Reserved on : 06.09.2017

Delivered on : 20.09.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2017

CORAM

THE HON'BLE Mr. JUSTICE M.DURAISWAMY

W.P.No.5086 of 2017 and
W.M.P.Nos.5358 to 5360 of 2017

M/s.V.Link Systems (P) Ltd.,
rep by its Director R.Venkat Ramakrishnan
A-Block, 2nd Floor, ALSA Gardens,
No.72/3, Harington Road,
Chetpet, Chennai - 600 031. ... Petitioner

Vs.

1.The Commissioner of Fisheries,
Administrative Building,
DMS Complex, Teynampet, Chennai - 600 006.

2.The Project Director,
The Project Management Unit,
Coastal Disaster Risk Reduction Project (CDRRP).
Tamil Nadu State Disaster Management Agency,
Office of the Commissioner Revenue Administration,
Chepauk, Chennai – 600 005.

3.M/s.Arya Communication & Electronics
Service Pvt. Ltd.,
Door No.1/53, Sripuram Colony 1st Street,
St.Thomas Mount, Chennai – 600 016. ... Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorarified mandamus calling for the records relating to Coastal Disaster Risk Reduction Project (CDRRP), Fisheries Management for Sustainable Livelihoods (FIMSUL-II) – IDA Credit No.5279-IN– International Competitive Bidding (ICB) pursuant to the tender notification passed by the 1st respondent dated 06.06.2015 and quash the ICB contract award in Project Credit No.5279-IN-Coastal Disaster Risk Reduction Project (CDRRP) – Bid/Contract Ref. Number – No.6/CDRRP/FIMUL II/GOODS- 2015-2016 for procurement of 2600 numbers of 25W VHF boat equipment and 18700 number of 5W VHF hand-held equipment for Country Crafts passed in favour of the 3rd respondent published on 12.01.2017 and direct the 1st respondent to award the contract in favour of the petitioner.

For Petitioner : Mr.P.Chandrasekaran for Dr.P.Jagadeesan

For Respondent : Mr.S.N.Parthasarathi,
Government Advocate (R1 & R2)

Mr.P.Giridharan (R3)

ORDER

The petitioner has filed the above Writ Petition to issue a writ of certiorarified mandamus calling for the records relating to Coastal Disaster Risk Reduction Project (CDRRP), Fisheries Management for Sustainable Livelihoods (FIMSUL-II) – IDA Credit No.5279-IN– International Competitive Bidding (ICB) pursuant to the tender notification passed by the 1st respondent dated 06.06.2015 and to quash the ICB contract for procurement of 2600 numbers of 25W VHF boat equipment and 18700 number of 5W VHF hand-held equipment for Country Crafts passed in favour of the 3rd respondent published on 12.01.2017 and to direct the 1st respondent to award the contract in favour of the petitioner.

2.The brief case of the petitioner is as follows:

(i)According to the petitioner, the Government of India and Government of Tamil Nadu received credit facility from the World Bank towards the cost of Coastal Disaster Risk Reduction Project (CDRRP) under the scheme of Fisheries Management for Sustainable Livelihoods (FIMSUL-II) for procurement of VHF (Very High Frequency) equipments (i.e.) Seamless Communication Equipments meant for fishermen of Tamil Nadu. The Government of Tamil Nadu, the Commissioner of Fishers, the 1st respondent, called for Bid under International Competitive Bidding (ICB) for supply of 25W VHF equipments for in-shore boats (2600 numbers) and 5W VHF equipments for Country boats (18700 numbers).

(ii)On 08.06.2015, the 1st respondent issued General Procurement Notice for Tender International Competitive Bidding for Seamless Communication Equipments. On 10.12.2015, the 1st respondent issued the final corrigendum with changes in the specifications. Subsequently, on 01.02.2016, the bids were opened. As per Section I, Clause 4.1 of the

Instruction to Bidders, a Bidder may be Firm that is a private entity, a Government-owned Entity or any combination of such Entities in the form of a Joint Venture (JV) under an existing entity agreement or with the intent to enter into such an agreement supported by a Letter of Intent. For Non-Manufacturers or Distributors or Dealers, the Evaluation and Qualification Criteria were provided under Section III (II) of the Bid Document.

(iii)According to the petitioner, the 3rd respondent is not a Manufacturer, therefore, they have to meet the Clause for Non-Manufacturers under Section III (II) of the Bid Evaluation Criteria. As per the said Section, the Bidder should have supplied, installed and commissioned one or multiple orders to the value of Rs.5.19 crores in any one of the last five years (i.e.) from 2010-2011 to 2014-2015 with satisfactory performance for a minimum period of one year as on the date of submission of Bid. That apart, a Bidder should have sold 4500 VHF/UHF or similar wireless equipments in any one of the last five years (i.e.) from 2010-2011 to 2014-2015. When the Bid was opened on 01.02.2016, it was found that the Bids for the petitioner and the 3rd respondent to be evaluated under Non-manufacturers Bid and an Evaluation Committee/Tender Scrutinizing Committee consisting of various technical experts, headed by a Superintendent of Police (Technical) was formed for procurement of the said equipments.

