IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.10663 of 2018

M/s Singh Electricals & Constructions
rep by its Authorised Signatory Mr.M.Sundar
Bhushan Bhawan, Shukla Colony
Hinoo, Ranchi-2 .. Petitioner

-vs-

1. The Managing Director
Chennai Metropolitan Water Supply
and Sewerage Board
No.1, Pumping Station Road
Chintadripet
Chennai 600 002

2. The Superintending Engineer
(Contracts & Monitoring)
Chennai Metropolitan Water Supply
and Sewerage Board
No.1, Pumping Station Road
Chintadripet
Chennai 600 002

3. AECOM India Pvt.Ltd.,
No.9/F, Infinity Tower-C
DLF Cyber City, DLF Phase-II
Gurgaon
Haryana .. Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus,to callfor the records of Tender No.CNT/WSS/1CB/KfW/DESAL/012/2016-17 floated by the first and second respondents inviting bids for designing & building 150MLD capacity of Desalination Plant based on Sea Water Reverse Osmosis at Nemmeli, East Coast Road, Chennai, Tamil Nadu and Operation and Maintenance for 20 years and quash the same and further direct the first and second respondents to call for a fresh tender

For Petitioner	:	Mr.Sathish Parasaran Senior Counsel for Mr.L.Muralikrishnan
For Respondents	:	Mr.Vijay Narayan Advocate General assisted by Mr.N.Ramesh Standing Counsel for R1 & 2 No appearance for R3

ORDER

Mr.Sathish Parasaran, learned senior counsel for the petitioner, assailing the impugned tender notification No.CNT/WSS/1CB/KfW/DESAL/012/2016-17 floated by the first and second respondents inviting bids for designing and building 150 MLD capacity of Desalination Plant based on Sea Water Reverse Osmosis at Nemmeli, East Coast Road, Chennai with Operation and Maintenance for 20 years, to quash the same with a further direction to the first and second respondents to call for a fresh tender, submitted that the petitioner, being a reputed contractor engaged in the designing and building of water treatment plants, having got huge experience in the said field by executing several projects for the drinking water and sanitation division in Chas, Chattisgarh, drinking water and sanitation division, Hatia project, Ranchi worth several crores of rupees, has been awarded with the contracts by various Government agencies and the said contracts have been successfully completed by the petitioner. The petitioner is also interested in quoting for the tender floated by the respondents to design and build 150 MLD capacity of desalination plant based on sea water reverse osmosis at Nemmeli, East Coast Road, Chennai. While so, when the first respondent has floated the impugned tender for designing and building 150 MLD capacity of desalination plant based on sea water reverse osmosis at Nemmeli, East Coast Road, Chennai stating that the bidding would be conducted in accordance with single stage-two envelope system bidding procedure of KfW and State Government, the respondents fixed the last date for submission of tender at 3.00 PM on 19.1.2017 and the tender was to be opened at 3.30 PM on the same day. It was also stated that initially the complete set of tender documents had to be either purchased by the interested bidders from 10.11.2016 to 18.1.2017 on submission of written application along with payment of a non-refundable fee of INR 100,000,000 plus VAT 5% or alternatively the complete set of tender documents had to be downloaded from the employer's website.

2. When the first and second respondents had extended the last date for filing of tender eight times, the same respondents could have considered and granted one extension in favour of the petitioner, since the system of indirect taxation from Customs and Central Excise Act, Central Sales Tax Act underwent a change to Goods and Services Tax Act and the rates of tax kept fluctuating. In such circumstances alone, the petitioner had raised certain queries with a request to extend the time for submitting the tender. Since the first and second respondents did not grant any extension of time, the petitioner, being interested in taking part in the tender process, filed W.P.No.24672 of 2017 seeking a direction to extend the time for submitting the tender document and this Court passed an order on 14.9.2017 making it clear that the tender process is subject to the result of the writ petition and the said writ petition is also pending. That shows that the petitioner is seriously interested to take part in the tender proceedings. Therefore, the allegation of the respondents that the petitioner waited till 28.8.2017 to purchase the tender document with an intention of delaying the tender process, is nothing but a figment of their imagination. Indeed the petitioner has spent Rs.1,00,000/- in purchasing the tender document. That also shows the bonafides of the petitioner.

