

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.06.2018

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Writ Appeal No.1227 of 2018
and
C.M.P.No.10042 of 2018

The Superintending Engineer
(Contracts & Monitoring)
Chennai Metropolitan Water Supply
and Sewerage Board,
No.1, Pumping Station Road,
Chintadripet, Chennai. ...Appellant/1st Respondent

-vs-

1.M/s.Subaya Constructions Co. Limited,
Rep. by its Director, Mrs.S.Meenakshi,
No.21, Soundarapandian Salai,
Ashok Nagar, Chennai. ... 1st Respondent/Petitioner

2.M/s.VVV Constructions Private Ltd.,
Rep. by its Managing Director,
Mr.Venkatavijayan,
No.1074, Munusamy Salai,
K.K.Nagar, Chennai. ...2nd Respondent/2nd Respondent

Appeal filed under Clause 15 of the Letters Patent to set aside the order dated 03.05.2018 made in W.P.No.11652 of 2018.

Writ petition filed under article 226 of the Constitution of India, praying to issue a writ of Mandamus forbearing the first respondent from considering any discounts offered by the Bidders that are not mentioned in the relevant forms furnished in Section 4(d) of the Letter of Price Bid as per Clause 12.1 of Instructions to bidders and consequently reject the Modification

cover submitted by the Second Respondent in the Tender proceedings in NCB No. 81/2017-18.

For Petitioner : Mr.Manishankar,
Additional Advocate General
assisted by Mr.N.Ramesh

For Respondents: Mr.Prabakaran,
Senior Counsel
for Mr.B.Natarajan

J U D G M E N T
[Delivered by M.SATHYANARAYANAN, J.]

By consent, the writ appeal is disposed of by this judgment.

The first respondent has filed Writ Petition Nos.11651 and 11652 of 2018 stating among other things that they participated in the tender floated by the appellant / first respondent in the writ petition vide No.CNT / SEW / NCB / AMRIT - ADB / 001 /2017-18 for providing Comprehensive Sewerage Scheme to Manali, Chinnasekkadu, Karambakkam and Manapakkam in Chennai City by submitting his Tender Documents on 27.02.2018 before the deadline at 03:00 PM and so also the second respondent had submitted Tender Documents on 27.02.2018 a couple of hours before the first respondent / writ petitioner. The first respondent / writ petitioner would further aver that the second respondent, after submissions of the Tender Documents, had submitted a separate Envelope with a heading "Modification Cover" with a mala fide intention to alter their Bid value by offering discounts illegally. The first respondent / writ petitioner, who was present at that time strongly objected as to the submission of the said "Modification Cover" and in this regard, they had also submitted three representations dated 02.03.2018, 05.03.2018 and 11.04.2018 to the first respondent herein requesting them not to take into consideration the modification cover submitted by the second respondent, but no response is forthcoming .

2. The first respondent / writ petitioner has also invited the attention of this Court to Clause No.4 of the Instructions to Bidders, which stipulates that, all discounts offered by the Bidders should be specified in relevant forms furnished in Section 4(d) of the Letter of Price Bid.

3. Clause No.12.1 of the Instructions to Bidders stipulates among other things, that the forms must be completed without any alteration to the text and no substitutes shall be accepted.

.....

4. The grievance expressed by the first respondent / writ petitioner is that despite such a stipulation in Clause No.12.1 of Instructions to Bidders, the second respondent had surreptitiously tried to offer discounts and altered the Bid value by submitting a cover printed as "Modification Cover" under the guise of modification under Clause 24 of Instructions to Bidders and they should not be allowed to modify and alter their Bid by offering discounts under the guise of the said modification and therefore, came forward to file the said two writ petitions praying for issuance of Writ of Mandamus forbearing the first respondent / appellant to consider any discounts offered by the Bidders that are not mentioned in the relevant forms furnished in Section 4(d) of the Letter of Price Bid as per Clause 12.1 of Instructions to Bidders and consequently to reject the "Modification Cover" submitted by the second respondent in the Tender proceedings.

