

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2016

Date of Reserving the Order	Date of Pronouncing the Order
31.03.2016	28.04.2016

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P.No.6617 of 2016 &
W.M.P.No.5887, 5888 & 9084 of 2016

Turbo Engineers (CBE),
Through its D.G.M., (Tech & Marketing),
Mr.D.Arunkumar
S/o.K.M.Duraiaraj,
2/A-2, Nandhi Nagar, Rathinapuri Post,
Coimbatore - 641 027. Petitioner

Vs

- 1.Mettur Thermal Power Station - STAGE II
Owned by TANGEDCO Ltd.,
Rep., through the Chief Engineer,
Mettur Dam - 636 406.
- 2.M/s.Rali Engineering Works,
No.3/73, Madurai Bye-Pass Road,
Near BPCL LPG Filling Plant,
Tuticorin - 628 101.
- 3.BMW Steels Ltd.,
Rep., by its Director,
Navipur Road, Hathras 204101 U.P.
- 4.Financial Controller (Tender),
TANGEDCO, 10th Floor, NPKRR Maalaigai,
Chennai - 600 002. ... Respondents

Prayer :- Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari, to call for the records of the first respondent concerning said Tender specification No.CE/MTPS-II (600 MW)/MM/AEE-2/O.T.1078/2015-16, dated 16.11.2015, and quashing the pre-qualification document,

dated 21.06.2014, vide Lr.No.CE/SE/P&A/TTPS/P.O.8273M/EE/MH/AEE-5 Secr.1959M/D.3149/14, dated 21.06.2014 submitted by the second respondent in the form of the previous purchase order issued by the Tuticorin Thermal Power Station, TANGEDCO, Tuticorin for the above tender of the first respondent.

For petitioners .. Mr.K.Ravi Anantha Padmanabhan

For Respondents .. Mr.G.Kirshnakumar for R2
Mr.S.K.Raameshwar for R1 & R4

O R D E R

The petitioner has filed this Writ Petition praying for issuance of a Writ of Certiorari, to quash the proceedings of the first respondent, dated 21.06.2014, placing a purchase order on the second respondent company for supply of 350NB and 250NB, Cast Basalt Bends of various sizes for ash slurry disposal lines of Unit I to V, on the ground that the pre-qualification document submitted by the second respondent in pursuance to the tender floated by the first respondent being defective.

2. The facts which are necessary for the disposal of the Writ Petition are that the first respondent, an organisation controlled by TANGEDCO, Generates Power with the capacity of 1X600 MW and supplies the same to the TNEB Grid. The first respondent procures various materials for its operations and maintenance works to produce electricity for public utility. The procurement is done by means of single/limited/open tender system and are required to abide by the guidelines stipulated under the Tamil Nadu Transparency in Tenders Act, 1998, (Act), the Rules framed thereunder and the Tamil Nadu Tender Regulations, 1991. The first respondent floated a tender for supply during the period 2015-16, under Open Tender/Two Part/Non-Proprietary basis for procurement of fly ash/bottom ash conveying line cast basalt lined pipe with flange on both sides for their plant at Mettur based on an indent received from the Superintending Engineer/Mechanical-I/MTPS-II. The tender notice was published in one English and Tamil daily on 29.11.2015 and also hosted in the TNEB website and the Tamil Nadu Government website on 01.12.2015, apart from being published in the notice boards in the offices of the first respondent. The due date for opening of the tenders was fixed on 16.12.2015 and the quotations received from the petitioner and the second respondent were opened. The tenderers had to satisfy the Bid Qualification Requirements (BQR) to enable them to proceed to the second stage, namely the price bid. On verification of the documents submitted by the petitioner and the second respondent as to whether they are in satisfaction of the BQR condition, the tenders were taken up for evaluation. After accepting the tenders of the petitioner and the second

