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

DECIDED ON : 5th JULY , 2017

+ **W.P.(C) 5266/2017 & CM No.22337/2017 (Stay)**

MANTOVANI-DHARTI CONSORTIUM & ANR.

..... Petitioners

Through : Ms.Asha Jain Madan, Advocate with
Mr.Mukesh Jain, Advocate.

versus

RATNAGIRI GAS AND POWER PVT. LTD. & ORS.

..... Respondents

Through : Mr.Sachin Puri, Sr.Advocate with
Mr.Sanjeev Sagar, Ms.Mehak Tanwar & Mr.Navin
Arora, Advocates for R1 & R2.
Ms.Reena Choudhary, Advocate for R3.
Mr.Bipin Aspatwar, Advocate for R4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The Petitioners complain of arbitrariness in rejection of its bid / tender for completion of breakwater at its LNG Terminal. The petitioners were communicated about the rejection of their financial bid, being non-compliant, by the respondents vide letter of the Gas Authority of India Ltd. (hereinafter referred as 'GAIL'), impleaded as the second respondent in this proceeding.

2. The brief facts of the case are that GAIL invited tender and an advertisement was issued in this regard, sometimes in August, 2016. GAIL in turn formed a joint venture company with the ("RGPPL",

also Ratnagiri Gas and Power Pvt. Ltd. referred to as 'first respondent' in this case) for the purpose of the tender. It entrusted the duty of technically evaluating the bids received and submitting its inputs / report to the third respondent Engineers India Limited (hereinafter referred as 'EIL'). The petitioners furnished its bid on 18.10.2016. The first petitioner is a consortium, created by an arrangement entered into between the foreign enterprise and the second petitioner on 29.08.2016. The foreign enterprise is an Italian company M/s. Impresa di Costruzioni Ing. E. Mantovani S.P.A. (hereinafter called as 'lead member'). It would be useful to notice certain tender conditions which the bidders had to comply with. The eligibility and other criteria applicable to consortium bidders were as follows :

“B) IN CASE OF CONSORTIUM

3.2.4 TURNOVER:

The minimum annual turnover achieved by the leader of the consortium as per the audited annual financial results during at least one of the three immediate preceding financial years shall be INR 1360 Million (Indian Rupees One Thousand Three Hundred Sixty Million Only) for Indian Bidders or USD 20.05 Million (US Dollar Twenty Point Zero Five Million Only) for Foreign Bidders while each of the other members of the consortium should have minimum annual turnover of INR 680 Million (Indian Rupees Six Hundred Eighty Million Only) for Indian member or USD 10.02 Million (US Dollars Ten Point Zero Two Million Only) for Foreign member.

3.2.5 NET WORTH:

Net worth of the leader of consortium and each of its members should be positive as per the immediate preceding year's audited annual financial results.

3.2.6 WORKING CAPITAL:

The minimum working capital of the leader of consortium as per the immediate preceding year's audited annual financial results shall be INR 272 Million (Indian Rupees Two Hundred Seventy Two Million Only) for Indian Bidders or USD 4.01 Million (US Dollar Four Point Zero One Million Only) for Foreign Bidders.

If the leader's working capital is inadequate, the Bidder should submit a letter issued by his Bank, having net worth not less than INR 100 Crore or USD 14.74 Million, confirming the availability of line of credit for the working capital requirement specified above.

5.3 All supporting documents, pertaining to "Bid Evaluation Criteria" shall be submitted duly authenticated as below:

(i) For authentication of document submitted in support of Financial Criteria of Bid Evaluation Criteria (BEC):

*(a) **Indian Bidder:** shall submit "Details of financial capability of bidder" in prescribed format duly signed and stamped by a chartered accountant.*

Further, a copy of audited annual financial statements submitted in bid shall be duly certified /attested by notary public with legible stamp.

*(b) **Foreign Bidder:** shall submit "Details of financial capability of bidder" in prescribed format duly signed and stamped by a chartered accountant/ CPA.*

Further, a copy of audited annual financial statements submitted in bid shall be duly certified true copies, duly signed, dated and stamped by an official, authorized for this purpose in Indian Embassy/High Commission in bidder's country. However, member countries of Hague Convention 1961, supporting document pertaining to Financial BEC "Apostle affixed by competent authorities designated by the government of bidder's country" shall also be acceptable.

