THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION No.9580 OF 2017

ORDER:

Heard learned counsel for the petitioners, learned counsel for the second respondent and the learned Senior counsel for the seventh respondent.

The facts in this case are not in dispute. M/s.Fertilizer Corporation of India Limited (FCIL) situated at Ramagundam, Telangana, was shut down in 1999. It was decided to revive the said fertilizer complex and to set up a new Gas based mega capacity Ammonia-Urea fertilizer complex mainly comprising of Ammonia Unit (2200 MTPD) based on natural gas feed, Downstream Urea unit (3850 MTPD) and associated utilities and offsite facilities. In the revival process, a Joint Venture company, the second respondent was formed involving the third respondent, the National Fertilizers Limited and FCIL. The third respondent invited e-bids for the "Supply, Fabrication and Transportation of Fabricated Structural Steel Assembly" vide Bid Document No.SM/A747-100-AZ-MR-8112/036, dated 22.11.2016. The late date for submission of bids was upto 1200 Hours on 22.11.2016. The pre-bid meeting was conducted on 08.11.2016 and it was stated that the price bids would be opened at 1400 Hours on 23.11.2016 in the Office of the third respondent at Delhi. The technical criteria specifies that the bidders shall be fabricators of structural steel and shall have executed minimum 3600 MT of fabrication work (including supply of raw material) from his own facility in a period of six months in preceding seven years. The minimum annual turnover of the bidder was required to be Rs.42 crores, in at least one of the immediate preceding three financial years as on date of issue of enquiry. The bid document provides for 'Clarification on Bidding Documents' under Clause 8 thereof. It is also stated that bid evaluation would be carried out without any post-bid correspondence. Part I comprises Techno Commercial and Part II relates to Price Bid. Four bidders became eligible in the second stage and seventh respondent was declared as lowest bidder. Challenging the action of the third respondent in computing the effect of a 2% adjustment against issue of 'Form C' in relation to tender 'Supply of Fabricated Structural Steel Assembly' and in regarding outside state suppliers as lower tenderers even though the quoted rate (exclusive of taxes) of the local supplier being lower as arbitrary and unconstitutional, and in the alternative, seeking declaration that Clause 8.2 of the Special Purchase Conditions (SPC) in the Bid Document, dated 22.11.2016 is illegal and contrary to the statutory provisions of the Central Sales Tax Act, 1956 and also violative of Articles 14, 19(1)(g), 21 and 300A of the Constitution of India, this Writ Petition was filed.

Since the matter relates to tender and this Court wanted to dispose of at the earliest point of time, while permitting the petitioners to take out personal notice to the respondents 2 to 5 and 7, ordered *status* quo to be maintained by order, dated 17.03.2017. Seeking vacation of the same, separate counter affidavits were filed by the second respondent and on behalf of respondents 3 to 5. In the counter affidavit filed by the second respondent, it was stated that the order on the successful bidder was already placed on 08.03.2017 and the parties involved took steps to fulfil their respective obligations under the contract.

In view of the nature of the controversy, it is not necessary to traverse the averments made in the affidavit filed in the writ petition and the counter affidavit filed. The controversy relates to the interpretation of Clause 8.2 of Special Purchase Conditions. At this stage, it is to be noticed that the petitioners did not raise any objections before filing its bid in spite of availability of opportunity with regard to the terms and conditions of the bid. After thoroughly understanding the conditions of the bid, the petitioners participated in the bid process and when they came to know that it was not the lowest bidder, the petitioners approached this Court by filing the present writ petition. This writ petition is liable to be dismissed on this sole ground as the petitioners cannot maintain a writ petition, having participated in the tender process and after coming to know that it was not successful. The tender conditions were accepted by the petitioners and the bid was submitted.

However, since arguments were advanced on the disputed clause in the Special Purchase Conditions, the case is heard on merits. Though the learned counsel for the second respondent raised the plea of non-maintainability of writ petition on the ground of lack of territorial jurisdiction, by submitting that the tenders were floated at Delhi and this court has no jurisdiction, the said point is not considered as relevant for the disposal of the case, as the case is being of on the merits.

The learned counsel for the petitioners submits that Clause 8.2 is contrary to the provisions of the Central Sales Tax Act and hence, it should not have been incorporated in the tender conditions. The said disputed clause reads as under.

> **8.2 Central Sales Tax (CST)/VAT:**
>
> Quoted Price should be exclusive of CST - and/or VAT as applicable on the finished goods. Form 'C' shall be issued by Owner as per requirement.
>
> VAT amount shall be paid at actuals to the Supplier on production of all related documents including tax invoice enabling Owner to take VAT input Credit in accordance with the provisions of VAT Act (for evaluation no input tax credit for VAT will be considered).