respondent, the first respondent addressed the General Manager of District Industries Centre, Tuticorin and Coimbatore for verification of the genuinity of the manufacturing certificates submitted by both the tenderers to assess as to whether they satisfy the BQR condition No.1. The said condition stipulates that the bidder should be a manufacturer or their authorised dealer of Cast Basalt Lined Cylinder/Pipes/Bends; valid evidence such as certificate of registration (licence)/Memorandum of Articles of association to be enclosed in case of manufacturer and in case of dealers, certificate proof for valid dealership certificate from the manufacturer should be enclosed. The District Industries Centre, Tuticorin, by letter dated 06.01.2016 informed that the Part II acknowledgement, dated 16.03.2015, issued to the second respondent is valid; the District Industry Centre, Coimbatore by letter 25.02.2016, informed that the Part-II acknowledgement dated 03.02.2009 was issued to M/s.Turbo Engineers (CBE), for manufacturing small enterprise status in manufacturing of cast basalt lined MS pipes & bends and other various items. In terms of BQR condition No.3, in case, the supplier has executed purchase order to TNEB/TANGEDCO, the end user certificate has to be obtained by the tender inviting authority. However, in case of other organisation, the end users performance certificate should be obtained and furnished by the bidder along with the tender. Accordingly, information was called for and it was certified that the vendor rating of the second respondent firm was found satisfactory. With regard to the vendor rating of M/s.Turbo Engineers/petitioner, the same is to be obtained shortly and after which, both offers were sent to the indenting authority for furnishing the technical suitability and by letter dated 21.01.2016, Superintending Engineer/Mechanical-1/MTPS-2, stated that both the offers of the petitioner and the second respondent are found technically suitable. Thus, both the tenders are said to have been scrutinised in detail and accepted after receipt of the performance and vendor rating report, after which the price bid opening intimation were sent to both the tenderers. As could be seen from the counter affidavit filed by the first respondent, the price bid is yet to be opened and as per the interim direction issued in this Writ Petition, the same have been kept in abeyance.

3. The petitioner's case is that the pre-qualification document is the basis for assessing the eligibility of the bidder to participate in the bidding process of the tender and the second respondent had produced an earlier purchase order showing the same as an eligibility document for the present tender, which was issued to the second respondent at the instance and request of the third respondent, who had authorised the second respondent to receive the earlier purchase order by Tuticorin Power Plant (TTPT) on their behalf. The petitioner would further contend that the mandatory condition being that

the second respondent must produce after the receipt of the purchase order from the first respondent, the test certificate and supply materials which certificate to be given by the third respondent. It is alleged that the second respondent gave a fake certificate and did not effect supply in conformity with the terms of the tender and it was also not supplied by the third respondent, who is the manufacturer. Therefore, it is contended that the entire acceptance process by the respondents accepting the offer of the second respondent is per se illegal, as it suffers from an incurable defect. It is submitted that while this was the position in respect of the first tender, for the present tender, the second respondent produced the said purchase order as a document to establish their eligibility and the first respondent without considering the objection raised by the petitioner and without rejecting the offer of the second respondent, has found the second respondent to have satisfied the bid qualification requirement and therefore, they seek for issuance of a Writ of certiorari to quash the acceptance of the eligibility document (pre-qualification document).

4. The learned counsel for the petitioner elaborately described as to what is the nature of the product to be supplied and it is submitted that the basic raw material is obtained from Mountain Lava which erupts from Volcanoes and the material is required to be imported for manufacture of the cast basalt lined pipes and allied items. According to the petitioner, the second respondent does not satisfy the qualification as per the BQR conditions and this is evident from the letter written by the third respondent, dated 27.10.2015, wherein they have stated that they have neither supplied basalt cylinders to the supplier, second respondent nor undertook quality assessment and no test certificate was issued against the said supply to the second respondent. Thus in effect, the contention is that the second respondent being not a manufacturer and if had procured the material from the third respondent, then necessary test certificate should have been furnished and the third respondent in unequivocal terms stated that they have not issued the test certificate. It is further submitted that the material test certificate has to be issued only by the manufacturer, which is the third respondent for confirmation of the tender as per the stipulation in the tender notification. Therefore, it is submitted that the second respondent has produced a fake certificate which has been accepted by the first respondent and in spite of the petitioner's objection, the first respondent has failed to initiate appropriate action to disqualify the second respondent. The petitioner earlier filed a Writ Petition before the Madurai Bench of this Court in W.P.(MD).No.23633 of 2015, in respect of the earlier tender, (called for by TTPT), but in the said Writ Petition, no interim orders were granted and supplies

have been effected by the second respondent. Therefore, it is submitted that the second respondent should be disqualified from participating in the present tender.

