

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.618 OF 2015

(M/s.Paragh Enterprises, Khaperkheda, Distt. Nagpur .vs. Mah. State Power Generation Co. Ltd., Khaperkheda, Distt. Nagpur, through its Chief Engineer and another)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr.S.D.Chopde, Adv. for the petitioner.
Mr.G.E.Moharir, Adv. for respondent no.1.
Mr.F.T.Mirza, Adv. for respondent no.2.

CORAM : B.P.DHARMADHIKARI &
S.B.SHUKRE, JJ.

DATE : 6.4.2015.

Heard.

Petitioner as also respondent no.2 participated in the tender process in response to tender notice i.e. e-tender Code No.5168 AWC for operating pre-treatment plant situated at 500 MW Khaperkheda T.P.S. The rate quoted by respondent no.2 was 8.9 % above the rate mentioned in tender. The rate quoted by petitioner was 14.68 % above. At that time, the estimated cost was 13.50 lakhs.

Before opening of commercial bid, the petitioner sent a letter on 29.10.2014 and informed that he wanted to quote 4.67 % above estimated cost in his commercial bid. On the next day i.e. on 30.10.2014, he offered discount of 11 % on the tendered rate. Thus, he brought down his tendered rate to 3.68 % above.

However, on 25.12.2014, respondent no.3 issued fresh tender. At this occasion, estimated cost was 12.64

lakhs. This was objected to by the petitioner by sending legal notice. He also pointed out that eligibility of respondent no.2 was also questioned by him. In spite of this objection, the petitioner also responded to the fresh tender notice.

Respondent no.2 did not participate in the fresh tender process, but raised objection to it claiming that he was lowest in the first tender process and hence, second tender invitation was unwarranted.

It appears that respondent no.1 then negotiated with respondent no.2 and respondent no.2 offered rebate of 4.99 % i.e. his earlier tender then offered rate of 4 % above the estimated rate of 13.50 lakhs. Respondent no.1 accepted this negotiated rate and issued him work order on 28.1.2015. This work order and process is questioned in the present Writ Petition. On 5.2.2015, while issuing notice in the matter, this Court directed the parties to maintain status quo. It is, however, not in dispute that respondent no.2 is presently functioning as a Contractor for the tender work.

Mr.S.D.Chopde, learned Counsel submits that rebate offered by the petitioner was before opening of the commercial bid and as such, it was not by way of afterthought. He points out that respondent no.2 has also offered rebate and that was after the commercial bids were opened. He further submits that the objection raised by the petitioner to status of respondent no.2 has not been looked into. When second tender was floated, though the petitioner raised objection to it, he also participated in the process. Thus, after commencement of second process, it was not open to respondent no.1 to fall back on the first process and to negotiate then only with respondent no.2. The learned

Counsel further submits that, in this situation, the petitioner also should have been invited for negotiation.

Mr.G.E.Moharir, learned Counsel for respondent no.1 submits that the petitioner as also respondent no.2 were found technically sound and therefore, their commercial bids were looked into. Petitioner's story of inadvertent error was not accepted and offer of respondent no.2 of 8.99 % above was also found high. A decision to float second tender was taken. The learned Counsel points out that though the petitioner and respondent no.2 both objected to it, the petitioner participated in that process while respondent no.2 did not. According to the learned Counsel, in the light of objections raised by both the parties, the Authorities in public interest decided to find out whether respondent no.2 can further reduce his rates. When respondent no.2 reduced his rates and offered discount of 4.99 %, work order came to be issued to him. The learned Counsel further submits that there are no allegations of mala fides against any Officer of respondent no.1 in the matter.

Mr.F.T.Mirza, learned Counsel on behalf of respondent no.2 adopts the arguments of Mr.Moharir, learned Counsel. He submits that as the rate quoted by the petitioner was 14.68 % above, the story of error and omission to mention 4.67 % is incorrect and cannot be accepted. The learned Counsel points out that, immediately on the next day, rebate of 11 % has been offered on 14.68 % rate for the same reason. He, therefore, submits that the petitioner did not fill in tender honestly, did not assign true and correct reason to alter the rates and has also not approached this Court with clean hands. According to the

learned Counsel, if the story of such inadvertent error is accepted and the rates are allowed to be corrected, entire sanctity of e-tender process will be lost. He, therefore, prays for dismissal of the petition.

Having heard the learned Counsel for the respective parties, we find that validity or otherwise of the process of offering rebate in the matter is not decisive. Not only the petitioner, but, later on, as a part of negotiation process, respondent no.2 also has offered rebate.

Respondent no.1 found offer by respondent no.2 at 8.99 % above high and therefore, decided to invite fresh tender. The said invitation was objected to not only by the petitioner but by respondent no.2 also. The petitioner participated in the second tender while respondent no.2 raised objection and did not participate in it. At that juncture, respondent no.1 decided to fall back on the first tender. Knowing fully that the rate offered by respondent no.2 was on higher side, it called upon only respondent no.2 for negotiations. It is to be noted that the percentage by which the offer exceeded was earlier calculated with reference to tender rate of Rs.13.50 lakhs. In the second tender, this rate was brought down to Rs.12.64 lakhs. It is in this background that respondent no.2 offered rebate of 4.99 % and thus, the offer was found to be only 4 % above as compared to earlier tender rate of 13.50 lakhs.

Respondent no.1 was aware that, in the second tender, the rate was brought down to Rs.12.64 lakhs i.e. by about Rs.86 thousand by respondent no.1 itself. In this situation, when it was aware of the still lower offer made by the petitioner also, as the process of negotiation was being

resorted to, it could have and ought to have called the petitioner also for negotiation. It could not have called respondent no.2 alone for negotiation on the ground that he was L-1 in the first tender. If 11 % rebate given by the petitioner is taken into account, the offer of petitioner remains higher by 3.68 % only as compared to the first tender.

As respondent no.1 was making all efforts to bring down rates and the petitioner also before opening of commercial bids as start of negotiation process, brought down the rates, we find the omission of respondent no.1 to invite the petitioner for negotiation not proper.

In this situation, we direct respondent no.1 to hold negotiation with the petitioner and respondent no.2 within a period of two weeks from today and thereafter, to issue work order to the eligible person. While undertaking that exercise, objection of petitioner to the status of respondent no.2 shall also be looked into.

As tendered work is of maintenance of pre-treatment plant and respondent no.2 is already doing that work, we permit respondent no.2 to carry out that work for a period of three weeks more from today. The exercise (mentioned supra) shall be completed within the said period. The Writ Petition is, thus, partly allowed and disposed of.

As respondent no.1 has accepted, after negotiation, the rate of respondent no.2 and the petitioner has not alleged any mala fides; for the work done by respondent no.2, respondent no.1 shall release the payment at the contract rate.

Authenticated copy of this order be supplied to
the learned Counsel for the respective parties.

JUDGE

JUDGE

jaiswal