(ii) All documents in support of Experience Criteria of Bid Evaluation Criteria (BEC) to be furnished by the bidders shall necessary be:

*(a) **For Indian Bidder:** duly certified/attested by Chartered Engineer and notary public with legible stamp.*

*(b) **For Foreign Bidder:** duly certified/attested by Chartered Engineer/ Licensed Professional Engineer/ EurEta Registered Engineer/ Eur Ing or equivalent Registered Engineer of bidder's country with legible stamp.*

Further, supporting document pertaining to Experience Criteria of BEC should also be certified true copies, duly signed, dated and stamped by an official, authorized for this purpose in Indian Embassy/High Commission in bidder's country. However, member countries of Hague Convention 1961, supporting document pertaining to Experience Criteria of BEC "Apostle affixed by competent authorities designated by the government of bidder's country" shall also be acceptable.

*All documents furnished by the bidder in support of meeting the Experience and Financial criteria (3.1 and 3.2 above) of BEC as per IFB shall be submitted in a separate section/booklet along with their offer. This section/booklet shall be titled as . **"Documentation against Bid Evaluation Criteria (Experience and Financial)"** with proper index and page numbering.*

(iii) In case of Foreign bidder, if the required documents for establishing the Bid Evaluation Criteria, such as duly audited Balance Sheet, Annual Reports, Work Order(s), Completion Certificate(s) etc., are not in English language, then the English translation copy of the same shall be furnished duly certified, stamped and signed by Local Chamber of Commerce along with the original Balance Sheet, Annual report. Work Order(s), Completion Certificate(s) etc. with the unpriced bid. This requirement of certification of English translation by Local Chamber of Commerce is additional to the

requirement of authentication stipulated in Clause No.5.3 (i) and/or 5.3 (ii) above as applicable.

9.0 GENERAL

9.1 A job executed by a bidder for its own plant / projects cannot be considered as experience for the purpose of meeting requirement of BEC of the tender. However, jobs executed for Subsidiary / Fellow Subsidiary/ Holding company will be considered as experience for the purpose of meeting BEC subject to submission of tax paid invoice(s) duly certified by statutory Auditor of the bidder towards payments of statutory tax in support of the job executed for Subsidiary/ Fellow Subsidiary/ Holding company. Such bidders to submit these documents in addition to the documents specified in the Bidding Documents to meet BEC.

9.2 Bidder shall not be affiliated with a firm or entity, (i) that has provided consulting services related to works to employer during preparatory stages of works or of the period of which the work form a part, or (ii) that has been hired (or proposed to be hired) by the employer as Engineer / Consultant for the contract.

9.3 The bidder shall furnish documentary evidence by the way of track record, copies of work order, completion certificate and Audited Financial Statements including Balance Sheets and Profit & Loss Account Statements etc. along with the Bid to establish his experience and track record meeting qualification criteria. Bidders should ensure submission of complete Information/ documentation in the first Instance itself. Qualification may be completed based on the details so furnished without seeking any subsequent additional information. Subsequent to the submission of bid, bidders are not allowed to change the price or substance of the bid i.e. scope of work, specifications, delivery schedule, completion period etc. including modification of the bid to meet the BEC of the tender.

9.4 In absence of requisite documents, GAIL / EIL / RGPPL reserves the right to reject the Bid without making any reference to bidder(s).

9.5 Bidder can download the Bidding Document from EIL's website <http://tenders.eil.co.in> or GAIL's website <http://www.gailtenders.in> or GAIL's e-tendering website <http://etender.gail.co.in> or Government website <http://eprocure.gov.in/cppp/relatedlinks>. However, bidders have to submit their bids only through e-tendering website of GAIL.

Corrigenda/Addenda, if any, shall also be available on the referred web sites. Further, bidder shall give an undertaking on their letter head that the content of the Bidding Document have not been altered or modified.

9.6 No extension in the bid due date/time shall be considered on account of delay in receipt of any document."

3. In addition to the general conditions, instructions to bidders were also issued and had to be complied with by each tenderer / consortium. They contained detailed guidelines and conditions. Clause 27 of the said instructions to bidders reads as follows :

"27.0 MODIFICATION AND WITHDRAWAL OF BIDS

27.1 The bidder may withdraw or modify its bid after bid submission but before the due date and time for submission as per tender document.