5. The learned counsel appearing for the Petitioner by referring to the purchase order submitted that the admitted position is that the second respondent is a dealer and not a manufacturer and as per the tender conditions, in particular under clause xii, manufacturer's test certificate is to be furnished along with the supply. It is further submitted that in terms of the conditions of tender as found in annexure A of the tender schedule, all documents have to be supplied by 16.12.2015. By referring to a test certificate issued by M/s. Inspection of India, dated 23.06.2014, which has been enclosed in the typed set of papers filed by the second respondent, it is stated that the test certificate is on the same date, when the purchase order, dated 21.06.2014, was despatched by the first respondent and curiously the undertaking given by the second respondent is on a non-judicial stamp paper, dated 26.02.2016. The petitioner would further state that they personally verified the credentials of M/s. Inspection of India and on seeing the building where the said organisation is functioning, it could not have the facilities for testing such a material. It is further submitted that the manufacturer's test certificate is a vital document, since the Bureau of Indian standards has not fixed any standards for cast basalt items and the first respondent has therefore insisted only upon the manufacturers standard and this has been admitted by the first respondent in their counter affidavit in paragraph 8. It is further submitted that the test certificate produced by the second respondent is a certificate issued by a third party and not a manufacturer's test certificate and therefore, cannot be considered as a document to satisfy the bid qualification requirement in the present tender.

6. The learned Standing counsel appearing for the first respondent elaborately referred to the factual averments as set out in the counter affidavit filed by the first respondent and submitted that the document furnished by the second respondent satisfy the BQR condition and it was accepted. It is further submitted that the first respondent being a huge organisation will not be in a position to probe into the matter whether the supplied materials (as against the first tender), are procured from the principal's or directly supplied by the purchase order holder when the supplied materials satisfy the specifications of the first respondent for which performance certificate has been issued later. Further, it is submitted that there is no deviation or violation in the procedure adopted by the first respondent and after the opening of the price bid, the tender will be finalised and awarded to the lowest tenderer (L-1). Further, it is submitted that the Indenting Authority will issue

the technical suitability of the supplied material and necessary conditions will be insisted in the purchase order under sample and replacement of defective/damaged materials clauses, so as to reject if the supplied materials are not as per the specifications and replacement will be done by the supplier free of cost. It is further submitted that the petitioner made representation on 23.01.2016, objecting the eligibility of the second respondent and appropriate action was being initiated, when the second respondent submitted a representation on 04.02.2016, stating that they have come to know that a representation has been received to reject the tender document alleging furnishing of fake material for the BQR requirement. The second respondent stated that they have supplied correct and genuine materials for the purchase order earlier issued (by TTPT) and the same materials are in service and requested the first respondent to seek for performance report on the materials supplied to the TTPS, Tuticorin. Further, it is submitted that based on the purchase order, they participated in another tender in TTPS, Tuticorin and secured purchase order, dated 23.12.2015 and have supplied 75% of the material as on the date of the representation. Based on the tender documents, a note was submitted to the first respondent seeking approval to open the price bid, in which the entire facts were placed, in which approval was requested from the Chief Engineer Level Tender Committee for opening the price bids of the petitioner as well as the second respondent.

7. From a perusal of the note, which has been filed in the typed set of papers filed by the first respondent, it is seen that the note dealt with the representation given by the petitioner, dated 23.01.2016, to reject the offer of the second respondent and the representation given by the second respondent, dated 04.02.2016. After which, it was recommended to open the price bid of both the tenderers as both of them were found to be eligible. Based on the above submissions, the learned counsel for the first respondent seeks for appropriate directions to enable the first respondent to proceed to open the price bids of the petitioner as well as the second respondent.

