IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH

* * * *

WRIT PETITION No.18313 of 2015

BETWEEN

M. Narasimha Rao.

... PETITIONER

AND

The Oil and Natural Gas Corporation Limited (ONGC), 1st Floor, C-Wing, Room No.1, Godavari Bhavan, ONGC Complex, Rajahmundry, East Godavari District, Rep. by its General Manager and others.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 29.07.2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

1.	Whether Reporters of Local newspapers may be allowed to see the Judgments?	No
2.	Whether the copies of judgment may be marked to Law Reporters/Journals?	No
3.	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	No

ORDER:

Petitioner and the fourth respondent are bidders with relation to a tender called for by respondents 1 to 3 bearing No.KC12C15020 dated 19.03.2015. The present writ petition is filed questioning the action of respondents 1 to 3 in, allegedly, considering the tender of the fourth respondent without considering the tender of the petitioner as illegal, arbitrary, unreasonable and violative of principles of natural justice.

2. The facts, in brief, are that the petitioner is a civil contractor. The tender aforesaid was called for by the first respondent for creating artificial lift base at the locations mentioned by them along with the electrical work and the work was estimated at Rs.3,55,70,248.97. Petitioner is stated to have offered his bid on 09.04.2015 by complying with all the requirements of the tender. Petitioner states that bids were to be filed in two parts viz. technical bid and the price bid.

The technical bid is stated to have been opened on 16.04.2015 in the presence of the petitioner and the fourth respondent and the petitioner was, allegedly, declared as qualified in the technical bid. It is alleged that respondents 1 to 3 were postponing the opening of the price bid and instead asked certain clarifications from the petitioner, which were provided by the petitioner. However, thereafter, also the price bid was not opened and the petitioner then came to know of the proceedings dated 18.06.2015 issued by the first respondent informing the fourth respondent that his price bid will be opened on 23.06.2015 at 3.30 PM. A copy of the said letter is produced along with the writ petition as annexure P7 and that appears to be the cause of action for filing the writ petition that the petitioner's price bid is not being considered

in spite of being qualified for the price bid.

3. The present writ petition, filed on 22.06.2015, came up for admission on 23.06.2015 when notice before admission was ordered. Thereafter, appearance has been filed by the learned standing counsel for respondents 1 to 3 and the fourth respondent is also now represented by his counsel. Counter affidavit also has been filed by respondents 1 to 3 and in view of the

representation of the learned counsel for the petitioner that the contract is likely to be awarded to the fourth respondent; this writ petition is taken up and heard on 22.07.2015.

4. It is the specific case of the petitioner that he has filed the tender in individual capacity as he purchased the tender document in his name.

5. Learned counsel for the petitioner submits that after opening of the technical bid the first respondent had issued letter dated 13.05.2015 calling upon the petitioner to submit clarifications with regard to parent company documents and to submit duly filled in Bid Matrix. Learned counsel states that the petitioner under his reply dated 19.05.2015 has clarified that he along with another company has formed partnership firm, which is the parent company, as per the deed of partnership dated 01.04.2015 and as such, the said partnership firm is the parent company of the petitioner and both the partners of the firm have sufficient experience in executing the civil works of all kinds. A notarized certified copy of the partnership deed was submitted along with duly filled in bid matrix. Learned counsel submits that there is no controversy that the bid matrix is in the nature of annexure certifying compliance of requirement criteria by confirming it as YES/NO. However, as per Annexure 2 to the tender form vide note under clause 6 it is provided as follows:

> "Non-submission of bid matrix duly signed by the bidder will not lead to rejection of the offer. In case, it is submitted along with the bid, this should be got completed prior to finalization of the tender."

Based on the above, learned counsel submits that even if the petitioner has not signed the bid matrix and even if there is any mistake in the same that would not invalidate the tender of the petitioner.

6. Learned counsel also submits that during pendency of this writ petition the petitioner was informed by the respondents 1 to 3 vide letter dated 03.07.2015 that the competent authority has decided that the petitioner's bid

was technically disqualified and EMD will be released as per procedure. The said rejection of the technical bid is also questioned by the petitioner on the ground that the decision of respondents 1 to 3 in rejecting the petitioner's technical bid on the ground that the petitioner failed to submit required documents in establishing correlation between him and the parent company is, therefore, erroneous, as the petitioner is in partnership and the other partner has requisite experience as per the requirement of the tender conditions. Learned counsel also submits that since the petitioner and the fourth respondent are only two bidders, eliminating the petitioner and taking steps to award the work to the fourth respondent is clearly arbitrary in view of the fact that the petitioner's tender is marginally less to the estimated value whereas the fourth respondent's bid is 32% higher than the estimated value.

