

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

* * * * *

WRIT PETITION Nos.14131 of 2016 and 3364 of 2017

WP No.14131 of 2016

Between:

The Consortium of M/s ACRE Coking and Refractory
Engineering Consulting Corporation (Dalian) MCC and
M/s. Shriram EPC Limited, rep. by its Vice President – Legal and
Secretarial, R. Sridharan.

...Petitioner

And

Rashtriya Ispat Nigam Limited (RINL),
Visakhapatnam Steel Plant, Visakhapatnam,
Andhra Pradesh, rep. by its Chairman and
Managing Director and others.

...Respondents

JUDGMENT PRONOUNCED ON : 15.03.2017

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

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

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

Writ Petition Nos.14131 of 2016 and 3364 of 2017

Common Order:

These two Writ Petitions are being disposed of by this common order as they arise out of the same cause of action.

The facts in the instant case are that a global tender was floated on 16.01.2014 for the work of 'Coal Chemical Plant including Chilled Water and MBC Treatment Plant' by the respondents. The respondent appointed a competent and credible Independent External Monitors (IEM) with the approval of the Central Vigilance Commission in order to scrutinize the tenders. The petitioner and four others submitted their tenders. The consortium of M/s. L & T Limited became the lowest tenderer and the petitioner became the next lowest tenderer. The documents of the lowest tenderer were verified and it was found that they were not substantiated as being original and it was found that the tender was vitiated due to great deal of ambiguity, lack of proper documentation and clarity. The IEM felt that in respect of Chinese documents there are gaps in language translation, communication, apprehension about the authenticity of documents submitted and it was found difficult to have proper and conclusive scrutiny. The documents submitted by the lowest tenderer were not backed up by verification through an established and reputed Chinese legal firm.

Coke Oven Battery – 5 (COB-5) consists of 17 different packages including consultancy services. The total envisaged project cost is Rs.2858 Crores, out of which the estimated cost of the package under the said tender is Rs.523 Crores which is about 18.3% of the total project cost. The Coke Oven Battery main package was awarded in July 2015

with a completion period of 29 months. On the recommendation of the IEM and legal advice, the tender of the lowest tenderer was rejected. It was also noticed that the petitioner is also having a consortium partnership with one Chinese Company and in view of the problem in documentation it was also thought not to award the work to the next lowest tenderer, but to re-tender the work. Accordingly, the work of Coal Chemical Plant was re-tendered on 30.03.2016 and the petitioner also submitted its tender. The tender of the petitioner was not processed further on account of their poor performance with the awarded/on going work i.e., Sinter Machine-1 Revamping and Upgradation and Phase-1 of Sinter Machine-2 Revamping and Upgradation.

In those circumstances, the petitioner filed W.P.No.14131 of 2016 challenging the cancellation of the tender notice dated 16.01.2014 and seeking award of the contract, as the petitioner being the second lower tenderer. The petitioner also filed W.P.No.3364 of 2017 seeking a direction to the respondents to consider the petitioner's tender along with other tenders submitted pursuant to the re-tender notice dated 30.03.2016.

Though the petitioner filed W.P.No.14131 of 2016 challenging the cancellation of earlier tender notice dated 16.01.2014, since the petitioner participated in the re-tender, which was not processed because of the poor performance of the petitioner, the earlier Writ Petition No.14131 of 2016 becomes infructuous and what remains to be considered is W.P.No.3364 of 2017 only.

This Court, by order dated 01.02.2017, granted interim stay for a period of one week and the respondents were directed to produce the

record on the next date of hearing. After few adjournments, the matter was heard on 07.03.2017.

The petitioner submits that the reason given for non-consideration of the petitioner's tender subsequent to re-tender notice was non-existing and invented to eliminate the petitioner from participating in the tender process. The fact of non-consideration of the earlier tender of the petitioner, though the petitioner became the second lowest tenderer, made it clear that the respondents wanted to eliminate the petitioner from the tendering process. However, it was admitted by the petitioner that in respect of the work of "Sinter Machine-1 Revamping and Upgradation and Phase-1 of Sinter Machine-2 Revamping and Upgradation" along with its consortium partner an agreement was entered on 23.06.2014 and the period for execution of the work expired on 23.10.2016. Even before the expiry of the said period of work, a termination notice was issued on 29.08.2016. The petitioner submitted a reply on 09.09.2016 alleging that the work was delayed mainly due to the laches committed by the respondents only. However, due to subsequent negotiations a letter was issued on 10.10.2016 directing the petitioner to start the shut down activities from 15th October 2016 and minutes of meeting was recorded on 14.10.2016. The termination notice dated 29.08.2016 was withdrawn on 20.10.2016. The time for completion of work was extended up to 22.01.2017. Hence, it cannot be said that there was poor performance in execution of the said work, which disabled the respondents from considering the tender in the present work. Hence, the letter dated 23.11.2016 has to be set aside. It is also stated that there were several other contracts issued by the respondents to others over the past 10

years and though majority projects were not completed no action was taken against them.