8. The second respondent submitted that they had participated in the tender only as a manufacturer and this is reiterated in the counter affidavit and it is stated that the petitioner has misled this Court by stating as if the second respondent has participated in the tender only as a dealer and has not produced a valid dealership certificate. Further, the allegation that the second respondent has supplied fake material to TTPS has been emphatically denied. With regard to the earlier tender, it is submitted that one of the BQR condition is that the tenderer should have supplied materials previously to any Thermal Power Stations of State and Central Government organisation for a value of not less than Rs.5.01 lakhs and it

does not mean that the third respondent has to be a manufacturer of the materials and the petitioner pursuant to the purchase order had supplied the materials as per the purchase order and provided test certificate from a common testing laboratory and the same was approved by TTPS. Further, it is submitted that the second respondent has never supplied any fake goods under the earlier purchase order as claimed by the petitioner and they have supplied materials as per the purchase order and never supplied the materials of the third respondent and the test certificate is not a bogus document.

9. Heard the learned counsels appearing for the parties and perused the materials placed on record.

10. The learned counsels on either side have made elaborate submissions on the factual matrix, referred to the salient feature of the tender notification. Though the facts referred to supra, at the first blush gives an impression that it is a complicated technical issue, on a closure scrutiny, it is clear that the dispute lies in a narrow campus. The allegation of the petitioner is that the second respondent is not a manufacturer of the said material and to eligible to participate in the tender, if a manufacturer, they should produce a manufacturer's test certificate. Whereas the second respondent is a dealer of the third respondent and he has failed to produce the test certificate issued by the third respondent, who is the manufacturer and produced a test certificate issued by an independent third party agency, which does not satisfy the BQR requirement and therefore, the bid submitted by the second respondent ought to have been rejected at the threshold and the second respondent should not have been permitted to move over to second stage of opening the price bid.

11. The sheet anchor of the case of the petitioner rests upon the purchase order issued by the Tuticorin Thermal Power Station(TTPS), dated 21.06.2014. At this juncture, it has to be pointed out that the present tender has been invited by Mettur Thermal Power Station(MTPS), the first respondent and it is a separate tendering process with no bearing on the earlier tender. The petitioner's earlier attempt to stall the implementation of the purchase order issued by TTPS by filing W.P.(MD).No.23633 of 2015, did not yield any fruitful results and supplies have been effected. However, the issue on hand in this Writ Petition cannot be permitted to be tested, based on a purchase order issued in respect of a different tender by a different tender inviting authority.

12. The case of the petitioner has to be considered on the requirements stipulated in the present notification, whether the second respondent has satisfied the BQR requirements, whether the first respondent made a proper assessment of the matter

especially being a technical matter and should the Court interfere at this stage of the tendering process, when both the petitioner and the second respondent have been found to have satisfied the BQR requirement and both their price bids are to be opened. The tender conditions do not permit an indenting bidder to put spokes in the tendering process. However, this does not mean that when certain information comes to the notice of a tenderer about a disqualification said to have suffered by another competing bidder, the same cannot be placed before the tender inviting authority nor can it be stated that the tender inviting authority should turn a blind eye to any valid objection that has been raised. The entire case of the petitioner is founded on the argument that the second respondent participated in the present tender as a dealer of the third respondent. On a careful scrutiny of the facts, it is evident that the entire case as projected by the petitioner is on a misconception of facts. The second respondent has participated in the present tender as a manufacturer. Therefore, they were entitled to produce the test certificate themselves, which has been produced.