27.2 The modification shall also be prepared, sealed, marked and dispatched in accordance with the provision of the clause 24 of ITB, with the outer and inner envelopes additionally marked modification or withdrawal as appropriate. A withdrawal notice may also be sent by e-mail or fax but followed by a signed confirmation copy post not later than the deadline for submission of bids.

No bid shall be modified/ withdrawn after the deadline for submission of bids.

27.3 No bid shall be allowed to be withdrawn/ modified/substitute in the interval between the deadline for submission of bids and the expiration of the period of bid validity specified by the bidder on the Bid Form, Withdrawal/Modification/Substitution of a bid during this interval shall result in the bidder's forfeiture of his bid security and rejection of bid.

27.4 The latest bid hence submitted shall be considered for evaluation and all other bids shall be considered to be unconditionally withdrawn.

27.5 In case after price bid opening the lowest evaluated bidder (L1) is not awarded the job for any mistake committed by him in bidding or withdrawal of bid or modification of bid or varying any term in regard thereof leading to re-tendering, GAIL shall forfeit EMD paid by the bidder and such bidders shall be debarred from participation in re-tendering of the same job(s)/item(s). Further, such bidder will be put on holiday for a period of six months after following the due procedure.

28.0 EMPLOYER'S RIGHT TO ACCEPT ANY BID AND TO REJECT ANY OR ALL BIDS

RGPPL/GAIL/EIL reserves the right to accept or reject any Bid, and to annul the Bidding process and reject all Bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligations to inform the affected Bidder or Bidders of the ground for RGPPL's/GAIL's/EIL's action. However, Bidder if so desire may seek the reason (in writing) for rejection of their Bid to which RGPPL/GAIL/EIL shall respond quickly."

4. The petitioners contend that its bid complied with the relevant particulars as regards experience and specially the turnover. To say so,

it has produced a tabular statement in its pleadings, co-relating the concerned bid conditions. The tabular statement reads as follows :

Clause Ref. No.	Bid Criteria	Bid Requirements		Compliance by the Consortium in the submitted Bid	
		Lead Member	Member	Lead Member	Member
3.2.4 (IFB)	Turn over At least one of the three preceding FY	20.05 M USD	INR 680 M	Maximum during last three years	
				Euro 445 M Euro	INR 3,566.0 managemen t
3.2.5 (IFB)	Net worth Immediate preceding FY	Positive	Positive	Positive	Positive
3.2.6 (IFB)	Working Capital Immediate preceding FY In case	4.01 M USD	NIL	Banker letter for 26.0 M	From SBI INR 1610M

	of short fall, Banker' letter is required			Euros	
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5. The petitioners rely upon communications exchanged between it and EIL to say that at the relevant time, the bid was never considered as non-responsive and on the contrary, continuous letters / e-mails were exchanged, eliciting information. It is stated that EIL by an e-mail dated 12.04.2017, in fact sought clarification that led it to furnish the bankers letter dated 19.04.2017. It is also stated that the EIL had sought clarifications with respect to the auditor's statements which were furnished in January, 2017. Ms.Madan, learned counsel argues that if the petitioners' bid was considered non-responsive and rejected, then all this exchange of correspondence would not have occurred. Furthermore, that the petitioner was asked to extend its EMB also is proof of the fact that the bid was never deemed non-compliant to the terms and conditions in the advertisement.

6. It is argued that the rationale given for bid rejection – primarily premised on two grounds i.e. financial unsoundness of the lead member and its inability to provide documentary evidence with respect to adequacy of working capital from a bank, and that it did not fulfill the financial eligibility parameters contained in the tender, are both untenable. It is argued that the chart produced in the petition

equally establishes that the basic turnover benchmark as well as the financial soundness of lead member and the Indian member, were satisfied. In the circumstances, it is urged that EIL's contentions that are based on the auditor's report, which indicated financial instability, are without basis. Likewise it is submitted that the bankers' certificate, required to be furnished by the lead member, was in fact in compliance with the tender conditions. Counsel highlighted that mere non-adherence to the format prescribed in the tender did not mean that the letter in fact provided, did not fulfill the tender conditions.

7. Learned counsel relied upon the decision of the Supreme Court in *New Horizons Limited & Anr. Vs. Union of India (UOI) & Ors.*, 1995 (1) SCC 478 to say that as long as the bid submitted by a joint venture indicates compliance by any of the members, the bid cannot be rejected. Lastly, the rejection of the tender in the present case is discriminatory because the fourth respondent, does not fulfill the eligibility conditions.

