Counsel for the Respondent contended as follows:-

(a) On 18.08.2008, the Petitioner responded to the tender notice and submitted his bid. The Petitioner in support of the financial parameter

submitted the audited balance sheet for the last five years of the company alongwith net worth certificate of the Chartered Accountant. However, the certificates submitted by the Petitioner were in respect of the combined business activities of the Petitioner instead of the required annual turn over of the company in respect of the construction works undertaken by it.

(b) Furthermore, the Petitioner in respect of the work experience claimed to have executed 144 MLD WD at Agra on behalf of UP Jal Nigam and UP Jal Nigam issued a certificate in favour of the Petitioner indicating that the plant in question was put in operation in the year 1997 and was handed over to the UP Jal Nigam on 24.05.1997. The work experience as stipulated in the bid was not satisfied by the Petitioner as it was beyond the period of seven years as the minimum eligibility criteria clearly laid down that work should have been executed in the last seven years and preferably work should have started after 30.05.1998.

(c) Regarding the work experience in respect of the Waste/Water Lime Softening Plant of 2 MLD the Petitioner submitted a certificate issued in its

favour by L&T. This certificate did not say as to whether Petitioner had designed, installed, tested and commissioned successfully the entire lime Softening Plant as per the requirement of the experience criteria.

(d) In light of the above, the Petitioner's application was liable to be rejected for having failed to satisfy the minimum eligibility criteria. However, the Delhi Jal Board offered another chance to the Petitioner to clarify in respect to the shortcomings pointed out above. In the meeting held on 18.8.2008 in the office of the Chief Engineer, the Petitioner was informed of the above shortcomings.

(e) The Petitioner attempted to clarify by way of a letter submitted on 18.08.2008. On the question of separate turnover on construction activities, the Petitioner's letter remained silent. For work experience, Petitioner requested the respondent to consider the project at Shimadri executed for NTPC instead of UP Jal Nigam. In respect of the Lime Softening Plant, Petitioner desired that instead of L&T certificate submitted earlier, certificate issued by Chhatishgarh Steel & Power Ltd. may be considered. The

clarification note submitted indeed had the certificate submitted by NTPC, Shimadri and Chhatisgarh Steel and Power Ltd.

(f) The Delhi Jal Board agreed to consider the clarification submitted by the Petitioner. But the Petitioner again failed to satisfy the tender conditions in respect of work experience of Water Treatment Plant of 4.5 MLD and also the certificate issued by the NTPC did not mention that the Petitioner had designed, constructed, supplied, installed, tested and commissioned the Water Treatment Plant in question. The certificate merely established that Petitioner had carried out only PG test in respect of the Water Treatment Plant at Shamidri. In fact the certificate stated as follows:-

“However, this is subject to the completion of the pending points at site like supply of main equipment, mandatory spares etc. and to liquidate all the pending issues at the earliest.”

(g) It is evident even from the certificate submitted by the Petitioner that Petitioner was not the one who executed the entire work as per the stipulation of the bid and worse, even the main equipment and mandatory spares were yet

to be supplied by the Petitioner. Eligibility conditions were to be adhered to since they were imperative in character. It was not envisaged that they were to be relaxed under any circumstances. Delhi Jal Board keeping in view the magnitude of the contract intended to have a contractor experienced enough who had the occasion of handling similar work by a party having the requisite experience. Since, the Petitioner failed to satisfy the eligibility condition on experience, it was decided that the bid of the Petitioner deserved rejection. It was then the Petitioner and the other bidder namely M/s. Sinomen Envirox JV (who was also rejected) were accordingly informed of the decision rejecting their bids.

(h) That inspite of opportunities granted to the Petitioner, the Petitioner failed to fulfill the minimum eligibility criteria in respect of the work experience. The requirement of the experience criteria was that bidder should have had at least the experience of designing, construction, supply, installation, testing and commissioning of at least one Treatment Plant (Water) executed in the last seven years.

(i) The contention that the price bid of the Petitioner was lower than the Respondent No. 2 was of no consequence since the price bid of the Petitioner was to be considered only after the eligibility bar was crossed and not otherwise. The alleged difference of the price between the Petitioner and the Respondent No. 2 was, therefore, of no consequence.

8. During the course of the proceeding we had asked the counsel for the Respondent to produce the Govt. file of Delhi Jal Board relating to the tender of 1 MGD WTP at Common Wealth Games Village near Akshardam Temple. The noting in the file clearly specifies that M/s. Triveni Engineering and Industries Ltd. satisfies the eligibility conditions (b) to (e) of clause 2.1.5.1 B.1 (i). However, the firm does not have relevant experience against (a) of clause 2.1.5.1 B.1 (i) and hence, cannot be considered eligible. In view of the above, we are confining our findings as to whether the petitioner fulfilled the minimum experience criteria as mentioned under clause 2.1.5.1 B.1 (i) (a) of the tender documents or not.