13. The first respondent has a big team of engineers who evaluate the technical specifications and this was done and the second respondent was found to satisfy the BQR requirement, more particularly with regard to their eligibility to participate in the tender in the capacity of a manufacturer. Yet when a complaint was made by the petitioner by representation, dated 23.01.2016 and when the second respondent came to know of the same and they submitted a representation, on 04.02.2016, the matter was analysed by the officials and a note was placed before the Chief Engineer Level Tender Committee on 16.02.2016. In the note, the following has been recorded:-

As the above firms were enclosed the previous P.O copies from MTPS-1 & TTPS to satisfy the BQR conditions, the End user certificate for the TNEB/TANGEDCO's Pos has to be obtained by the Tender Inviting Authority. Hence, the SE/P&A/MTPS-I and the SE/P&A/TTPS has been addressed to furnish the vendor rating and performance of the material supplied for the previous Pos enclosed along with the tender for ascertaining the BQR satisfaction. Also, the genuineness of the SSI Certificate has also been sent to the concerned DICs (Coimbatore & Tuticorin) for verification. The reply has been received from DIC/Tuticorin dated 06.01.2016 & the SE/P&A/TTPS, dated 14.01.16 for M/s.Rali Engineering Works, Tuticorin in which it is stated that the manufacturer certificate issued is a valid one & the performance of the materials supplied against the previous P.O is satisfactory till date. No reply has been received

for M/s.Turbo Engineers, Coimbatore towards performance & genuineness. Meanwhile, M/s.Turbo Engineers (CBE), Coimbatore towards performance & genuineness. Meanwhile, M/w.Turbo Engineers (CBE), Coimbatore vide their letter dated 23.01.2016 addressed to the Chief Engineer/MTPS-II, has requested to reject M/s.Rali Engineering Works, Tuticorin offer, stated that M/s.Rali Engineering works, has supplied Fake material without their principal BMW's knowledge to TTPS with a copy to the Director (Generation), Director (Finance), DGP-Vigilance, CE/Mech, SE/P&A, EE/MM and Financial Controller/MTPS-II. Based on the above, the CE/M/TS vide his letter dated 04.02.2016 has instructed to keep pending all offers and related papers including process of P.O., if any, in respect of M/s.Rali Engineering Works till further instruction from Headquarters. Amid to the M/s.Rali Engineering Works, Tuticorin has requested vide his letter dated 04.02.16, to open the tender OT.1078/15-16 and also stated that they supplied correct and genuine material for the TTPS P.O., and the same materials are in service.

14. In fact, thorough enquiry appears to have been conducted and process was put on hold till the authorities were satisfied as regard the second respondent's eligibility. The note file clearly shows that the matter was analysed in a proper prospective and there is no arbitrariness in the approach of the authorities and the matter was considered by the Chief Engineer/MTPS-II Level Tender Committee which has approved the same vide resolution dated 17.02.2016. Thus, in the absence of any perversity in the manner in which the authorities have acted, this Court is not inclined to interfere in the tender process, which is in the midway.

15. It appears that the petitioner's attempt is to weed out the second respondent from the zone of consideration, so that they become the single tenderer to secure the work. However, the facts disclosed in the materials placed before this Court, it is clear that the second respondent has participated in the tender as a manufacturer and not a dealer as contended by the petitioner.

16. The second respondent has specifically stated in paragraphs 17 and 18 of their affidavit filed in support of the vacate stay petition that they have participated in the bid as a manufacturer, not a dealer. Though a rejoinder has been filed by the petitioner to the said affidavit, this averment has not been specifically denied by the petitioner.

17. For all the above reasons, the petitioner has not made out any case for interference with the impugned tender. Accordingly, the Writ Petition fails and it is dismissed. The interim order granted on 24.02.2016, stands vacated and the first respondent is permitted to proceed to open the price bid of the petitioner as well as the second respondent and proceed further in accordance with law. No costs. Consequently connected Miscellaneous Petitions are closed. pbn

s/d-

Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

To

1.Mettur Thermal Power Station - STAGE II
Owned by TANGEDCO Ltd.,
Rep., through the Chief Engineer,
Mettur Dam - 636 406.

2.Financial Controller (Tender),
TANGEDCO, 10th Floor, NPKRR Maalaigai,
Chennai - 600 002.

+ 1 cc to Mr.K.Ravi Anantha Padmanaban, Advocate SR 27435

+ 1 cc to Mr.S.K.Raameshuwar, Advocate SR 7804

+ 1 cc to Mr.G.krishnakumar, Advocate SR 27207

ev(co)

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W.P.No.6617 of 2016

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