8. The EIL as well as GAIL have filed responses. The EIL points out to a letter, the document furnished by the petitioner i.e. its statutory auditor's report, which was in fact taken into consideration while rejecting the bid. Particular emphasis is placed upon the observations of the auditor with respect to its inability to give a positive report / opinion in regard to the financial criteria. Learned counsel relied upon the following extract of the auditor's report (which was reproduced, by GAIL in its rejection letter dated 10.06.2017) :

“However, because of the events described in the "Elements determining the impossibility of expressing an opinion" paragraph, we were unable to form an opinion on the financial statements.

Elements determining tile Impossibility of expressing an opinion

The financial statements as at 31st December, 2015 closed with losses for 3.9 million Euro, a value of production of 186 million Euro, down from the 386 million Euro of tile previous year, and indebtedness to banks of 113 million Euro, with a moratorium and standstill agreement that shall expire on 31st December, 2016. Moreover, in August 2016 the Company received a first tranche of payments made by Expo 2015, amounting to a total of 21 million Euro, after a delay that had exacerbated tile financial difficulties of the company in the first half year of 2016. Moreover, it also collected a shareholders; loan of 20 million euro made by the Single Shareholder in September, 2016.

In the Notes to the Financial Statements, paragraph "Considerations on the adoption of the business continuity principle" describes the causes of the financial difficulties, together with tile actions identified in the 2016-2018 Industrial Plan approved by the Board of Directors on 17th October, 2016. The Board of further resolved to present the plan to the banks in order to reach an agreement.

As at 31st December, 2015, some uncertainties might raise doubts concerning the business continuity, with possible repercussions on the collectability of receivables and the capacity to honour the company's commitments in tile normal course of the period. Such uncertainties can be summarised as follows:

Uncertainties normally connected to the nature of the forecasts, that is to say, the ability to attain the forecast value of production and operating costs as described in

the 2016-2018 industrial plan, given tile current financial contexts;

The drafting of a consistent financial operation in line with the development of the construction business forecast in the industrial plan for the 2016-2018 financial years approved by management, that will allow the company to make a new agreement with the financial institutions to maintain the credit lines that are necessary for the development of the job orders included in tile plan:

Tile ability to implement the planned sales as intended by the company, also through the-identification of new, potential investors, according to the schedule and prices included in the 2016-2018 industrial plan while obtaining a consistent support by the banking system;

The forecasts for tile sale of certain assets comprising mainly holdings and financial and trade receivables, which have not been included in the industrial plan but which appear especially uncertain, in particular, the stake in S.I.F.A. Societa consortile por azioni;

The Board of Directors, after examining tile above mentioned uncertainties, and taking into account the future shareholders' loan of 20 million Euro by the Sole Shareholder, the expected collections on the Expo 2015 job, the results of the rationalisation carried out in compliance with the provisions of the 2016-2018 industrial plan and the situation of the ongoing negotiations with the banking system and potential investors for the sale of certain investments, decided to adopt the business continuity principle in drafting the financial statements for the company as at 31st December, 2015.

The above shows that the business continuity presumptions is subject to several material uncertainties, which could potentially interact and produce cumulative effects on the company accounts.

Impossibility of expressing an opinion due to the effects of the uncertainties described in the "Elements

determining the impossibility of expressing an opinion" paragraph, we were unable to form an opinion on the financial statements of Impresa di Costruzioni Ing. E. Mantovanl S.pA as at 31st December, 2015.

The Financial Prudence demands that in the light of such adverse observations by the Auditor and doubts raised over the business continuity, it is construed that the financial statements do not reflect the true & fair view of the financial position of the company. As such the financial criteria evaluated based on above financial figures cannot be relied Upon.

As claimed in your letter dated 25.05.2017, we cannot consider your offer / bid by giving credence to your future financial projection and events occurring after the cut off date as stated in the bid document, Till such time, same is reviewed and accepted by auditor, your offer cannot be accepted in order to mitigate exposure to a potential failure."