3. Mr.Sathish Parasaran, referring to the appointment of the third respondent as a technical consultant for the tender in respect of 400 MLD of desalination plant, has emphatically pleaded that when the first and second respondents have paid a sum of Rs.14 crores to the third respondent for its technical expertise by entering into a supplementary contract, now the third respondent, after going through all the tender documents submitted by the five companies, has declared all the five selected bidders as non-responsive. When the report of the technical consultant and the evaluation of the technical report recommended to the Board clearly show that they are the ineligible companies, as per the ratio laid down by the Apex Court in Reliance Airport Developers (P) Ltd., v. Airports Authority of India and others, (2006) 10 SCC 1, the first and second respondents have to either scrap or abandon the process and second to reconduct the tender. Again assailing the stand taken by the first and second respondents in the counter that in the event of meeting fresh tender, few lakhs of rupees would be spent for publishing the tender in the international and national dailies including regional language, it is further pleaded that when the first and second respondents are particular in providing clean and potable water to the general public and the respondents are genuinely interested in awarding the contract to the eligible bidder, the plea of financial damages is only a smoke screen to create sympathy of this Court and there is no justifiable reason for violating Rule 26(2) of

the Tamil Nadu Transparency in Tenders Rules, 2000. Concluding his arguments, Mr.Sathish Parasaran went on to contend that Section 15 of the Tamil Nadu Transparency in Tenders Act, 1998 cannot be invoked by the first and second respondents to circumvent Rule 26(2), inasmuch as there is no extraordinary or special circumstance brought on record by the first and second respondents to apply the mischief of Section 15 against the petitioner. A reading of Section 15 shows that the provisions of this Act shall not apply to the extent they are not consistent with the procedure prescribed in the project funded by international agreement.

4. Explaining further, the learned senior counsel submitted that when the third respondent had already found the five bidders technically non-responsive, as they did not satisfy the pre-qualification conditions called under sub-clause 3.2.1(iii) of Section III Vol-I, the first and second respondents have no option, but to go for fresh tender, so that more competent and eligible companies could take part in the future tender that would be greatly useful for commissioning of the present sea water desalination plant based on reverse osmosis process. Again referring to the rejection of the bid of Cobra Instalaciones Y Services SA, the learned senior counsel submitted that when Cobra Instalaciones Y Services SA has submitted only a self-certified form without a certificate from a statutory auditor, the said bidder has made an attempt to influence the tender inviting authority in the evaluation of the bids. Such an approach of Cobra Instalaciones has been found to be improper that would lead to the rejection of its bid. Similarly, in the case of SUEZ International, it was found that they did not satisfy the conditions called under sub-clause 3.2.1(iii) and 3.2.1 (vi) of Section III, Vol.I, hence, their bid was found to be technically non-responsive. Again the third respondent found the bid submited by VA Tech Wabag as technically non-responsive, since the said bidder failed to satisfy the conditions called under sub-clause 3.2.1(i) and 3.2.1(iii) of Section-III, Vol.I. When all the five bidders were found ineligible by the third respondent, the second respondent ought not to have proceeded further. Hence, by setting aside the impugned tender, a direction be issued to the first and second respondents to go for a fresh tender.

5. Responding to the contentions made by the petitioner's side, Mr.Vijay Narayan, learned Advocate General for the first and second respondents urged this Court to dismiss the writ petition, as the petitioner has no locus standi to file the writ petition, for the simple reason that the petitioner never submitted the bid. This fact was also suppressed in the affidavit filed in support of the writ petition. When the petitioner has not participated in the subject matter of tender, it has no locus standi to file the present writ petition, as the

petitioner is not an aggrieved person. Explaining further, Mr.Vijay Narayan submitted that when the tender notification No.CNT/WSS/1CB/KfW/DESAL/012/2016-17 was floated by the first and second respondents inviting bids for the designing and building of 150 MLD desalination plant based on sea water reverse osmosis at Nemmeli, East Coast Road, Chennai with the operation and maintenance for 20 years, the said plant is a very prestigious and very important project to tide over the crisis in the water starved Chennai city at an outlay of Rs.1259.38 crores with the funding of Rs.700 crores from Kreditanstalt fur Wiederaufbau, hereinafter referred to as KfW and from the Government of Tamil Nadu under AMRUT of Rs.559.38 crores. As the petitioner, without any locus, has filed the present writ petition and obtained an order of status quo, it has delayed the finalisation of tender that would lead to financial burden to the Board, inasmuch as the Board is liable to pay commitment charges of 0.25% on the non-drawn amount which may lead to cancellation of the fund by KfW.

