* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON : JULY 06, 2017

\+ **W.P.(C) 3592/2017 & CM Nos.15800-802/2017**

NATIONAL OILFIELD EQUIPMENT & SERVICES (W.L.L)

..... Petitioner

Through : Mr.Balbir Singh, Sr.Advocate, with Mr.Sandeep Bajaj, Mr.Soayb Qureshi, Ms.Rubal Maini and Ms.Aakanksha, Advocates.

versus

OIL AND NATURAL GAS CORPORATION LIMITED & ANR

..... Respondents

Through : Mr.Varun Mishra, Advocate, for R-1.
Mr.Anil Airi, Sr.Advocate, with Ms.Sukanya Lal and Mr.B.Singh, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The petitioner questions rejection of its bid, for supply of 12863 MT of Potassium Chloride (tender value to be ₹103 crores). The tender (NIT) was issued by Oil and Natural Gas Corporation (ONGC) on 4.10.16, inviting bids for the supply of Potassium Chloride for the requirement of various ports/basins of ONGC.

2. The petitioner is a Jordian incorporated company; it provides oilfield chemicals and equipments. It claims to have experience for at least twenty years as a regular supplier of Potassium Chloride to ONGC. Furthermore, it has the reputation of supplying Potassium Chloride to major oil drilling companies across the world and has been awarded the tender, in the subject tender itself for two ports for Chennai and Kolkata. Its main contention in these proceedings is with respect of rejection of this tender for supply of the tendered articles at Mumbai port. For Mumbai port, its bid was US$ 503.95 per MT; the successful bidder i.e. RNA International Marketing (M.E.) (FZE) offered US$ 500.92 per MT. On the basis of this price comparison, RNA International Marketing (M.E.) (FZE) (hereinafter 'RNA') was treated L-1 and declared successful.

3. As required under the contract, the petitioner raised its grievance with the Independent External Monitor i.e. IEM. It was contended firstly that RNA (the bidder) did not exist at the time when samples were given for testing, and that the manufacturer's letter of authorization being Dead Sea Works Limited, an Israeli based company. It was submitted that in these circumstances the bid ought to have been rejected. The other contention made was that change of name by RNA (as previously known as M/s Flawless Trading) was

deceptive and a device to bid for the contract. The petitioner contended that M/s Flawless Trading essentially was a jewellery manufacturer and exporter owned by a single shareholder. Its metamorphosis into RNA, was shrouded in suspicion and dubious. The petitioner sought to highlight that RNA, the successful bidder, did not have the ability or financial strength to execute the contract and that the rejection of its bid, was arbitrary.

4. The IEM on the basis of submissions made before it, recorded its conclusions, the material part of which is reproduced below:

> *"From the documents before us, it is clear that RNA came into existence on 15.11.2016. RNA could not produce before us any document that theirrequest for name change from Flawless to RNA has been approved by SAIF zone authorities on or before 08.11.2016. Thus on 08.11.2016 i.e the date of submission of sample by RNA to lDT, RNA had not come into existence. Also the manufacturer of KCL i.e Dead Sea Works Ltd. on whose behalf of RNA has quoted in the instant tender had issued the letter of authority to RNA on 09.11.2016 but on this date RNA had not come into existence. Thus, on 08.11.2016, when the sample was submitted by RNA for testing in ONGC lab neither the company RNA had came into existence nor had the con1pany been authorized by the manufacturer to quote on its behalf. In such circumstances, the validity of the test report issued to the bidder on the basis of wrong representation made by RNA needs to be considered by the Competent Authority.*
>
> *ii. With respect to RNA meeting the turnover parameter of the Financial criteria clause, we have noted ONGC has relied upon the Balance Sheet of Flawless for evaluation purposes. However, ONGC have not looked into the bank account details of RNA. The representative of RNA in their submission before the IEMs could not provide any information as to when RNA had opened their Bank account in Sharjah nor any*

documentation to refute the allegations made by NOES regarding financial statement of Flawless Trading despite their being specifically informed of the allegations."