7. Respondents 1 to 3 have filed counter affidavit pointing out that the petitioner failed in complying with the Bid Evaluation Criteria (BEC)/Essential Qualification Requirement (EQR) in terms of para 6 of BEC. For the sake of convenience, it is appropriate to extract the relevant portion:

1. Experience	The bidders should have successfully completed similar works during last 7 years ending last day of month previous to the one in which application are invited should be either of the following: ***Three*** *similar completed works each costing not less than the amount equal to* ***40%*** *of Estimated cost.* **OR** ***Two*** *similar completed works each costing not less than the amount equal to* ***50%*** *of Estimated cost.* **OR** ***One*** *similar completed work costing not less than the amount equal to* ***80%*** *of Estimated cost.* **Note:** Similar works means ***Any nature of Civil construction/Civil maintenance works"***
2. VAT	Copy of Certificate of registration under **APVAT** is to be submitted.
3. Service tax	Copy of **Service tax** registration certificate is to be submitted.

Note: - Bid Matrix attached with tender document should be submitted along with the bid duly filled and singed by the bidder. (As per **Annexure-3** BEC- Matrix)

8. It is stated in para 6 of the counter affidavit as under:

"**6 .** The petitioner along with his tender, submitted details of experience of one Shri K.V. Ramakrishna Rao, claiming him to be his parent company along with a notarized Agreement and Guarantee deed of the so called parent company. In addition to the same, the petitioner also submitted three certificates relating to the works executed by the petitioner himself. After opening the technical bids, the tender committee evaluated the technical bids submitted by both the petitioner and the fourth respondent with reference to BEC/EQR. In the said evaluation, the tender committee observed that the experience certificates submitted by the petitioner on the basis of works executed by him do not qualify his technical bid on experience criteria,

but petitioner submitted experience of one Shri K.V. Rama Krishna Rao as the experience of his parent company to satisfy the experience criteria with reference to BEC/EQR. However, the tender committee felt that on the basis of a notarised agreement executed by Shri K.V. Rama Krishna Rao which was enclosed by the petitioner along with the bid documents,

the parent company relationship between the petitioner and
Shri K.V. Rama Krishna Rao cannot be established, as such,
the petitioner should be asked to submit statutory documentary evidence to establish the said relationship."

It is further stated that in this situation the petitioner was asked by letter dated 13.05.2015 to clarify these aspects and while submitting the reply, petitioner submitted documentary evidence viz. notarized copy of the partnership deed dated 01.04.2015 whereas in the bid matrix filed by the petitioner, he has specifically mentioned against column 17 as follows:

17	Indicates status of the bidder	**PARTNERSHIP FIRM**	
	(A) If the bidder is a **Proprietorship Firm,** Confirm that the Power of Attorney, if any, of authorised signatory from appropriate competent authority on Non-judicial stamp paper of appropriate value duly executed before Notary Public or First Class Magistrate is submitted along with the bid.	**NOT APPLICABLE**	

	(B) If the bidder is **Partnership Firm,** Confirm that **(i)** The Partnership deed is submitted along with the bid & signed by Authorised Signatory. **(ii)** Firm Registration certificate is submitted along with the bid.	**CONFIRM**	
	(C) If the bidder is **Limited Company**, Confirm that the relevant documents related to Limited Company are submitted & signed by Authorized Signatory.	**NOT APPLICABLE**	

9. Learned standing counsel for respondents 1 to 3, therefore, submits that while the tender was filed by the petitioner in his individual name, in the bid matrix he declared as if the status of the bidder is a partnership firm, which is a departure from the bid of the petitioner. Learned standing counsel also stated that the petitioner individually does not have the requisite experience and in the absence of satisfactory documents establishing his correlation with the partnership firm and as a part of the company, the tender committee was not satisfied with regard to the requirement of EQR by the petitioner in terms of BEC, consequently, the petitioner's technical bid was rejected. Learned standing counsel would also submit that though the partnership firm claimed by the petitioner was formed on 01.04.2015 the bid was submitted by the petitioner individually and deviation in the change of structure of the bid from individual to partnership firm was impermissible as per the instructions to the bidder in para 19. Hence, it is the specific case of respondents 1 to 3 that since the petitioner failed to comply with BEC and EQR criteria, the recommendations of the tender committee were accepted by the competent authority and petitioner's technical bid was rejected under letter of respondents 1 to 3 dated 03.07.2015 and consequently,

the fourth respondent was notified of opening of the price bid.