9. The minimum eligibility criteria in respect of project experience to be

fulfilled by the applicants, as indicated in Clause 2.1.5.1 B.1 (i) (a) of the tender documents which is the center of controversy in the present petition reads as under :-

“i) The bidder should have experience of Engineering procurement construction (EPC)/ Design-Build/Design-Build-Operate-contact including design, construction, supply, installation, testing & commissioning successfully of:

(a) At least one water treatment plant of minimum capacity 4.5 MLD, producing water for potable use. The water treatment plant should have been operating for at least one year after DLP as on 30.05.2008.

For pts. (a) to (e) above, only experience in the Employer's country will be considered for eligibility. All works as required in points (a) to (e) above should have been executed in the last 7 years. The work should preferably have started after 30.05.1998.” (emphasis supplied)

10. The main grievance of the Petitioner is that the Respondent No. 1 failed to give sufficient reasons as to why and how the Petitioner did not meet the eligibility criteria of the tender as it had satisfactorily clarified all the queries raised by Respondent No.1 and submitted all the relevant documents in

consonance with the tender conditions. In our view, this contention of the Petitioner cannot be sustained as the facts and circumstances of the case clearly show that the petitioner has failed to fulfill the mandatory requirement in respect of project experience as laid down in the tender conditions to participate further in the bid process.

11. The essential pre condition of the minimum eligibility requirement to participate in the tender was with regard to the nature of the project work experience. The Petitioner claimed to have executed 144 MLD WTP at Agra on behalf of UP Jal Nigam who issued a certificate in favour of the petitioner whereby it was indicated that the plant in question was put in operation in the year 1997 and was handed over to the UP Jal Nigam on 24th May, 1997. The work experience stipulated in the bid clearly stipulated that the bidder was required to have the experience of Engineering Procurement Construction (EPC)/design/design build/design build operate contract including design, construction, supply, installation, testing of the water treatment project executed in the *last seven years and wherein work should have preferably*

started after 30th May, 1998. Thus, the petitioner did not satisfy this eligibility condition in view of the fact that UP Jal Nigam project was beyond the prescribed period of seven years.

12. The Petitioner in respect of the Waste / Water Lime Softening Plant submitted a certificate issued in its favour by Larsen & Toubro (L&T). This certificate did not say that the Petitioner had designed, installed, tested and commissioned successfully the entire lime Softening Plant as per the requirement of the experience criteria.

13. The Petitioner at the initial stage of the bid failed to satisfy the minimum essential eligibility criteria. However, in public interest and in view of the fact that only two bidders were taking part in the bid process, the Respondent No.1 in consonance with the principles of natural justice and fair play offered another chance to the Petitioner to rectify the shortcomings evident in the documents in support of his experience related to work projects. The petitioner attempted to clarify by way of letter dated 19th August, 2008. For work experience in respect of the Water Treatment Plant of 4.5 MLD capacity,

the petitioner requested to consider the project at Simhadri executed for NTPC instead of UP Jal Nigam.

14. The petitioner submitted the certificate dated 24th March, 2003 issued by NTPC which is reproduced herein below:-

“Sub.: P.G. Test of Water-treatment Plant-Reg.

Ref.:- (i) LOA No. CS-3250-137-9-SU-LOA
3721 dated 29.01.1999

(ii) LOA No. CS-3250-137-9-ER-LOA
3722 dated 29.01.1999

Dear Sir, This is to inform you that the P.G. Test conducted for the above package and subsequent submission of the documents it is found that there is no short fall in equipment performance as compared to the guaranteed parameters. However, this is subject to the completion of the pending points at site like supply of main equipment, mandatory spares etc. and to liquidate all the pending issues at the earliest.”

(emphasis supplied)

The above certificate submitted by the petitioner dated 24th March, 2003, issued by the NTPC in respect of the work experience of the Water Treatment Plant of 4.5 MLD capacity, in our view, does not establish that the Petitioner had successfully completed the said Water Treatment Plant as the supply of

main equipment and mandatory spares still remained to be done.

15. The petitioner in support of the certificate of work experience issued by NTPC on 24th March, 2003 submitted another certificate dated 12th April, 2003 which is reproduced as under:-

“This is to confirm that the PG Test Certificate issued by us on 24.03.2003 is for the complete Water Treatment Plant as per the following LOAs awarded to M/s. Triveni Engineering & Industries Ltd.