5. The Tender Evaluation Committee of ONCG considered the report of the IEM and proceeded to reject the petitioner's claim as well as IEM's report. Material part of the Tender Evaluation Committee, its consideration and decision are extracted below

"2.4 ***Representatfon to Independent external Monitor:***

Representation dated 12/02/2017 has been sent by M/s National Oilfield Equipment and Services Jordan to Independent External Monitors (IEMs) .The response submitted by ONGC to IEMs is as under:

SI	*Representation of M/s NOES, Jordan*	*ONGC's Reply*
1	***<u>Invalid Lab Test Report:</u>*** *RNA International Marketing (M.E.) FZE, Sharjah., 'U.A.E. is a new company and has only come into existence on November 2016 vide commercial license No.08476 issued by Sharjah Airport International Free Zone (SAIF).* *As against the above the KCL sample as per IDT test report No.20000008999 dt.21.11.2016 has been submitted in the name of M/s RNA International C/O Anuj Gupta, Dehradun on 8th November, 2016.* *I.e., the sample has been submitted in the name of non-existing company as on date of submission and as such should not be used for submitting in the present tender. The lab test report therefore submitted is invalid and should not be considered by the ONGC for the present tender*	*The test report no.20000008999 dt.21.11.2016 and amendment dated 8.12.2016, issued by IDT, Dehradun is acceptable as per tender Bid Evaluation Criteria.*

2.	***R.N.A. International Marketing (M.E.) FZE is a fictitious company that has been created to carry out this tender:*** *M/s. R.N.A. International Marketing (M.E.) FZE is a fictitious company which has taken over a shell company Mis Flawless trading FZE with a turnover of approx .. 25 million USD just in 3 days before the deadline of tender dosing date with sole purpose to meet the 30% turnover criteria as per the BEC requirements of turnover of ONGC tender clause.* *Credential of M/s R.N.A. International marketing did not have a bank account and was opened only in January 2017. We have verified from confirmed sources that the banking transaction of Mis Flawless have been less than 1 million dollar.* *License no. 0846 issued by SAIF Zone to M/s. FlawlessTrading FZE showing incorporation date as 30th August 2010.The License also shows the period of the license as 30th August 2015 to 29th August 2016. This is the annual feature of the license as it Is renewed every year for next 12 months. License no. 0846 referred above RE-ISSUED WITH NAME CHANGE to R.N.A. International Marketing (M.E.) FZE showing date of incorporation as 30th August 2010. The License shows the period of license as 30th August 2016 to 29th August 2017.The license Issue date of 22nd November 2016 is mentioned at bottom*	*As per annual accounts submitted by the bidder, Turnover of M/s Flawless trading company is USD 25.25 million.* *The licence certificate number enclosed with the bid is 08476. It was noted that issued certificate is of dated 22.11.2016. It was also noted from the certificate that the date of validity of the said certificate is mentioned as w.e.f.30.08.2016 to 29.08.2017. As such, the date has been considered as the date of the firm for*

	of license. *We wish to state that as per the GOING CONCERN CONCEPT the date of incorporation I.E. 30th August 2010 will remain the same for the company I entity with license no. 0846 irrespective of the name Memorandum & Articles of Association. It is therefore, the date of the amendment to the memorandum & articles of association of the licence no. which brings out the change in the structure of the company be it capital structure, name of company, object clause etc.* *In this context, We therefore once again emphasize, that the company name R.N.A. International Marketing (M.E.) FZE has come in to existence only on 15th November 2016 vide above referred amendment to memorandum & articles of association and as such any sample submitted in its name prior to 15th November, 2016 is null and void.*	*coming into existence.*

2.6 M/s RNA international ME FZE is evaluated as L-l for Mumbai Port .In view of pending decision of IEMs for Mumbai Port, It was decided in previous TC meeting held on 27.02.2017 that decision with respect to Mumbai port shall be taken upon decision of IEMs on the matter (Minutes at Annexure-3). In view of urgency of material, order was place on L-l bidder i.e. M/s National Oilfield Equipment and Services Jordan on 01/03/2017 for quantities pertaining to Chennai and Kolkata Port."