(iv)By letter dated 23.02.2016, the 1st respondent requested additional documents from the petitioner and the petitioner provided the additional documents on 29.02.2016. The Tender Scrutinizing Committee headed by the Superintendent of Police (Technical) had its meeting and considered the Bids submitted by the Bidders. Thereafter, the 1st respondent on 22.03.2016, sought clarifications with respect to the Country of Origin, Make and Model and the petitioner gave the details with the covering letter dated 28.03.2016. The petitioner appeared before the Tender Scrutinizing Committee and the petitioner made a Power-point Presentation on 04.04.2016 explaining the technical specifications of the equipments and other components those quoted in their Bid. The 3rd respondent was also directed to present their Power-point Presentation about their product, performance and test certification and the 3rd respondent made a Power-point Presentation on 09.04.2016.

(v)According to the petitioner, they have submitted all the relevant documents before the Committee. Further, according to the petitioner, inspite of the objections regarding the qualification criteria of the 3rd respondent, which are against the mandatory conditions and regulations of the Bid Document, the 1st respondent preferred the 3rd respondent, even though the 3rd respondent was a non-responsive Bidder. The 1st respondent's actions are *malafide* and the procurement consultants have acted in haste without any application of mind. The disparity of the technical specifications and standards for VHF sets – 5W mobile set specified under the Schedule of Requirements and that of the Manual downloaded from OEM (Original Equipment Manufacturer) Website were glaring and this renders the 3rd respondent as a totally ineligible Bidder. The petitioner is challenging the eligibility criteria of the 3rd respondent to compete in the Bid.

(vi)By communication dated 11.01.2017, the 1st respondent returned the Bid Guarantee of Rs.86,50,000/- by way of Bank Guarantee to the petitioner. The contract was awarded to the 3rd respondent and the impugned ICB contract award notice was published in the Website on 12.01.2017. The Performance Certificate submitted by the 3rd respondent cannot be accepted as they are not in terms of the conditions as in Section III II (b) of Tender Document. There is gross violation of the Bid Conditions. In these circumstances, the petitioner has filed the Writ Petition.

3.The brief case of the respondents 1 & 2 is as follows:

(i)According to the respondents, marine fishing is a hazardous and dangerous occupation with a relatively high rate of injury and death among the fishers while fishing in the Ocean/Sea. Accidents occur at high Sea due to inclement weather conditions, engine failure, collisions, high swells of Sea and vagaries of nature. During the time of disaster predicted by scientific organizations like Indian Meteorological Department, INCOIS, the warning issued by these organizations could reach only to the Sea-shore level, however, the fishermen already fishing inside the Sea could not be communicated, which often results in severe tragedies. Likewise, the tough situations and disaster faced inside the Sea by the fishermen could not be communicated to the shore for arranging quick search and rescue operation to save the lives of the fishermen. Considering such disastrous situations, the Government of Tamil Nadu has taken the initiative to provide wireless communication network facility across Tamil Nadu coast to provide communication between Shore and Sea and between fishers themselves at Sea. The provision of communication facilities will significantly improve the safety of fishers inside the Sea. This, in turn, will build capacity in management of disaster risk and build disaster resilience amongst the fishing community.

(ii)The World Bank has provided tender procedures and formats to be followed in tender process. The tender was called for as per the World Bank guidelines under International Competitive Bidding (ICB) procedures. The ICB tender falls under prior review category of the World Bank. The World Bank has to approve the Tender Document prior to calling for tenders. The tender was scrutinized by the Fisheries Department. The recommendations of the Fisheries Department, along with the documents submitted by the Bidders, analysis made by the Fisheries Department, additional information sought and entire documents, including the minutes of the Technical Committee meeting, has to be forwarded to the World Bank for getting the World Bank's approval through the Project Management Unit of the CDRRP. Hence, the outcome of the tender has to be approved by the World Bank in the form of a No Objection Certificate.

(iii)The tender for procuring VHF equipment for 2600 numbers of 25W to mechanized fishing boats and 18700 numbers of 5W VHF equipment for small Country Crafts was called following International Competitive Bidding (ICB) procedures of the World Bank and the invitation for bidding was published on 06.06.2015. Based on the pre-bid meeting queries by the Bidders on 23.06.2015, NOC for ICB Bid Document, incorporating the corrigendum for queries, was approved by the World Bank on 03.11.2015. Based on the World Bank's approval, the Bid was invited on 10.12.2015 and also was uploaded in the Website. The last date for receipt of the Bid was

01.02.2016 before 3.00 pm IST. Two Bidders had submitted the bids on 01.02.2016 viz., the petitioner and the 3rd respondent. The Bids were opened on 01.02.2016 at 03.30 pm by the Tender Technical Scrutinizing Committee members and officials concerned in the presence of the Bidders/Authorized representatives of the Bidders.