- i) LOA No. CS-3520-137-9-SU-LOA
3721 Dtd. 29.01.1999.
- ii) LOA No. CS-3520-137-9-ER-LOA
3722 Dtd. 29.01.1999

This job involves the following:-

- Main Water Treatment System
(Capacity – 800 M³/Hr.)
- Potable Water Treatment System
(Capacity – 600 M³/Hr.)
- Chlorination System
(Capacity – 5 Kg./Hr.)

This certificate is issued on the request of M/s. Triveni Engineering & Industries Ltd. for their experience credentials required for their ongoing bids' negotiations.”

However, the certificate dated 12th April, 2003 does not in any way

prove that the petitioner has fulfilled the mandatory requirement of project work experience as stipulated in the tender documents. This is also evident from the fact that as rightly pointed by the Respondent without any effective rebuttal that even upon further clarification that the certificate submitted by the petitioner on 12th April, 2003, as issued by the NTPC, Simhadri merely stated that the petitioner did not satisfy fully the mandatory requirements of the tender process which were the designing, constructing, supplying, installing, testing and commissioning the Water Treatment Plant. It is thus evident that the Petitioner had neither designed the entire plant nor had fully supplied even the full machinery which does not in any way fulfill the minimum essential criteria to participate in the next stage of the tender process as stipulated in Clause 2.1.5.1 B.1 (i) (a) of the tender documents.

16. The petitioner in support of the above certificate issued by the NTPC, Shimadri enclosed a bank guarantee dated 20th February 2004 to strengthen his argument that he had discharged his liability fully with regard to the Water

Treatment Plant and the contract was completed fully by the Petitioner. This document was disputed as never having been received by the Respondent. However, even if taking the said document into consideration we do not think that this document establishes that in any way that the petitioner had designed, constructed, supplied, tested, installed and commissioned the Water Treatment Plant as per the essential conditions laid down in the tender documents.

17. The Hon'ble Supreme Court in the case of *Laxmi Sales Corpn. Vs Bolangir Trading Co. & Ors.* 2005(3)SCC 157 held that preconditions or qualifications for tenders as stipulated by the tender documents are mandatory in character. After a perusal of the facts and circumstances of the case, we are of the view that the Petitioner failed to fulfill the pre-conditions in the tender documents. The eligibility condition of work experience which was a mandatory condition of the tender bid being imperative in character was not fulfilled by the Petitioner initially and even after being given a second chance by the Respondent No. 1. Thus, the bid of the Petitioner was rightly rejected

by the Respondent No. 1.

18. The contention of the Petitioner that it was in the interest of DJB and the larger public interest that the prices should be competitive which can only happen if there is enough competition in the final price bid. The Respondent No. 1 in public interest and in consonance with the principles of natural justice had rightly given a second chance to the Petitioner to fulfill the mandatory conditions stipulated in the tender documents. The Petitioner again failed to fulfill the essential eligibility criteria with regard to the work experience leading to the rejection of the bid by Respondent No.1 and the liability of such failure on part of the Petitioner cannot be incurred by the Respondent No.1. The Respondent No.1 had also rejected the bid of the other bidder namely M/s. Sinomen Envirox JV alongwith the Petitioner. In this view of the matter, the conduct of the Respondent No.1 cannot be termed as malafide in any manner.

19. The petitioner through his representation dated 1st September 2008 has also contended that the bid of the sole remaining bidder i.e. respondent No. 2 was not in conformity with the eligibility criteria even though the respondent No. 2 was considered as qualified party by relaxing the eligibility criteria. However, the matter received attention of the Sub-Technical Committee consisting of four Chief Engineers on 3rd September 2008. In our view, it was rightly noticed by the appropriate committee that the complaint of the petitioner on the lack of experience of the respondent No. 2 was meritless since the said respondent had the requisite experience on Lime Softening Plant and therefore, we do not deem it necessary to go into such findings. Further, the plea that the price bid of the petitioner was lower than the respondent No. 2 is of no consequence since the price bid of the petitioner was never opened as it needs to be considered only after the minimum eligibility conditions as laid down in the tender documents are fulfilled and not otherwise. We also do not deem it necessary to go into the plea of the petitioner that the price of the successful bidder should be brought at par with the price of the petitioner, as in

our view this plea of the petitioner does not merit any attention with regard to the facts and circumstances of the present case which indicate that the petitioner's bid was not responsive.

20. The petitioner, therefore, in our view failed to fulfill the mandatory minimum eligibility criteria in respect of the work experience which required that the bidder should have had the experience of designing, construction, supply, installation, testing and commissioning of at least one Water Treatment Plant. Consequently, in view of the above findings, we dismiss the writ petition alongwith all pending applications. The writ petition is disposed of accordingly.

(MUKUL MUDGAL)
JUDGE

(MANMOHAN)
JUDGE

18th December, 2008

dr/s/rkb