6. The Committee took strength from the legal opinion given to ONGC with respect to RNA's change of name and accepted it. According to that view, change of name, once approved (and the change of business also likewise approved) did not result in dissolution or winding up of an incorporated entity, and matter related back to the point of time when the samples were given and the authorization letter, issued by the Israeli company. This view of the committee was accepted by the official authority in the ONGC i.e. Executive Procurement Committee.

7. Mr.Balbir Singh, learned Senior counsel on behalf of the petitioner reiterates the submissions and grounds urged in the pleadings. It is stated that the RNA company did not exist and was not authorized to procure tender, at a point when the samples were allegedly given for testing. Furthermore, even the Israeli manufacturers' letter of authorization was premised upon RNA's existence. As a matter of record, M/s Flawless Trading merely exported and traded in jewellery. Its change of name and change of business lines, to suit the specifications of the tender, occurred under dubious circumstances as at the time when the samples were furnished for testing, the bidder, in fact, did not exist and was not authorized to enter into such arrangements. The bid should have been rejected at the threshold. It was also highlighted that being a Sharjah based enterprise, RNA was covered by the Arab League Resolution of 1972 which banned commercial dealings and trade between UAE and Israel and as such there was a legal bar which prohibited RNA from procuring Israeli origin products such as

Potassium Chloride. If these arguments were to be accepted, the petitioner would be treated as L-1 instead of RNA.

8. Learned Senior counsel further submitted that the eligibility conditions postulated that the concerned bidders should have at least some past record. In this regard the petitioner relied upon Clause 10.1 (m) and Appendix-7 to say that past performance of the bidder, in the same or relative field was essential and since RNA had no prior experience, its bid should not have been accepted. Likewise, it was submitted that RNA did not have financial strength or capability to effect the supplies it claimed it could. In this regard, learned Senior counsel relied upon the tender bid of the successful bidder/RNA. It was lastly urged that the successful bidder has itself undergone a change of shareholding and that M/s RNA Marketing Pvt.Ltd. has now become the sole shareholder. This new shareholder is a Singaporian entity. The change of shareholding into new entity was made to effect supplies. It is submitted that on the face of the tender conditions, it should be cancelled for non-compliance and for not considering all these aspects.

9. Counsel for the respondents appearing on advance notice argue that RNA was an established and existing company although it had no previous record of trading and supplying Potassium Chloride products. Nevertheless, its existence is undoubted, as is evident from the analysis of the Tender Evaluation Committee who took note of its financial health for the past two years. Learned counsel pointed out that M/s Flawless Trading FZE's (RNA) had an average turnover of US$ 25 million in the past and in these circumstances RNA that chose to enter the trade by tying up with the Israeli company for procurement of

Potassium Chloride; obtaining a sample and thereafter changing its name did not violate any law. Learned counsel submitted that fact of the matter is that the samples were found to be fit by ONGC which is an important consideration. Consequently the company, which underwent a change in the name and change in the object clause, was nevertheless an existing one and not a 'fly-by-night' operator. The legality of the opinion with respect to where the change of name or the change of object clause relating back has no importance and certainly, that is not an issue before the court. What matters to the purchaser is the quality of the supply, quality of the product, the assurance of constant supply and the financial stability or health of the supplier. The fact is that both the petitioner and RNA are procurers and not manufacturers ONGC was of the opinion that having regard to samples provided by both, they fulfilled the specifications: RNA had to be preferred being the one with a lower bid.