A detailed counter affidavit was filed on behalf of the respondents stating that the consortium partner sent an e-mail on 27.12.2016 informing the respondents that they are no longer participating in the project. In view of the withdrawal of the consortium member, the tender of the petitioner did not become eligible. The case of the petitioner with regard to ongoing contract was referred to the Independent External Monitors (IEMs) pursuant to the representations made by the petitioner on 14.11.2016 and 24.11.2016 and the Independent External Monitors (IEMs) submitted a report on 11.01.2017 holding that the petitioner's performance was poor. The said fact is thus established beyond doubt by the chronology of events provided by the respondents and the large number of reminders seen on record given by the respondents to which the petitioner did not respond positively. Added to the above, as stated above, the consortium partner was not willing to participate in the project. It is also stated that the earlier notice of termination was not brought to the notice of the consortium partner which indicates the casualness and *mala fide* intention on the part of the petitioner in suppressing such information from the consortium partner. The action of non-consideration of the tender of the petitioner was taken in view of Clause No.32 of the tender conditions which enables the respondents to reject the offer of the tenderer whose performance is poor in awarded/ongoing works. Even after giving a chance to the petitioner by withdrawing the letter of termination, the performance of the petitioner was found to be poor. The time bound completion of the work under the present tender is very essential and crucial for the respondents for production planning and

logistics and financial stability as the commissioning of Coke Oven Battery-5 is scheduled in December 2017. The extension of time was granted by letter dated 27.10.2016 reserving the right to levy liquidated damages with no provision for escalation. The extension for Sinter Machine-1 was granted up to 22.04.2017 and that of Sinter Machine-2 up to 22.10.2017. In spite of that the current progress is not in line with the committed schedule and the schedules are being slipped. The actual percentage of completion remains as low as 30% for supply, for equipment erection it is only 4%, engineering it is 83%, civil work is 54% and dismantling is 98%. Hence, the withdrawal of termination notice and granting extension of time does not absolve the poor performance of the petitioner in respect of the ongoing works. The matter relating to the rejection of offer was referred to the IEM on the representations of the petitioner and the IEM opined that there was poor performance by the petitioner. In view of the above circumstances only, the offer of the petitioner was not taken into consideration. After rejection of the offer of the petitioner, the other tenders were evaluated and three tenderers were found qualified.

The petitioner filed a rejoinder stating that the letter issued by the consortium partner was dated 27.12.2016 and it was much later to the communication made by the respondents to the petitioner on 23.11.2016. In fact, the communication of the consortium partner was also misunderstood, as the partner never decided to withdraw from the tender process and the misunderstanding arose due to English translation of the Chinese version. The partner addressed a letter to the respondents confirming that they are willing to continue to remain in the tender process. The delays in ongoing works are purely attributable to the respondents. In fact, the subject tender was originally floated in the year

2013 and because of ineligibility of the bidders the tender was again floated in 2014, where the petitioner was the second lowest bidder. Without awarding the work to the second lowest bidder, fresh tenders were called for and the tender of the petitioner was rejected at the threshold on the ground of poor performance. The role of IEM is only recommendatory in nature, but it is not binding on the respondents. In fact, in respect of one McNally Bharat Engineering Limited a contract was awarded, though the said party delayed the ongoing project for more than nine years. Though the said party also tendered for the present work, Clause 32 was not applied in its case.

In view of the above averments, it has to be seen whether the refusal of consideration of the tender of the petitioner based on Clause 32 of the tender conditions is valid or not.

The relevant Clause 32 of the tender conditions reads as follows.

“RINL reserves the right to reject the offers of the tenderers whose performance is poor in awarded/ongoing works if any.”

There is no dispute that the petitioner was earlier awarded the work of Sinter Machine-1 Revamping and Upgradation and Phase-1 of Sinter Machine-2 Revamping and Upgradation and the said work was terminated by letter of termination dated 29.08.2016. Thereafter negotiations took place and the minutes of meeting were recorded on 14.10.2016. The letter of termination was withdrawn and the period of execution of work was extended up to 22.04.2017 and 22.10.2017 respectively. In view of the said act of the respondents, it cannot be said that there was poor performance inviting them to invoke Clause 32. Even if there was any poor performance, that poor performance was condoned by the subsequent acts of extending the time for completion of the work.

As pointed out by the petitioner, the subsequent communication of the one of the consortium partners withdrawing from the bid was based on poor communication and translation of such communication and in any event it is only a subsequent communication to the letter of the respondents dated 23.11.2016. Thus there is no basis for rejecting the consideration of tender of the petitioner based on poor performance in the ongoing works by invoking clause 32 of tender conditions and hence the letter issued by the respondents on 23.11.2016 cannot be sustained. The tender of the petitioner is eligible to be considered along with other valid tenders for award of the present work. In the circumstances, W.P.No.3364 of 2017 is liable to be allowed.

Accordingly, W.P.No.14131 of 2016 is dismissed as infructuous and W.P.No.3364 of 2017 is allowed directing the respondents to consider the tender of the petitioner along with other eligible tenders pursuant to the tender notice dated 30.03.2016. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions, if any, pending in these Writ Petitions, shall stand closed.

A.RAMALINGESWARA RAO, J

Date: 15th March 2017
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