6. Mr.Vijay Narayan further submitted that the Chennai Metropolitan Water Supply and Sewerage Board, hereinafter referred to as "the Board" have entered into the field of desalination of sea water to bridge the demand of water supply gap as drought proving measure. Accordingly, 100 MLD sea water reverse osomois plant at Kattupalli, Minjur was set up on Design, Build, Own, Operate and Transfer basis and commissioned on 25.7.2010 for supply of potable water to the people of North Chennai, Central Chennai, Kathivakkam and Tiruvottiyur of Chennai city. Again to supply water to the people in the areas of Velachery, Pallipattu, Tiruvanmiyur, Kottivakkam, Palavakkam, Neelankarai, Sholinganallur and IT corridor locations, the second 100 MLD sea water reverse osmosis desalination plant was set up at Nemmeli and the same was also inaugurated on 22.2.2013 and it is catering to the needs of 10 lakh people in the aforementioned areas. Similarly, the proposed plant of 150 MLD sea water reverse osmosis desalination plant is going to be set up at Nemmeli with the funding assistance from KfW, Germany to satisfy the drinking water requirement of 10 lakh people. Therefore, the Board, being pioneer in the field of maintenance and establishment of desalination plants at Minjur and Nemmeli, have decided to evalute the tenders. Such a decision taken by the Board to supply safe potable and drought proof water to the public in Chennai city is being wrongly challenged by the petitioner without any locus as the petitioner has not even submitted its tender. When the tenders for the aforementioned project was invited on 10.11.2016 by fixing the due date for submission of bid as 19.1.2017, the said date was further extended for eight times upto 15.9.2017. When the petitioner came into the picture at the eleventh hour and sought for extension of time, the same was refused by the Board. Hence, the petitioner came to this Court with W.P.No.24672 of 2017

seeking extension of further time for submission of its bid, citing a reason of change in the indirect taxation law, viz., Goods and Services Tax Act, which came into force from 1.7.2017. When the tender was open from 10.11.2016, the petitioner had purchased the bid document only on 28.8.2017 and raised queries on 29.8.2017. That shows that the petitioner is not really interested in participating in the bid and its intention is also not bona fide. Considering the want of merits in such request, this Court refused to extend the time. However, the petitioner preferred W.A.No.1160 of 2017 and the said appeal was dismissed as withdrawn on 15.9.2017. When the petitioner had not submitted the tender on or before 15.9.2017, the writ petition became infructuous and liable to be dismissed. This apart, when the bidders were allowed sufficient time to raise further clarification till 14.6.2017, about 1029 queries were raised after the pre-bid meeting and again after getting approval of KfW, the German funding agency, reply for the 1029 queries were hosted on the internet to the bidders and they were also allowed sufficient time to raise further clarification till 14.6.2017. However, due to the introduction of the Goods and Services Tax from 1.7.2017, the due date for submission of the tender was also further extended to 31.7.2018 to consider the change in the addendums due to GST. When the bidders were given sufficient time to consider the replies to their queries totalling 1174 numbers along with 122 numbers of addemdums and also to consider the impact of GST, many of the bidders have purchased the tender documents well in advance. But the petitioner had purchased the tender document 58 days after the introduction of GST, namely, on 28.8.2017 and started seeking clarifications on GST and extension of time with an ulterior motive to delay the tender process. Therefore, the first and second respondents refused further extension of time, for the simple reason that the extension were granted for eight times to the previous bidders, keeping in mind that the prestigious project to solve the drinking water needs of the people of Chennai city should not be unnecessarily delayed. On this basis, it was further pleaded that the petitioner is not a bona fide bidder. Hence the writ petition of the petitioner being ill-advised is liable to be dismissed on the ground of no locus to challenge the impugned tender. In any event, the petitioner has not made out any grievance against the respondents.