10. Before proceeding to discuss the merits and the rival contentions and the conditions in the tender, to the extent that they are relevant, are extracted below:

> ***"ELIGIBLE BIDDERS***
>
> *1.1 The bid should be from actual manufacturers.*
>
> *1.2 The bids from sole selling agents/authorised distributors/ authorised dealers/ authorised supply houses can also be considered, provided such bids are accompanied with backup authority letter from the concerned manufacturers who authorised them to market their product, provided further such an authority letter is valid at the time of bidding. Offers without back-up authority from manufacturer will not be considered.*

Required warranty cover of the manufacturers for the product will be provided by such supplier.

1.3 Bidders should not be associated, or have been associated in the past, directly or indirectly, with a firm or any of its affiliates which have been engaged by the Purchaser to provide consulting services for the preparation of the design, specifications and other documents to be used for procurement of the goods to be purchased under this Invitation for Bids."

DOCUMENTS COMPRISING THE BID

10.1 The bid prepared by the Bidder shall comprise the following components, duly completed:

a) Online priced bid format.

b) Documentary evidence establishing that the Bidder is eligible to bid and is qualified to perform the contract if its bid is accepted. The documentary evidence of the Bidder's qualifications to perform the Contract if its bid is accepted, shall establish to the Purchaser's satisfaction:

(i) that, in the case of a Bidder offering to supply goods under the contract which the Bidder did not manufacture or otherwise produce, the Bidder has been duly authorised by the good's Manufacturer or producer to supply the goods in India;

(ii) that the Bidder has the financial, technical and production capability necessary to perform the Contract;

(iii) that, in the case of a Bidder not doing business within India, the Bidder is or will be, if awarded the Contract, represented by an Agent in India equipped and able to carry out the Supplier's maintenance, repair and spare parts stocking obligations prescribed in the Conditions of the Contract and/or Technical specifications; and

(iv) that the Bidder meets the qualification criteria listed in the Bid Data Sheet.

c) Documentary evidence that the goods and ancillary services to be supplied by the Bidder are eligible goods and services and conform to the requirements of bidding documents.

(i) The documentary evidence of the eligibility of the goods and services shall consist of a statement in the price schedule on the country of origin of the goods and services offered which shall be confirmed by certificate of origin from the concerned Chamber of Commerce at the time of shipment.

(ii) The documentary evidence of conformity of the goods and services to the bidding documents may be in the form of literature, drawings and data and shall consist of:

1) A detailed description of essential technical and performance characteristics of the goods.

2) A list giving full particulars including available sources and current prices of spare-parts, special tool etc. necessary for the proper and continuing functioning of the goods for a period of one year.

3) An item by item commentary on the Purchaser's Technical specifications demonstrating substantial responsiveness of the goods and services to those specifications, or a statement of deviations and explanation to the provisions of the technical specifications.

(d) Bid security

(e) Deleted.

(f) Bid submitted by foreign Bidder shall include a detailed description of the relationship between the bidder and its Local

Agent/ Consultant I. representative/ retainer including specific services to be rendered, permanent income tax account number of agent/ consultant/ representative/ retainer, permanent income tax account number of foreign bidder and amount of commission or other payments.

(g) Bid must accompany necessary literature/ catalogue of the equipment as well as of the spare parts catalogue thereof failing which the bid will be rejected.

h) Bidding Document Acknowledgement Form (Appendix-!)

(i) Bid Submission Form (Appendix-2)

(j) Bid submission Agreement Form (Appendix-3).

(k) Check List (Appendix-5)

(l) Bidder's Response Sheet (Appendix-9)

(m) Bidder's past supplies Form (Appendix-?)