5. Both the writ petitions came up for admission before the learned Judge during Vacation Court sitting on 03.05.2018. The learned Judge has disposed of the writ petitions vide common order dated 03.05.2018, by directing the first respondent / appellant herein to accept any modification of the tender offered by the contesting party in the prescribed form if it has not been given in the prescribed form so far and thereafter, can proceed further. Aggrieved by the common order dated 03.05.2018 made in W.P.Nos.11651 and 11652 of 2018, the appellant / first respondent came forward to file this writ appeal.

6. Mr.Manishankar, learned Additional Advocate General assisted by Mr.N.Ramesh, learned counsel for the appellant / first respondent has invited the attention of this Court to the tender documents and would submit that the last date for submission of bid documents was on 27.02.2018 and admittedly, the second respondent has given the modified bid in terms of Clause 24.1 of the Instructions to Bidders and the bids are yet to be opened and therefore, the apprehension expressed by the petitioner is wholly unfounded.

7. It is the further submission of the learned Additional Advocate General that the appellant / first respondent has got several panel of lawyers and without issuing notice either to the appellant / first respondent or to the Standing Counsel as well as to the first respondent, the writ petitions came to be disposed of at the admission stage itself.

8. It is also pointed out by the learned Additional Advocate General that under the guise of the order, the first respondent / writ petitioner wants to submit the modified bid after expiry of the time stipulated and it virtually amounts to

rewriting the tender conditions and this Court normally will not undertake that exercise. In sum and substance, it is the submission of the learned Additional Advocate General that the writ petitions came to be disposed of at the admission stage itself without affording an opportunity to the appellant / first respondent to refute the allegations / averments made in the writ petitions and that apart, by disposing of the writ petitions, by directing the appellant / first respondent to accept the modified bids after the date of expiry of the submission of bid documents containing tender conditions, are sought to be altered and therefore, prays for interference.

9. Per contra, Mr.Prabakaran, learned Senior Counsel assisted by Mr.B.Natarajan, learned counsel for the first respondent / writ petitioner has drawn the attention of this Court to the relevant Clauses in the tender documents and would submit that the second respondent under the guise of modification of bid, has offered discounts and for the reasons best known, the appellant / first respondent has also chosen to accept the same and therefore, in all fairness, the first respondent / writ petitioner, who is also a rival builder, should have been granted opportunity to submit the same and taking note of the same only, the learned Judge has passed the order directing the appellant / first respondent in the writ petitions to accept the modification bid / envelop. Admittedly, the bids are yet to be opened and as such, there cannot be any impediment on the part of the appellant to open the modification bid submitted by the second respondent as well as by the first respondent / writ petitioner and decide the same in accordance with the tender conditions and therefore, prays for dismissal of this writ appeal.

10. This Court paid its best attention to the rival submissions and also perused the materials placed before it.

11. It is relevant to extract the following Clauses of the Instructions to Bidders.

"12.1 The Letters of Technical Bid and Price Bid, and the Schedules, including the Bill of Quantities, shall be prepared using the relevant forms furnished in Section 4 (Bidding Forms). The forms must be completed without any alterations to the text, and no substitutes shall be accepted. All blank spaces shall be filled in with the information requested and as required in the BDS.

.....

14.3 The price to be quoted in the Letter of Price Bid, in accordance with ITB 12.1, shall be the total price of the Bid, excluding any discounts offered. Absence of the total bid price in the

Letter of Price Bid may result in the rejection of the Bid.

14.4 The Bidder shall quote any discounts and the methodology for their application in the Letter of Price Bid, in accordance with ITB 12.1.

.....

22.1 Bids must be received by the Employer at the address and no later the date and time indicated in the BDS.

22.2 The Employer may, at its discretion, extend the deadline for the submission of Bids by amending the Bidding Document in accordance with ITB 8, in which case all rights and obligations of the Employer and Bidders previously subject to the deadline shall thereafter be subject to the deadline as extended.

23.1 The Employer shall not consider any Bid that arrives after the deadline for submission of bids, in accordance with ITB 22. Any bid received by the Employer after the deadline for submission of Bids shall be declared late, rejected, and returned unopened to the Bidder.

24.1 A Bidder may withdraw, substitute, or modify its Bid - Technical or Price - after it has been submitted by sending a written notice, duly signed by an authorized representative, and shall include a copy of the authorization in accordance with ITB 20.2 (except that withdrawal notices do not require copies). The corresponding substitution or modification of the Bid must accompany the respective written notice. All notices must be

(a) prepared and submitted in accordance with ITB 20 and ITB 21 (except that withdrawal notices do not require copies), and in addition, the respective envelopes shall be clearly marked "WITHDRAWAL," "SUBSTITUTION," "MODIFICATION;" and

(b) received by the Employer no later than the deadline prescribed for submission of Bids, in accordance with ITB 22.