Learned standing counsel submits that though opportunity was given to the petitioner to substantiate his parent company's relation,

the documents furnished by the petitioner were found to be wholly insufficient. Hence, the petitioner was technically found to be not qualified.

10. Learned standing counsel also submits that the bid matrix and the information furnished by the petitioner is, therefore, not the reason for rejection of the petitioner's technical bid but on overall scrutiny, the tender committee was not satisfied of the compliance of BEC and EQR by the petitioner. In order to substantiate the same, learned standing counsel also pointed out that the petitioner gave incorrect information in the bid matrix contrary to his tender not only regarding item 17, extracted above, but to a further criteria that when the bidder was required to confirm whether it is a proprietory firm, petitioner endorsed as not applicable and in the next criteria that when the bidder is required to confirm whether the bidder is a partnership firm and partnership deed is submitted along with the bid signed by an authorized signatory and whether the firm registration certificate is submitted along with the bid, as against this column the petitioner endorsed as confirmed thereby giving an impression as if petitioner's bid is on behalf of partnership firm but neither partnership deed was submitted nor firm registration was submitted along with the bid and on the contrary, the bid was submitted in individual capacity by the petitioner. Learned standing counsel, therefore, specifically has pointed out that in para 16 of the counter it was denied that the petitioner was declared technically qualified on 23.06.2015, as alleged in the affidavit.

11. The fourth respondent through his counsel also opposed the writ petition by pointing out clause 3.1 of the instructions to bidder which state that the bid shall be submitted in the name of the bidder in whose name the tender document is purchased and the tender document is non-transferable. Further, under instruction 5 it was specifically mentioned that the transfer of bid submitted by one bidder to another is bidder is impermissible and no alteration in the name of the bidder subsequently shall be permissible.

Learned counsel, therefore, states that the petitioner, being well aware of the same, has offered the bid in his individual capacity but is later trying to link up to the partnership firm in order to claim the benefit of the experience of the other partner, which is impermissible.

12. In the light of the above, it has to be appreciated whether the disqualification of the petitioner, at the stage of consideration of technical bid, is justified. It is, no doubt, true that the petitioner submitted his bid in individual capacity on 09.04.2015 and by that date, the partnership between the petitioner and the other partner had already come into being under partnership deed dated 01.04.2015. There is no material to show that the said partnership deed was registered with the Registrar of Firms. Thus, by the date of filing of the bid, the petitioner was already a partner of the said firm but the bid was not filed in the name of partnership firm and it is only later that the partnership firm was sought to be introduced as a parent company.

13. Reliance is placed by the learned counsel for the petitioner on the agreement between the petitioner and the partnership firm dated 08.04.2015 on Rs.100/- non-judicial stamp paper duly notarized provides that the petitioner will submit the offer as main bidder and the firm will be sub-contractor and places overall responsibility of satisfactory execution of the contract on the bidder. Learned counsel also submitted another document executed in a similar manner also dated 08.04.2015 styled as a parent company guarantee, which is executed by the said form giving guarantee to respondents 1 to 3 wherein the firm agreed to provide technical, financial and such other support as is necessary for the performance of the work relating to the said tender.

14. The aforesaid two documents coupled with the notarized partnership deed were scrutinized by the tender committee of the respondents but the documents were not accepted as sufficient to establish the parent company relationship between the petitioner and the said firm. Petitioner being a

partner of the firm technically,

I am unable to see how there is a relationship with the firm as parent company and in fact, the petitioner being a partner of the firm,

as per the provisions of the Partnership Act, the firm cannot be a parent company of a partner and in fact, the partner remains part of the firm. However, the bid was not filed by the petitioner as a partner of the firm and thereby, the correlation between the petitioner and the firm, so far as the present tender is concerned, did not satisfy the essential qualification requirement and experience required to be satisfied as per BEC. Hence, petitioner could not have fallen back on the experience of the other partner of the firm to claim technical qualification. In my view, the decision of the tender committee in disqualifying the petitioner at the stage of technical bid, after giving him opportunity and examining all the documents produced by the petitioner, is justified and does not suffer from any illegality or arbitrariness. In view of that, therefore, the merits of the price bid of the fourth respondent and the allegation that it is 32% over the estimated rate etc. do not fall for consideration in this writ petition and it is entirely left for respondents 1 to 3 whether to accept the price bid of the fourth respondent or call for fresh tenders.

In the result, the writ petition is accordingly dismissed.

As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

July 29, 2015
DSK