THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

WVMP.No.3264 of 2015

in

WP.No.4820 of 2015

And

WP.No.4820 of 2015

ORDER

In this Writ Petition the petitioner has sought a declaration that the action of 1st respondent regarding the tender process issued vide RPF No.APSPDCL/01/RFP/DBF00 dt.08.01.2015, is illegal, arbitrary and violative of Articles 14, 19 and 21 of the Constitution of India; and to direct the 1st respondent to include the source of fuel obtained through coal mines obtained through mines e-auctioned by 3rd respondent also.

2. The petitioner's apprehension is that, in the event the petitioner, who is having captive source of coal, becoming a successful bidder is disqualified on the basis of the interpretation placed by 1st respondent on the terms of the tender, the petitioner might be mulcted with heavy penalties.

3. On 24.06.2015, after initial submissions of both sides, this Court was of the opinion that as per paragraph no.22.4.2 of the draft Fuel Supply Agreement, a supplier is entitled to procure the required supplies of fuel from any captive or contracted source, not being CIL, and arrangement of such fuel would be deemed to be FSA for the purpose of agreement.

4. This Court held therein that the question whether the change of rules/conditions of bid after commencement of RFQ can be made or not, would be decided in the main Writ Petition, as such a contention was also advanced at that time. However, this Court did not stay the processing of the tenders submitted pursuant to the above tender notification, and after noticing that the petitioner has qualified in RFQ, it observed that petitioner is not prevented from submitting his RFP if he is otherwise interested in participating in the bidding process.

5. After this order was passed, petitioner participated in the tender process by submitting a bid on 25.06.2015. The petitioner therefore was required to furnish bid security as per Clause 2.20.1 of the RFP. The petitioner submitted bid security of Rs.25 crores in the form of a Bank Guarantee (BG). The validity of this bid of petitioner as per the terms of the bid was for (120) days and it expired on 23.10.2015, and the BG Validity would expire on 12.12.2015.

6. In anticipation of these events, the respondents issued a letter dt.08.10.2015 to petitioner stating that

Clause 1.2.4 of the RFP provides extension for bid validity and requesting the petitioner to extend validity, of the RFP bid and also the Bank Guarantee of Rs.25 crores in its favour for a period of sixty (60) days with additional claim period of sixty (60) days.

7. In response thereto, the petitioner refused to extend the bid validity/bank guarantee by letter dt.19.10.2015 stating that it came to know that 1st respondent would shortly initiate tender inviting bids for procurement of electricity of approximately 1200 MW only on long-term basis, instead of procuring the same for 2400 MW on long-term basis as mentioned in the tender RPF No.APSPDCL/01/RFP/DBF00 dt.08.01.2015, and therefore, the petitioner is intending to withdraw the very Writ Petition itself subject to the condition that the bank guarantee given by petitioner is not invoked by the respondents.

8. Sri O. Manohar Reddy, learned Standing Counsel for 1st respondent, states that on evaluation of the bid of petitioner the 1st respondent has come to the conclusion that it is a non-responsive bid, but it has not communicated this decision to the petitioner as yet, although in the counter-affidavit filed by 1st respondent a stand appears to have been taken that petitioner's bid is not at all evaluated.

9. Clause 1.2.4 of the tender document states as under :

> *"A Bidder is required to deposit, along with its Bid, a bid security of Rs.5 lakh (Rupees five lakh) per MW of capacity offered by the Bidder (the "Bid Security"), refundable not later than 60 (sixty) 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 under the PSA. The Bidders will have an option to provide Bid Security in the form of a demand draft or a bank guarantee acceptable to the Utility. In case a bank guarantee is provided, its validity period shall not be less than 180 (one hundred and 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 Utility and the Bidder from time to time. Where a demand draft is provided, its validity shall not be less than 80 (eighty) days from the Bid Due Date, for the purpose of encashment by the Utility. The Bid shall be summarily rejected if it is not accompanied by the Bid Security."*

10. It is this provision which was quoted by the 1st respondent in its letter dt.08.10.2015 to petitioner insisting for extension of bid validity.

11. But such extension of bid validity as per the above clause cannot be unilaterally insisted upon by 1st respondent and such extension has to be mutually agreed between 1st respondent and petitioner. Since the petitioner is not agreeable to the extension of either bid validity or the bank guarantee, it is not open to 1st respondent to unilaterally compel petitioner to extend the bid validity as well as bank guarantee.

12. Moreover, it is not the case of 1st respondent that petitioner has been chosen or is liable to be chosen by it for award of the contract pursuant to the above tender. If the petitioner's bid had been accepted, and thereafter the petitioner intended to withdraw from the contract, there could be some justification for the 1st respondent to invoke the bank guarantee or insist for extension of bid validity. That not being the case, it is inexplicable why the 1st respondent is insisting that petitioner extend the bid validity on threat of invocation of the bank guarantee. Such conduct on the part of 1st respondent has to be termed as arbitrary and violative of Article 14 of the Constitution of India.

13. In this view of the matter, and since the petitioner now wishes to withdraw the Writ Petition, this Court grants leave to petitioner to withdraw the Writ Petition and directs the 1st respondent not to invoke the bank guarantee given by petitioner with regard to bid validity and return the bank guarantee given by petitioner within a period of two (02) weeks from the date of receipt of a copy of this order.

14. Accordingly, the Writ Petition is disposed of with the above directions. Consequently, WVMP.No.3264 of 2015 is dismissed. No order as to costs.

15. Miscellaneous applications, pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 16.12.2015
Ndr/*