(n) Form on Information on Bidder (Appendix-8)

(o) Authorisation letter for Tender Opening (Appendix-10)

(p) Certificate on Relatives of Directors. (Appendix-11)

(q) Back-up Authority Letter alongwith warranty cover of manufacturer in case the bid is from sole selling agent/ authorised distributor/ authorised dealer/ authorised supply house.

r) ....-Integrity ·Pact (IP) (Annexure-VII):

Proforma of Integrity Pact (which is issued along with the bidding document) shall be returned by the bidder along with technical bid, duly signed by the same signatory who signs the *bid, i.e. who is duly authorized to sign the bid. All the pages of the Integrity Pact shall be duly signed by the same signatory.*

(s) Indigenous Bidders should submit copy of valid registration certificate under the VAT/ Sales Tax rules. Further, wherever the scope of supply involves rendering of any taxable service alongwith supply of goods/materials, the Bidder (other than the Service providers from outside India, who do not have any fixed establishment or permanent address in India) should submit copy of a valid registration certificate issued by concerned authorities of Service Tax department. In case the registration certificate for the quoted category of service is not available at the time of submission of offer, an undertaking should be furnished for submission of copy of requisite service tax registration certificate alongwith the first invoice submitted for payment against the purchase order.

(t) The bidder should submit a declaration to the effect that neither the bidder themselves, nor any of its allied concerns, partners or associates or directors or proprietors involved in any capacity, are currently serving any banning orders issued by ONGC debarring them from carrying on business dealings with ONGC. (Appendix-14)

(u) Copy of valid Registration Certificate, if bidder is a Micro or Small Enterprises (MSE) registered with District Industry Centers or Khadi and Village Industries Commission or Khadi and Village Industries Board or Coir Board or National Small Industries Corporation or Directorate of Handicrafts and Handloom or any other body specified by Ministry of MSME. The Registration Certificate should clearly indicate the monetary limit, if any and the items for which bidder are registered with any of the aforesaid agencies.

In case bidding MSE is owned by Schedule Caste or Schedule Tribe entrepreneur, valid documentary evidence issued by the agency who has registered the bidder as MSE owned by SC/ST entrepreneur should also be enclosed.

REJECTION CRITERIA:

	The following vital technical conditions should be strictly complied with failing which the bid will be rejected:
B.1.1	*Bid/should be complete in all aspects covering entire scope of supply for the items quoted and should conform to the technical specifications indicated in the bid document, duly supported with technical catalogues/ literatures, wherever applicable. Incomplete and non-conforming bids will be rejected.*
B.1.2.	***Manufacturer's Experience:*** *In case the bidder is a manufacturer of the offered item, he should satisfy the following along with documentary evidence, which should be enclosed along-with the techno-commercial bid:* *(a) Minimum 3 (three) years of experience of manufacturing Potassium Chloride. The period reckoned shall be the period prior to the date of opening of the techno commercial bid.* *(b) Should have manufactured and supplied minimum 5% of the tendered quantity of Potassium Chloride to various companies during the last 5 (five) Years.* *(c) Documentary evidence in respect of the (a) and (b) above should be submitted in the form of copies of relevant Purchase Orders alongwith copies of any of the documents in respect of satisfactory execution of each of those Purchase Orders, such as-*

	(i) Satisfactory Inspection report (OR) *(ii) Satisfactory supply completion report (OR)* *(iii) Consignee Receipted Delivery Challans (OR)* *(iv) Central Excise Gate Pass/ Tax Invoices issued under relevant rules of Central Excise/VAT/**Bill of Lading** (OR)* *(v) any other documentary evidence that can substantiate the satisfactory execution of each of the purchase orders cited above.* *The purchase orders generated through the SAP system (POs having ten digit PO number) by Corporate MM, Dehracjun I Delhi or any work center of ONGC, a list of such purchase order reference numbers is sufficient.* *For supply orders other than those placed by ONGC as above, all required documents in respect of 8.1.2 (a) & 8.1.2 (b) need to be submitted as specified at B.1.2(c) above.*
B.1.2.2	*In case the bidder is not a manufacturer, then the bidder is required to submit documentary evidence in respect of the above 8.1.2 (a) & (b) from the concerned manufacturer (having supplied such items either by manufacturer himself or his distributor) along with the techno-commercial bid.*
B.1.2.2.	*Domestic manufacturers who have satisfactorily executed development orders placed by ONGC for tendered item(s) (with old / new specifications) will be considered as established source for supply of tendered item and their bid shall be considered acceptable in terms of experience, irrespective of clause B.1.2(a) & (b) above. Documentary evidence in respect of placement of development order (copy of*

	PO) and its successful execution (copy of field trial report) must be enclosed with the bid.