24.2 Bids requested to be withdrawn in accordance with ITB 24.1 shall be returned unopened to the Bidders."

12. The primordial stand of the first respondent / writ petitioner in the writ petition is that as per Clause No.12.1 of the Instructions to Bidders, discounts should be duly filled in relevant forms only; however, the second respondent has surreptitiously tried to offer discounts and altered their Bid value by submitting a cover printed as "Modification Cover" under the guise of modification under Clause 24 of Instructions

to Bidders. However, the said fact is seriously disputed by the appellant / first respondent.

13. A perusal of the affidavit filed in support of the writ petition would disclose that the allegations of mala fide and non following of the tender conditions have been made against the second respondent and therefore, this Court is of the considered view that in all fairness, notice should have been issued to them so as to enable them to refute the allegations.

14. It is also the case of the first respondent / writ petitioner that the appellant / first respondent, in violation of Clause 24.1 of Instructions to Bidders, has accepted the said modification. Once again, it is to be pointed out that in the light of the said allegation, it is always open to the appellant / first respondent to deny or refute the said allegations by filing their counter-affidavit with supporting documents. However, the opportunities to do so have not been given to both respondents.

15. Clause No.22.1 of Instructions to Bidders says that "Bids must be received by the Employer at the address and not later than the date and time indicated in the BDS".

16. According to the learned Additional Advocate General, the last date for submission of bid was expired on 27.02.2018 and as per the order, which is the subject matter of challenge in the writ petitions, the first respondent / writ petitioner was granted liberty to submit the modification bid in terms of Clause No.24.1 after the expiry of the time stipulated in the tender conditions.

17. In our considered opinion, this Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot rewrite or alter the tender conditions.

18. The learned Additional Advocate General has also placed reliance upon the decision rendered by the Hon'ble Supreme Court of India in the case of Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) vs. CSEPDI-Trishe Consortium reported in (2017) 4 SCC 318, as to the judicial review of the tender and the stage of exercise of power and pointed out that before finalization of tender in respect of the representations submitted, the High Courts should exercise powers and admittedly, by virtue of the impugned order passed in the writ petitions, the writ petitioner / first respondent has been granted benevolence to submit his modification bid after the expiry of time stipulated in the tender conditions and it cannot be done.

19. It is also relevant to extract paragraph 37 of the said judgment, which reads as follows:-

"37. Before parting with the case we are constrained to add something. 'We do so with immense pain. The respondent, before finalisation of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not one of such nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint."

20. In our considered opinion of this Court, the impugned order passed in the writ petitions warrants interference for the reason that it came to be disposed of at the admission stage itself without notice either to the first respondent / appellant or to the Standing Counsel and that apart, though allegations have been leveled against the second respondent, they have not been put on notice at all and that apart, by permitting the first respondent / writ petitioner to submit his modification bid after the expiry of last date, i.e., on 27.02.2018, the tender conditions were also sought to be rewritten and modified and the same is impermissible under law.

21. This Court, taking into consideration the above facts and circumstances of the case and without going into the merits of the case, is of the considered opinion that the impugned order passed in the writ petitions warrants interference and it should be remanded so as to enable the respondents in the writ petitions to put forth their stand.

22. In the result, the writ appeal is partly allowed, the impugned order dated 03.05.2018, is set aside and the writ petition is remanded for fresh adjudication. After issuance of notice to the respondents in the writ petitions and eliciting

the response, it may be disposed of, as expeditiously as possible. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True copy//

Sub Assistant Registrar

abr/sk

To

1.The Superintending Engineer
(Contracts & Monitoring)
Chennai Metropolitan Water Supply
and Sewerage Board,
No.1, Pumping Station Road,
Chintadripet, Chennai.

+lcc to Mr.N.Ramesh, Advocate SR.No.38998

+lcc to Mr.B.Natarajan, Advocate SR.No.38870

Writ Appeal No.1227 of 2018

GN(03/07/2018)



WEB COPY