9. It is submitted that the petitioners had in fact not complied with the tender condition inasmuch as the auditor's report which was an essential document that had to be annexed along with tender, reflecting the financial soundness for the period ending 31.12.2014, was not filed. The EIL pointed out that even though it was not obliged to do so, it requested the petitioner to furnish the letter and an up-to-date auditor's statement as on 31.12.2015. It was only after an appraisal of this document that the observations of the petitioners' auditor with respect to the impossibility of expressing an opinion, were quoted. It was argued that if the auditor was unable to certify as to the financial soundness of the petitioners, there would be no question of proceeding on the assumption that it would be able to fulfill the eligibility condition with regard to viability. Furthermore,

submitted the counsel, the letter of the lead member's bank (Monte Dei Paschi Di Siena, dated 19.04.2017), was also not in compliance with the tender conditions inasmuch as its paid up capital was equivalent to ₹ 100 crore as on date. It was submitted by the counsel that the letterhead indicating the paid up capital to be Euro 7365674.07, as on 25.11.2016, was inadequate since such a statement was not confirmed by the bank and further this was assumed to be bankers' certificate, as on 25.11.2016.

10. The above factual narrative shows that the dispute in regard to the petitioners' grievance about unjustified rejection of its bid is premised around appreciation of two facts. The first is as to the auditor's certificate. The EIL here says that the impossibility of the petitioners' auditor to certify about its financial soundness, casts cloud on its ability to manage the contract. The report, of the auditor, which was furnished after the submission of the bid, in January, 2017 states, *inter alia*, that the lead member of the petitioners' consortium faced uncertainties with regard to the ability to implement the planned sales by the company, as also the identification of new, potential investors according to schedule and the prices included were for 2016 - 2018 only. It furthermore and secondly highlights that the financial statements as on 31.12.2015, reveal that the lead member closed with losses of 3.9 million Euro in the valuation of production by 200 million Euro. Earlier it was recording the value of production at 386 million Euro, but for the latter year i.e. ending on 31.12.2015, it recorded the value of production at 186 million Euro and indebtedness to the bank was to the tune of ₹ 113 million euro. Apparently, the first

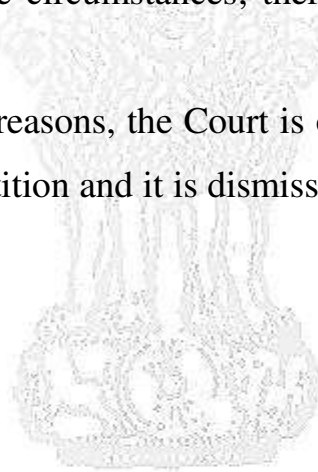
petitioner lead member entered into a moratorium with its creditor. Moreover, the bankers' statement too was ambiguous inasmuch as the requirement that the bank had to certify that its paid up capital was not less than ₹ 100 crores or USD 14.74 million was absent. The letter dated 19.04.2017 that was relied upon was a printed statement as to the paid up capital. However, this did not fulfill the criteria as to the net worth of the bank.

11. Whilst the task of construing contractual conditions in the case of ordinary dispute is undoubtedly in the domain of the Court, the task of construing whether tender conditions have been complied with by a bidder at a pre-contractual stage in present case are of the first two respondents. If only such construction leads to arbitrariness, results in illegality, or is a product of procedural irregularity, or is unreasonable (i.e. the construction or action is so unreasonable that no reasonable man in such situation would arrive at such a conclusion) or lacks in *bona fide*, would the remedy of judicial review be available. In the present case the EIL's insistence – which has been endorsed by the first two respondents that the specifications in paras 3.2.4, 3.2.5 and 3.2.6 should be complied with substantially and strictly, cannot be faulted. The Court further notices that the tender had attached the specific form of letter, to be written by the bank, which contained a clear statement on the part of the bank as to its net worth. Whilst non adherence to the format in the tender *ipso facto* cannot be a ground for rejection of the tender, the substance or the contents of the format, had to be fulfilled. Along with this, the evaluation of the documents with

respect to the financial stability of the first petitioner lead member, cannot be termed as unreasonable.

12. As to the petitioners' complaint of discrimination *vis-a-vis* the fourth respondent, the Court is of the opinion that these are without basis and foundation. The reference made in the petition, pertained to other entities i.e. part of the SR group. Whilst the fourth respondent may be a part of SR group, there is nothing on record to indicate that it had disability or was subjected to disqualification as averred in para 21 of the writ petition. This has been clearly stated by the third respondent / EIL. In the circumstances, there is no question of any discrimination.

13. For the foregoing reasons, the Court is of the opinion that there is no merit in the writ petition and it is dismissed. Pending application also stands disposed of.



S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

JULY 05, 2017 / tr