(iv)The Bids were duly signed by the members and officials monitoring the tender process and the bid information, on amount quoted in the tender, Bid security amount, important documents enclosed were announced to the Bidders. The petitioner quoted a sum of Rs.41,92,08,300/- and became L2 Bidder, whereas, the 3rd respondent quoted Rs.33,97,30,118/- and became the L1 Bidder. On scrutinizing the tender, it was found that there were arithmetical error between the Letter of Bid of both Bidders and that of Price Schedules, which were informed to the Bidders and confirmation obtained for confirmed bid price from both the Bidders viz., the petitioner quoted Rs.45,48,39,100/- and the 3rd respondent had quoted Rs.34,02,63,218/-. The petitioner had quoted Rs.11.46 crores higher than the L1 bidder viz., the 3rd respondent.

(v)For scrutinizing the tenders, a Tender Technical Scrutinizing Committee and a Tender Award Committee was formed through

G.O.(Ms).No.215, Animal Husbandry Dairying and Fisheries (Fs-6) Department dated 19.11.2015. The Commissioner of Fisheries is the Chairman of the Committees. The received tenders were scrutinized by the Tender Scrutinizing Committee as per the World Bank prescribed procedures and the conditions in the Bid Document. At this stage, the petitioner submitted a representation to the Commissioner of Revenue Administration, Chennai on 05.08.2016. The petitioner raised several objections with regard to the documents submitted by the 3rd respondent. By reply dated 11.08.2016, the Fisheries Department explained the correctness of the decision taken by them.

(vi)Though Joint Venture was allowed, the petitioner firm had not quoted the Bid under Joint Venture as per the Bidder Information Form submitted by the petitioner as part of their Bid Document. As per the Tender Conditions, the Bidder should have executed one similar contract or any other wireless communication equipments contract, equivalent to or more than Rs.34,60,00,000/- in any one of the last five years as on 31.03.2015. The petitioner (L2 Bidder) has executed maximum of Rs.7.08 crores, whereas, the 3rd respondent (L1 Bidder) had executed contracts in the year 2013-2014 for a value of Rs.19.65 crores, which is higher than the basic eligible amount of Rs.5.19 crores. Further, as per the Tender

Conditions, the Dealer or the Non-Manufacturer should have sold at least 4500 numbers of VHF equipments or similar wireless communication equipments in any one of the last five years as on 31.03.2015, which are in successful operation for at least one year on the date of submission of Bid. The petitioner had sold a maximum of 3877 numbers, which is less than the required 4500 numbers, which makes the petitioner ineligible, whereas, the 3rd respondent (L1 Bidder) had sold 4629 numbers of equipments, which is more than the required 4500 numbers. Hence, the petitioner becomes ineligible based on the Tender Documents provided by them. The turn over of the 3rd respondent for the years 2010-2011 to 2014-2015 was Rs.98.04 crores, whereas, the turn over of the petitioner was only Rs.20.64 crores. In these circumstances, the respondents 1 & 2 prayed for dismissal of the Writ Petition.

4.The 3rd respondent also filed their counter and stated that the 3rd respondent was fully qualified and was rightly awarded the tender. Further, the 3rd respondent has stated that the petitioner was ineligible since they have not fulfilled the conditions stated in the Tender Form. In these circumstances, the 3rd respondent also prayed for dismissal of the Writ Petition.

5.Heard Dr.P.Jagadeesan, learned counsel appearing for the petitioner, Mr.S.N.Parthasarathi, learned Government Advocate appearing for the respondents 1 & 2 and Mr.P.Giridharan, learned counsel appearing for the 3rd respondent.

6.On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the 1st respondent floated a tender for procuring 2600 numbers of 25W VHF boat equipments and 18700 number of 5W VHF hand-held equipments for Country Crafts. The date of commencement of the tender was 10.12.2015 and the last date for submission of the tender was 01.02.2016 at 03.00 pm IST. The Bid was opened on 01.02.2016 at 03.30 pm. Only the petitioner and the 3rd respondent had participated in the tender. The 3rd respondent quoted a sum of Rs.34,02,63,218/-, whereas, the petitioner had quoted a sum of Rs.45,48,39,100/-. Since the 3rd respondent quoted a lesser price, they were declared as L1 Bidder and the petitioner became L2 Bidder. From the price quoted by the petitioner and the 3rd respondent, it is clear that the petitioner had quoted a sum of Rs.11.46 crores higher than the 3rd respondent. So far as the price is concerned, it is clear that the petitioner has quoted a higher price, therefore, the tender cannot be awarded to the petitioner.