The said clause is clear and was thoroughly understood by the bidders, who submitted their bids. As stated above, though there was a provision under Clause 8 of the General Conditions by seeking clarification on bidding document, no such clarification was sought by the petitioners. It was also made clear in the 'Bidding Document' that no post-bid correspondence would be entertained.

The bids which were qualified in the technical bid were evaluated for price bid and the Statement was prepared as follows.

LOADING FACTOR (INDIGENOUS) SUPPLY + FREIGHT									
Sl No.	Description	M/s.ATMASTCO Pvt Ltd		M/s.Karbon Steelmart Pvt Ltd		M/s.Pennar Engineered Building Systems Ltd		M/s.Phenix Construction Technologies (A Division of M&B Engineering Ltd)	
1	FOT Despatch Point Price including Pkg&Fwdg charges		1.000		1.000		1.000		1.000
2	Inspection Charges	1.25%	0.0125	1.25%	0.0125	1.25%	0.0125	1.25%	0.0125
3	Excise Duty	12.50%	0.1250	12.50%	0.1250	12.50%	0.1250	12.50%	0.1250
4	Sales Tax (CST/VAT)	2%	0.0225	2%	0.0225	5%	0.0563	2%	0.0225
5	Freight	4.80%	0.0480	5.07%	0.0507	2.22%	0.0222	5.50%	0.0550
6	Service Tax on Freight Charges	15.00%	0.0072	15.00%	0.0076	NA	0.0000	4.35%	0.0024
7	ED on Freight	0%	0.0000	0%	0.0000	12.500%	0.0028	0%	0.0000
8	CST/VAT on Freight	0%	0.0000	0%	0.0000	5%	0.0012	0%	0.0000
9	Total Loading Factor		1.2152		1.2183		1.2200		1.2174
	Engineers India Ltd	RFQ No:SM/A747-100-AZ-MR-8112/036							
	New Delhi	ITEM: SUPPLY, FABRICATION & TRANSPORTATION OF FABRICATED STRUCTURAL STEEL ASSEMBLY							

Thereafter, another statement was prepared for the loading factor (indigenous), supply and freight and including sales tax (CST/VAT).

A plain reading of the clause makes it clear that the quoted price is exclusive of CST/VAT as applicable in the financial year and in respect of outside suppliers/bidders, Form 'C' would be issued by the owner as per requirement, as a result of which, the tax liability would be only 2% in respect of suppliers outside the State. In respect of local suppliers, the VAT amount had to be included and actuals would be paid to the supplier on production of all related documents including tax invoice enabling the owner to take VAT Input Credit in accordance with the provisions of the

VAT Act. However, it is made clear that for evaluation, no input tax credit would be considered. This clause was properly understood by the petitioner, seventh respondent and other tenderers. After understanding as per the bid document, bids were submitted and a comparative statement was prepared, which reads as under.

PRICE COMPARATIVE AND LOADING STATEMENT										
Sl. No	Description /Bidder	Qty	M/s.ATMASTCO Pvt Ltd		M/s.Karbon Steelmart Pvt Ltd		M/s.Pennar Engineered Building Systems Ltd		M/s.Phenix Construction Technologies (A Division of M&B Engineering Ltd)	
			Unit in INR	Total in INR	Unit in INR	Total in INR	Unit in INR	Total in INR	Unit in INR	Total in INR
1	M/s	6000	65,200	391,200,000	67,000	402000,000	66,300	397,800,000	75,818	454,860,000
3	Total lumpsum price on FOT Despatch Point			391,200,000		402000,000		397,800,000		454,860,000
4	Multiplying Factor for Supply + Freight (refer Loading Factor)			1.2152		1.2183		1.2200		1.2174
5	Total Supply Price after applying Multiplying Factor			475,386,240		489,756,600		485,316,000		553,746,564
			L1		L2		L3		L4	
	Engineers India Ltd		RFQ: NO:SM/a747-100-AZ-MR-8112/036				PROJECT:Revival of Ramagundam Fertilizer Complex			
	NEW DELHI		ITEM: SUPPLY, FABRICATION & TRANSPORTATION OF FABRICATED STRUCTURAL STEEL ASSEMBLY				CLIENT:- M/s.Ramagundam Fertilizers and Chemicals Limited (FRCL)			

After preparation of the comparative statement, the seventh respondent was found to be the lowest, whereas the petitioner was found to be the highest. The seventh respondent and two others are outside State suppliers for whom Form 'C' would be issued by the owner which involves the liability of 2% tax. In respect of the petitioners, 5% tax component on the basic price as well as on freight was loaded. The other bidders did not claim any tax on the freight. The loading of tax on the freight is also another contributing factor for the price of the petitioner going on high side. The petitioners did not dispute the above statement, but now turn around and submits that the very clause incorporated in the tender document under Clause 8.2 itself is contrary to law. This Court is not inclined to accept the said submission and examine the merits of the said submission while examining the provisions of the VAT Act for the simple reason that the petitioners, with its eyes wide open, after understanding the terms and conditions, submitted the bid. When they noticed that their bid was not the lowest, it cannot be allowed to turn around and challenge the conditions, which they accepted earlier.

