

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
WRIT PETITION No.16431 of 2012

% 02.9.2015

Between:

M/s RSR Infra Works (India) Pvt
Ltd & PVSRSN Enterprises Pvt Ltd (JV),
Rajahmundry, reptd by its General
Power of Attorney Holder-R.Gopal Krishna

..... Petitioner

And:

\$ State of A.P., reptd by the Principal
Secretary to Govt., Irrigation & CAD
Department, Hyderabad and another.

.....Respondents

< Gist:

> Head Note:

! Counsel for the Petitioner: Mr. K.Rathanga Pani Reddy

^ Counsel for the Respondents: AGP for Irrigation & CAD
(AP)

? Cases Referred:
(2011) 13 SCC 200

**IN THE HIGH COURT OF JUDICATURE AT
HYDERABAD**

*FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH*

WRIT PETITION No.16431 of 2012

Between:

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Department, Hyderabad and
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...

Respondents

JUDGMENT PRONOUNCED ON 02.9.2015

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

1. Whether Reporters of Local newspapers : No
may be allowed to see the
Judgment?
Yes/No

2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes

3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? : Yes

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Counsel for the Petitioner: Mr. K.Rathanga Pani Reddy

Counsel for the Respondents: AGP for Irrigation & CAD
(AP)

The Court made the following:

ORDER:

In pursuance of tender notice No.2/2010-11, dated 07.02.2011, issued by respondent No.2, the petitioner has offered its tender for execution of the work of "Providing balance hydro mechanical items for spill way regulator, formation of flood banks on both sides of river from spill way to old regulator (new work), formation of balance dyke portion and excavation of balance right main canal from KM 0/0 to KM 48.88 including construction/completion of all CM & CD works (excluding reach from KM 43.00 to KM 47.00) of Thotapalli Barrage Project in Vizianagaram District." Under Clause-2.3 of the Bid document, the bid validity period is three months from the date of opening of the bids. It is not in dispute that the bid validity of 90 days expired by 07.7.2011. The respondents could not finalise the tender process within the bid validity period. However, the petitioner on its own,

through letter, dated 12.7.2011, extended the bid validity period up to 31.10.2011. Having waited for three months thereafter, the petitioner has addressed another letter, dated 12.10.2011, to respondent No.2, wherein it has *inter alia* stated as under:

“So far, no work order is received. We lost considerable valuable working period and only hardly 6 months of working period is left over. We firmly opined that it is not practicable to execute and complete the work before on set of monsoon of 2012. Further, there is an abnormal increase in the hike rates of materials and labour rates when compared with rates prevailed at the time of filing the tender and it is not practicable to carry out the work with the rates prevailed at the time of filing the bid.”

On receipt of the said letter, respondent No.2 has sent a reply, vide his letter, dated 15.10.2011, wherein it is stated that as the petitioner has extended the bid validity period up to 31.10.2011 and the approval of the bid is under process, its request cannot be considered. A week thereafter, respondent No.2 has addressed letter No.SE/TTPRC/VZM/DB/JTO/AEE-1/B.W.File Vol.3/513M, dated 22.10.2011, informing the petitioner that its offer of execution of contract for Rs.60,26,10,847/- (after considering voluntary rebate of Rs.3,24,78,528/-) is accepted. The petitioner was, therefore, called upon to attend the office of respondent No.2 along with the documents within 15 days, failing which, its Earnest Money Deposit (EMD) will be forfeited and further action will be initiated. This letter was followed by another letter No.SE/TTPRC/VZM/DB/DEE(T)AEE1/JTO/B.W.Vol-2/555M, dated 05.11.2011, whereby respondent No.2 has forfeited the petitioner's EMD by placing reliance on

Clause-11(c) of G.O.Ms.No.94, Irrigation and CAD (PW-ODD) Department, dated 01.7.2003. This letter is called in question in this Writ Petition.

On behalf of the respondents, respondent No.2 has filed a counter-affidavit, wherein he has *inter alia* stated that through its letter, dated 12.7.2011, the petitioner has voluntarily extended the bid validity up to 31.10.2011 besides extending the bank guarantee up to 06.01.2012, which was received in the office of respondent No.2 on 30.9.2011. Respondent No.2 has further taken the stand that it is not mandatory for him to communicate his acceptance to the petitioner's offer of extending the bid validity up to 31.10.2011, and that, as a Special Class Contractor, the petitioner cannot be unaware of the fact that its offer extending the bid validity up to 31.10.2011 is deemed to have been accepted by respondent No.2, who is pre-occupied with the process of finalisation of the tenders. Respondent No.2 has placed reliance on Clause-2.3 of the Bid document and also Clause-11(c) of G.O.Ms.No.94, dated 01.7.2003, in order to justify his action of forfeiting the petitioner's EMD.

I have heard Mr. K.Rathanga Pani Reddy, learned counsel for the petitioner and learned Government Pleader for Irrigation & Command Area Development (Andhra Pradesh).

