IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2476 OF 2018

Arya Omnitalk Wireless Solutions Pvt. Ltd. ...Petitioner
vs
1.Maharashtra State Road Transport Corporation.
2.Rosmerta Autotech Pvt.Ltd.
3.State of Maharashtra. ...Respondents

Mr.Atul Damle, Senior Advocate with Mr.Sandesh Shukla & Mr.Amit Singh i/b. Santosh Sawant, for the Petitioner.

Mr.P.P.Kakade, AGP for Repsondent No.3.

Mr.G.S.Hegde with Mr.Lokesh, for Respondent No.1.

Mr.Suren Uppal with Sneha Baul i/b. Vijay Hiremath, for Respondent no.2.

CORAM : NARESH H.PATIL ACTING C.J &
G.S.KULKARNI, J.

DATED: 21th September,2018

<u>P.C.</u>:-

1. Heard the learned Counsel for the parties. Perused the record.

2. Respondent no.1-Maharashtra State Road Transport Corporation (for short "MSRTC") had issued a tender for appointment of an agency for implementation of a "Vehicle Tracking System and Passenger Information System." The petitioner was one of the bidders in the said tender. Respondent no.2–Rosmerta Autotech Pvt.Ltd. was the successful bidder having submitted the lowest bid(L-1). The petitioner interalia prays

that the award of the tender in favour of respondent no.2 vide letter of intent dated 16 November 2017, be quashed and set aside, and that a fresh bidding process be undertaken by respondent no.1-MSRTC.

3. The principal contention as urged on behalf of the petitioner is that the bid of respondent no.2 was required to be held as non-responsive by the MSRTC inasmuch as the bid was not complying one of the tender conditions being sub-clause (8) under paragraph 7.2 which reads thus:-

> "**7.2 Financial Proposal Instructions**.
> 1. … … ..
> … … …
> 8. CAPEX cost shall not be more than 50% of total cost (CAPEX + OPEX).
> … …"

4. The petitioner contends that after issuance of the tender notice on 5 January 2017, the MSRTC issued a corrigendum dated 4 April 2017 providing for standard set of deviations, in which under item no.7 the following deviation was provided:-

" Corrigendum

Request for Proposal for Appointment of an Agency for Implementation of Vehicle Tracking System and Passenger Information System at MSRTC

sr. no	Section no.	Section Name	Existing Clause	Clause to be read as
..	…	…	…	…
7	Annexure A: Format for Financial Bid	Taxes		**New Clause amended as: It is paramount that the supplier has to abide by the laws of new GST Implementation. New GST Taxes as applicable during the**

				time of service delivery shall be applicable. The same has to be intimated by the supplier to MSRTC.

5. The petitioner contends that respondent no.2 had submitted its bid taking into account the GST whereby it exceeded the parameters as contained in sub-clause 8 in paragraph 7.2 (supra), inasmuch as the bid exceeded the CAPEX cost, which was required to be not more than 50% of the total cost. The petitioner contends that the MSRTC ought not to have entered negotiations with respondent no.2 when principally the bid was contrary to sub-clause (8) of paragraph 7.2.

6. The MSRTC has filed a reply affidavit interalia contending that there was nothing arbitrary in the decision making process in entering into negotiations with respondent no.2 who was the lowest bidder and more particularly in view of the new regime of Goods and Service Tax (GST) which was introduced after the publication of tender notice. It is contended that at the time of submission of the bids and at the time of closure of financial bids, the Goods and Service Tax regime was not in force and the GST rates were unknown to the parties and thus the bids were based on the rates of indirect taxes like service taxes, VAT, Excise etc. that prevailed at the time of submission of bids. It is contended that the CAPEX cost as originally quoted by respondent no.2 was below 50% of the total cost. It is contended that after the last date of submission of bids on 27 April 2017,

on 28 June 2017 vide Notification No.11/2017 GST rates were notified. It is contended that after the respondent no.2 was declared L-1, it was invited for negotiations, so that the tax components of the amount quoted by them could be readjusted to suit the newly introduced GST rates. The relevant averments in that regard can be found in paragraphs 6 to 10 of the reply which read thus:-

> "6) I say that the Petitioner thereafter states that while the tender required that CAPEX cost cannot be above 50% of the total bid price, the CAPEX cost quoted by the Respondent No.2 when added with GST, exceeded 50% of the total costs. That at the time of submission of bids and at the time of closure of financial bids, the GST regime was not in force and GST rates were unknown to the parties. The bids are based on the rates of indirect taxes like Service Taxes, VAT, Excise etc. that prevailed at the time of submission of bids.
>
> 7) I say that the CAPEX cost originally quoted by Respondent No.2 was below 50% of the total cost. To elaborate, the Respondent No.2 had quoted a CAPEX of Rs.15,75,42,802.00 i.e. only 49.45% of the Rs.31,85,64,537/- total bid price quoted.
>
> 8) That after the last date of submission of bids, 27/04/2017, only on 28/06/2017 vide Notification No.11/2017 GST rates were notified. After the respondent No.2 were declared L-1, they were invited for negotiations, so that the tax components of the amount quoted by them could be readjusted to suit the newly introduced GST rates.
>
> 9) That pursuant to negotiations a slight revision of prices was allowed in the total CAPEX cost. That the Respondent No.2 had agreed to reduce the Base price of the CAPEX expenses and consequently the only change in prices that occurred was on account of replacement of the currently prevailing tax rates as against the tax rates quoted in the bid, and that too at a substantially discounted base price. As a result, the bid of

Respondent No. 2, which initially quoted a total CAPEX cost of Rs. 15.75 Crores on the basis of a base price of Rs. 14.82 Crores and tax amounting to Rs. 0.93 Crores, was revised to a base price of Rs. 13.71 Crores on which a GST of 2.71 Crores would be made applicable thereby taking to total CAPEX cost to Rs. 16.45 Crores. I say that no Revision was allowed in the total OPEX cost and the entire burden of the enhanced Tax rates was to be borne by the Respondent No.2.