11. In the present case, the petitioner as well as RNA are not manufacturers. They rely upon overseas companies and corporations for their supplies. The petitioner's source of Potassium Chloride is from Jordian based company, RNA on the other hand, claims that sources the same product from the other side of the Dead Sea through an Israeli company. The record indicates that the IEM favoured and accepted the petitioner's contention that RNA ought to be disqualified and rejected the bid because firstly the sample that was submitted for testing was by an entity which was not RNA and secondly the manufacturers' letter of authority too was given to RNA when it was not in existence. RNA, however, was able to establish that its previous name was M/s Flawless Trading and it has been in existence for number of years in Sharjah and that its main line of business was jewellery export. Apparently, it changed its line of business and, therefore, amended the objects clause to include the business of general trading. Likewise, it decided to change its name to RNA. The tender conditions nowhere state that in such circumstances, when a bidder indicates name change or change of its line of business (through amendment of object clause) prior to the submission of the bid, would be a disqualification or constitute a bar to the bid. What is important is that ONGC should have been satisfied that in such circumstances, the sample furnished was by an entity which changed the name was the one which submitted the bid as eventually happened in this case. In these circumstances, there is no illegality or

mishap of the kind that is sought to be projected by the petitioner that vitiates the acceptance of RNA's bid as a lowest tender.

12. Now coming to the petitioner's contention with respect to RNA's financial stability or strength, the discussion of the Tender Evaluation Committee clearly demonstrates that RNA was into trading and had a turnover of US$ 25 millions average annually in the past two years. This was well above the minimum eligibility indicated i.e.1/3rd of value of contract. The overall value of the contract in this case was ₹103 crores, 1/3rd would work out to about ₹34 crores. The petitioner's arguments on this aspect, therefore, are not tenable and are baseless.

13. The last argument was with respect to the likelihood of the contract being awarded to a Singaporian identity. Here Mr. Balbir Singh urged that after the bid was lodged by RNA, it underwent change of shareholding and that RNA International Marketing (M.E.) (FZE), a Singaporian entity has become its sole shareholder and that the said entity has now sought permission to effect supplies through Singapore. The apprehension voiced by the petitioner, in the opinion of the court, is without foundation and insubstantial. Neither is there any bar in the tender condition or the contractual condition annexed along with the form (of contract to be entered into with successful bidder) nor any liability which prevents a bidder from indicating change in its shareholding. Per se, therefore, on the basis of petitioner's apprehension as to the likelihood of the contract being assigned to another entity, cannot be accepted. Furthermore, the Court notices that the form of Agreement (to be entered into between ONGC successful tenderer)

itself envisages that subject to ONGC permission, the contract can be assigned.

14. The appreciation by a public or executive agency of the facts with respect to award of tender, and the evaluation of the rival bids, fall within the exclusive domain of that agency. The interpretation of the documents or even tender conditions, are primarily not a matter of construction by the court. The public agencies's interpretation ordinarily ought to be deferred to in judicial review. Article 226 can be resorted and the court's intervention is legitimate where the facts establish illegality, procedural irregularity in the decision making process or manifest arbitrariness i.e. where the decision is so unreasonable that no reasonable person in such circumstances would have arrived, at such conclusion on the same facts.

15. This Court is satisfied that none of these elements have been established by the petitioner. Consequently the petition fails and is dismissed. All pending application(s) also stand disposed of.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

JULY 06, 2017/sa