The whole dispute hinges upon Clause-2.3 of the Bid document, which is in *pari materia* with Clause-11(c) of G.O.Ms.No.94, dated 01.7.2003. Clause-2.3 of the Bid document reads as under:

"BID VALIDITY

The bids shall be kept valid for acceptance for a period of 3 months from the date of opening of the bids. Before the expiry of validity, the authority competent to call for tenders shall seek for further extension of validity from the bidders and in case the

validity is not extended, his/her tender will not be considered and the EMD shall be returned. During the period of validity if any tenderer withdraws his tender, his/her EMD shall be forfeited. The EMD shall also be extended by the same period as the extension in the validity of the bid. A bidder granting the request will not be permitted to modify its bid.”

The above-reproduced Clause comprises the following aspects:-

- (a) Every tenderer shall keep his bid valid for a period of three months from the date of opening of the bids to enable the Department to accept the bid.
- (b) Before the expiry of bid validity period i.e., three months (if the bids are not finalised), the competent authority who called for tenders shall seek further extension of bid validity from the bidders.
- (c) In case, the bid validity is not extended, the bids of such tenderers will not be considered and the EMDs shall be returned and
- (d) If during the period of bid validity, any tenderer withdraws his tender, his EMD shall be forfeited.

A careful analysis of the above-mentioned Clause would reveal that the bid validity period is three months. A tenderer during this period is not permitted to withdraw his bid and if any tenderer withdraws his bid during this period, his EMD is liable for forfeiture. In case, the tenderer does not extend the bid validity beyond 90 days in response to a request made by the competent authority, his tender will not be considered and his EMD will be returned. If the bids are not finalised before the expiry of the bid validity period, an obligation is cast on the competent authority to seek further extension of bid

validity.

In the instant case, though the respondents failed to finalise the bids before the bid validity period, respondent No.2, who is the competent authority, has not requested the petitioner to extend its bid validity. The petitioner has itself voluntarily extended the bid validity up to 30.10.2011. Even after the petitioner has extended its bid validity, respondent No.2 has not responded to the same. Having waited for three months after such extension, the petitioner has informed respondent No.2 that for the reasons mentioned in its letter, dated 12.10.2011, it has restricted its bid validity extension up to 07.10.2011 only.

Interestingly, even by the time, the said letter of the petitioner was received by respondent No.2, the tenders were not finalised, as is evident from letter, dated 15.10.2011, of respondent No.2. It is only two days later that respondent No.2 has informed the petitioner that its tender has been accepted.

The short question that needs to be addressed on these undisputed facts is whether the action of respondent No.2 in forfeiting the petitioner's EMD is legally sustainable?

It is trite that the purpose of providing bid validity period is to ensure that only genuine parties make bids and to prevent the persons who do not have the capacity or intention of entering into contract from making bids

(See ***State of Haryana Vs. Malik Traders***^[1])

While the tenderers are prevented from withdrawing their tenders during the bid validity period, evidently, to prevent the Department from keeping the bids pending without finalising for unduly long periods, maximum period of 90 days is prescribed as bid validity period so that, if the bids are not finalised within such period, the bidders can withdraw from the bid process. In such cases, Clause-2.3 of the Bid document has clearly envisaged

non-consideration of such tenders and return of the EMD. The said Clause empowers the Department to forfeit the EMD only if any tenderer withdraws his tender “during the period of validity”. The phrase “during the period of validity” in Clause-2.3 of the Bid document, in my opinion, shall be construed as the period of three months for which the bid shall be kept valid for acceptance. If the said clause intended forfeiture of the EMD even during the extended period of validity, there should have been a specific addition of the words “or during the extended period of validity” after the words “during the period of validity”. It is legally well settled that a provision statutory or otherwise which is penal in nature shall be strictly construed.

There is another angle from which this issue needs to be examined. If a tenderer is provided freedom not to extend the bid validity period and is allowed to take back his EMD after expiry of bid validity, in the event of his refusal to extend the bid validity, I do not find any reason as to why a tenderer who has voluntarily extended the bid validity period shall be denied the freedom to withdraw his offer of extension or confine extension of bid validity only to a particular period, before his bid is accepted.

Admittedly, by the time the petitioner’s letter, dated 12.10.2011, restricting its extension of bid validity period up to 07.10.2011, was received by the respondents, its tender was not accepted. Therefore, under the tender conditions, there is no prohibition on the petitioner from withdrawing its offer of extension of bid validity at any time before its tender was accepted. Having failed to seek extension of bid validity by respondent No.2 or even respond to the petitioner’s voluntary offer of extension of the bid validity, it is wholly arbitrary on the part of the respondents to accept the petitioner’s offer after it has withdrawn its voluntary offer of extension of bid validity

and forfeit the EMD on the ground that the latter has refused to enter into agreement. Such an action also is unconscionable and capricious.

For the above-mentioned reasons, the Writ Petition is allowed as prayed for.

As a sequel to disposal of the Writ Petition, WPMP.No.21104 of 2012 shall stand disposed of as infructuous.

*JUSTICE C.V.NAGARJUNA
REDDY*

02nd September 2015

Note:

LR copies to be marked.

B/o

DR

[\[1\]](#) (2011) 13 SCC 200