7.The next aspect is with regard to the qualification of the petitioner and the 3rd respondent as per the Tender Conditions. As per Section III (II) of the Bid Document, the Bidders must fulfill the following conditions:

> "Bids of Bidders quoting as authorized representative of a manufacturer also can be considered, provided:
>
> a. the manufacturer furnishes a legally enforceable authorization in the prescribed form assuring full guarantee and warranty obligations as per GCC and SCC; and
>
> b. The Bidder as authorized representative has financial capacity, for at least 15% of the amount specified in TABLE 1 for all items mentioned in any one of last 5 years with satisfactory operation for at least one year on the date of submission of the bid. (2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015). It is further clarified that the Non-Manufacturer bidder can either have single order of 15% value of INR 34,60,00,000/- as specified in table-1 of sl.no.2 or multiple orders of total value as specified above in any one of the preceding of 5 years in this clause. It is further clarified that such orders can be of supply of VHF.UHF/Similar Wireless Communication Equipments for which bids are invited.
>
> c. The bidder is allowed to meet this criterion of 30% as

the technical experience capacity of the quantity spelled in the Table 2 for item 1, in any one of the last five years on the date of submission of bid. (2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015).

- The supplies made should be in satisfactory operations for at least one year on the date of submission of Bid. Also satisfy items of 2 and 3 of Table 2"."

8.It is pertinent to note that both the petitioner and the 3rd respondent come under the category of Non-Manufacturers and hence, they are bound to comply with Section III (II) of the Bid Document. The documents of the petitioner and the 3rd respondent were scrutinized by the Tender Scrutinizing Committee and it was found that the petitioner has only executed a maximum of Rs.7.08 crores in any one of the last five years as on 31.03.2015, whereas, the 3rd respondent had executed contracts to the tune of Rs.19.65 crores in the year 2014-2015, which is higher than the basic eligible amount of Rs.5.19 crores.

9.As per Section III, Table 2 S.No.1, a Dealer or Non-Manufacturer should have sold at least 4500 numbers of VHF equipments or similar wireless communication equipments in any one of the last five years as on 31.03.2015 (i.e.) 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, which are in successful operation for at least one year on the date of submission of the Bid. In this regard, the petitioner had sold a maximum of 3877 numbers of VHF equipments in the year 2012-2013, which is less than the required 4500 numbers to have been sold, which makes the petitioner ineligible, whereas, the 3rd respondent had sold 4629 numbers of VHF equipments in the year 2013-2014, which is more than the required 4500 numbers. Therefore, on this ground also, the petitioner becomes ineligible for awarding the tender.

10.It is settled position that a Court before interfering in tender or contractual matters in exercise of power under judicial review, should satisfy itself whether the process adopted or decision made by the Authority is malafide or intended to favour some one or whether the process adopted or decision made is so arbitrary or irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached and whether the public interest is affected. If the answer to these questions are in the negative, then there should be no interference under Article 226 of the Constitution of India.

11.The Court does not have the expertise to correct the administrative decision. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. Such decisions are made by experts. In view of the nature of the work, the qualifications or eligibility criteria prescribed by the respondents 1 & 2 cannot be said to be unreasonable or discriminatory.

12.When the Tender Scrutinizing Committee, after scrutinizing the Bid Documents submitted by the petitioner and the 3rd respondent, found that the petitioner is ineligible, the same cannot be reviewed by this Court unless *malafide* is attributed to the Technical Committee. In the case on hand, there cannot be any *malafide* to the Tender Scrutinizing Committee in declaring the petitioner as ineligible. The petitioner having quoted a higher rate (i.e.) Rs.11.46 crores more than the price quoted by the 3rd respondent, they cannot claim for awarding the tender in their favour. That apart, the petitioner has not fulfilled the conditions in Section III (II) and

Section III, Table 2 S.No.1 of the Tender Documents, which also makes the petitioner ineligible for awarding the tender.

13.In these circumstances, I do not find any merits in the Writ Petition and the Writ Petition is liable to be dismissed. Accordingly, the Writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

20.09.2017

Index : No

Internet : Yes

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To

1.The Commissioner of Fisheries,
Administrative Building,
DMS Complex, Teynampet, Chennai – 600 006.

2.The Project Director,
The Project Management Unit,
Coastal Disaster Risk Reduction Project (CDRRP).
Tamil Nadu State Disaster Management Agency,
Office of the Commissioner Revenue Administration,
Chepauk, Chennai – 600 005.

M.DURAISWAMY, J.

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Order made in
W.P.No.5086 of 2017 and
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