This point was decided by the Supreme Court in **Meerut Development Authority v Association of Management Studies and another**[1] and **Reliance Telecom Limited and others v Union of India and others**[2]. The Supreme Court considered the entire case law in the latter case and held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and it must have a reasonable play in its joints. By relying on **Global Energy Limited v Adani Exports Limited**[3], the Supreme Court observed that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. The Courts also cannot interfere with the terms of the tender simply because it feels that some other terms in the tender would have been wiser or logical.

It is not the case of the petitioners also that the conditions of the tender are tailor made to benefit any particular tenderer or class of

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[1] (2009) 6 SCC 171
[2] AIR 2017 SC 337
[3] (2005) 4 SCC 435

tenderers. In **Afcons Infrastructure Limited v Nagpur Metro Rail Corporation Limited**[4]**,** it was held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there are *mala fides* or perversity in the understanding or appreciation of the tender conditions.

The learned counsel for the second respondent also relied on the decision in **Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) v CSEPDI-Trishe Consortium**[5]. In the said case, the submission made by the unsuccessful tenderer to the evaluation report prepared by the consultant was not accepted by the Court on the ground that the Court cannot sit in judgment over the decision taken by the employer by observing that in a complex fiscal evaluation, the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies etc., have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field.

The petitioners did not challenge the preparation of evaluation statement nor it is the case of the petitioners that the petitioners were discriminated. The sole point on which the entire case rests is with regard to the condition under clause 8.2, which equally applies to all the parties. In view of the same, this Court sees no ground as to interfere to the said clause or declaring the seventh respondent as lowest bidder.

In the hind site, it appears that the petitioners were aware of the issuance of the Letter of Acceptance on 08.03.2017 and came to this Court on 17.03.2017. This Court in its anxiety to settle the dispute, granted *status quo* on 17.03.2017 and modified on 03.04.2017 when the

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[4] 2016 (8) SCALE 765

[5] 2016 (10) SCALE 69 = AIR 2016 SC 4879

petitioners did not cooperate for disposal of the case. The work has to be completed within a period of six months and already precious time of nearly forty-five (45) days had lapsed. The project is for the revival of the second respondent, which was closed in the year 1999.

When the case was listed for consideration on 03.04.2017, time was sought by the petitioners for filing rejoinder instead of cooperating with the disposal of the matter. Keeping in view the Letter of Acceptance on 08.03.2017, this Court, by order, dated 03.04.2017, permitted the second respondent to go ahead with the work by modifying the order of *status quo* and posted the case after one week. Instead of appearing after one week and arguing the matter, the petitioners took the matter to the Division Bench in W.A.No.464 of 2017 and the Division Bench was pleased to allow the Appeal, by order, dated 13.04.2017, on the short ground of lack of reasons in the order of modification dated 03.04.2017 and accordingly, the order, dated, 03.04.2017, was set aside and liberty was given to make a request for early hearing. When the matter was listed in an unreachable position for hearing, the counsel for the second respondent made a request and accordingly an order was passed on 18.04.2017 to post the matter on 20.04.2017 high-up in the list. In the meanwhile, the petitioner filed rejoinder. However, on 20.04.2017, the petitioners again sought time. This Court passed an order adjourning the case to 21.04.2017 by observing that in view of the request made by the petitioners, in the event of dismissal of the writ petition, the petitioners shall be mulcted with costs. The case is ultimately heard on 21.04.2017 and orders are reserved.

In view of the law laid by the Supreme Court in **Raunaq International Limited v I.V.R.Construction Limited**[6], this writ petition is dismissed with costs on Rs.25,000/- (Rupees twenty five thousand only)

[6] (1999) 1 SCC 492

payable to the Telangana Legal Services Authority within four weeks from today.

Consequently, miscellaneous petitions, if any pending in the writ petition, shall stand closed.

A.RAMALINGESWARA RAO, **J**

26.04.2017
Pln

Note: Issue C.C.by 29.04.2017.
(By order)
pln