10) That the MSRTC had allowed Revision in CAPEX cost alone to reflect the GST rates. Consequently, while the original base CAPEX cost quoted by the Respondent No.2 was Rs.14.82 Crores and the original total CAPEX cost was about Rs.15.75 Crores with around Rs.0.93 Crores being the tax component, after negotiations, the base price was reduce to Rs.13.71 Crores but the revised total CAPEX Cost rose to 16.45 Crores as the tax component under the GST regime rose to Rs.2.71 Crores. As far as the OPEX cost is concerned, no revision was allowed. If the revision was allowed as per new GST rate (15% service tax to 18% GST), the OPEX cost would have proportionately increased to about 16.52 crores making it more than 50% of total Bid value as per tender condition. However during negotiation L-1 bidder agreed to absorb the additional tax burden in OPEX. Accordingly base OPEX cost was reduced by L-1 bidder to keep the total OPEX same. This additional negotiation and acceptance of further discount by the L-1 bidder during negotiation can't be considered as a reason for their bid cancellation."

7. On behalf of respondent no.2 it is submitted that the levy of GST was unknown when the tender notice was issued and therefore, the bidders necessarily were required to take into account the GST and the rates so notified by the Government of India in regard to supply which would be undertaken by the successful bidder. Our attention is drawn to a

Government Circular dated 19 August 2017 which provides for guidelines on account of implementation of GST from 1 July 2017. It provides that the introduction of GST would change the structure of taxes in the Government contract. Paragraph 3 of the said circular pertains to the tenders accepted before 1 July 2017 and the contracts /work order issued after 1 July 2017. Paragraph 3 reads thus:-

> "3) **Tenders accepted before the date 1 July 2017 and the contracts given the work order after the date 1 July 2017** :
> If the tender is issued before 1st July 2017 and the work order is given after the date of 1st July 2017, then in such cases the contract should not be cancelled and the contractors should be instructed to start the work. Due to the changes going to take place in the tax burden of implementation of GST, the opinion of Law and Justice Departments would be taken separately in regard with the change of prices of contracts. After receiving the said opinion the concerned people would be informed the proceedings to be done."

8. It is contended on behalf of respondent no.2 that the negotiated price as quoted by respondent no.2 was within the permissible parameters available on the introduction of GST rates and thus, such a deviation fell within the contemplation of corrigendum. It is thus submitted that there is nothing illegal or erroneous in issuance of the work order in favour of respondent no.2.

9. We have heard the learned Counsel for the parties. We have perused the record.

10. It is not in dispute that the bidders requiring to take into consideration the GST, was not in contemplation when the original tender notice was issued and thus, a corrigendum dated 5 January 2017 was issued providing that the bidders should take into consideration the Goods and Service Tax rates which would be notified. Thus, the bidders including the petitioner and respondent no.2 were required to take into consideration the said condition of Goods and Service Tax as notified in the corrigendum. As pointed out on behalf of MSRTC and as noted by us above, respondent no.2 being L-1 being lowest bidder was entitled to negotiate in regard to the lowest bid offered by it and more particularly on taking into consideration the Capital Expenditure cost (CAPEX) and Operational Expenditure Cost (OPEX). The MSRTC has found that the petitioner has appropriately applied the GST in the manner in which it would be beneficial to MSRTC. Respondent no.2 in the negotiations also agreed to reduce the Base price of the CAPEX expenses and consequently the only change in prices that occurred was on account of replacement of the currently prevailing tax rates as against the tax rates quoted in the bid, and that too at a substantially discounted base price. Resultantly the bid of Respondent No. 2 though initially quoted a total CAPEX cost of Rs.15.75 Crores on the basis of a base price of Rs.14.82 Crores and tax amounting to Rs. 0.93 Crores, was revised to a base price of Rs. 13.71 Crores on which a GST of Rs.2.72 Crores would be made applicable thereby taking to total

CAPEX cost to Rs.16.45 Crores and also no revision was allowed in the total OPEX cost and the entire burden of the enhanced tax rates was to be borne by Respondent No.2. The MSRTC has rightly contended that additional negotiations and acceptance by further discount by the L-1 bidder/respondent no.2 during negotiations, cannot be considered as a reason to cancel their bid.

11. It is also clear that the Circular dated 11 September 1917 issued by the State Government permitted negotiations with L-1 in view of the implementation of GST. Even otherwise under law there was nothing illegal for the MSRTC to have negotiations with respondent no.2 and also on the GST issue, so that the lowest bid becomes more beneficial to MSRTC. It is evident that the original tender condition pertaining to the effect that the CAPEX cost not to exceed more than 50% of the total cost, was required to be read in conjunction with the corrigendum which provided for GST to be accounted for by the bidders. The Government circular also permitted negotiation in that behalf by the tendering authority.

12. Having perused the record, we do not find that the approach of MSRTC in any manner unconscionable or arbitrary to accept the lowest bid of respondent no.2. MSRTC has acted in accordance with the tender conditions, and in view of the introduction of new regime of GST during

the tendering process, the decision of the MSRTC cannot be said to be contrary to the tender conditions read with the corrigendum. Thus the only contention as urged on behalf of the petitioner that sub-clause 8 of clause 7.2 of the tender condition stands breached in awarding the contract to respondent no.2, in these circumstances, cannot be accepted.

13. We see no merit in the petition. It is accordingly rejected. No costs.

(G.S.KULKARNI, J) **(ACTING CHIEF JUSTICE)**