7. Again meeting the second contention of the petitioner with regard to the power to engage a technical consultant to assist the Board in evaluating the bids, the learned Advocate General submitted that the Board has the power to engage a technical consultant to assist the Board in evaluating the bids. Now the report of the technical consultant on all the five prospective bidders has been placed before the technical committee, which will place the same with its recommendation to the Board and in turn the Board is not bound to accept the

report of the technical consultant. The reason being that the Board consisting of 11 Directors have the authority to examine, review and revise the report of the technical consultant and thereafter, KfW as the funding agency, has to examine all the reports and offer its opinion. Finally a decision will be taken by the Board only after getting concurrence from the KfW. Further, a committee of senior officials of the Board consisting of Executive Director, Engineering Director, all Chief Engineers, Superintending Engineer (C&M) and Superintending Engineer (Desal) held meetings on 23.3.2018 and 26.3.2018 and after going through the documents and other proceedings in connection with the tender for establishing the 150 MLD desalination plant including the evaluation report submitted by the consultant, the committee resolved to overrule the consultant's views for rejection of bid of responsive bidder, since suo motu confirmation of the bidder does not have any implication, as price bids were already submitted and it is only a technical evaluation and also to overrule the consultant's views for another bidder, since the client has certified that the bidder has carried out the O&M for more than three years as per the requirement of the qualification condition clause 3.2.1 (iii). Besides, the Board has also resolved to concur with the views of the consultant for the remaining three bidders. As the Board is the employer in this case, they are the deciding authority for technical responsiveness, but not the technical consultant. Therefore, the procedure adopted in treating the two bids as technically responsive and to reject the other three bids is in accordance with law and is not illegal or in other words, as denounced by the petitioner's side, no favour is shown to anyone.

8. Replying to the contention that the period of tender had exceeded 180 days and as per Rule 26(2) of the Tamil Nadu Transparency in Tenders Rules, they should go for a fresh tender, the learned Advocate General submitted that Rule 26(2) cannot be applied by virtue of Section 15 of the Act read with clauses 19.1 and 19.2 of the bid document, inasmuch as the bid validity has been extended twice upto 31.8.2018 and the bid validity starts from the date after the day of opening of the bid. While so, in this case, the bid validity starts from 16.9.2017 and as such, two and half months have gone over the 180 days of bid validity. Therefore, the contention made by the petitioner that 500 days delay had occurred is wholly incorrect. Even the two and half months period after the initial bid cannot be put against the respondents, since clauses 19.1 and 19.2 of the bid document show that the bid validity, in exceptional circumstances, prior to the extension of the bid validity period, can be extended, for the reason that the funding agency KfW has also accorded concurrence for extension of the bid validity.

9. Heard both sides.

10. When the first and second respondents proposed to set up the 150 MLD sea water reverse osmosis desalination plant at Nemmeli as a prestigious project to tide over the drinking water crisis in the State at an outlay of Rs.1259.38 crores with the shared funding from KfW, a German funding agency to the tune of Rs.700 crores and by the Government of Tamil Nadu under AMRUT to the tune of Rs.559.38 crores approximately, the tender for the above said project was floated on 10.11.2016 fixing the last date for submission of the bids on 19.1.2017. Thereafter, the period was repeatedly extended for eight times upto 15.9.2017. After eight extensions, the petitioner, who purchased the tender document only on 28.8.2017 i.e., two days before the due date on 31.8.2017, did not submit its bid before the last date and sought for extension of time for submission of the bid. As this was refused, the petitioner came to this Court and filed W.P.No.24672 of 2017 seeking a direction for extension of time for the bid submission beyond 15.9.2017. But this Court refused to grant extension of time except observing that the tender process is subject to the result of the writ petition. As against that order, the petitioner prefered W.A.No.1160 of 2017 and the Hon'ble Division Bench dismissed the said writ appeal as withdrawn on 15.9.2017, resultantly, the petitioner had not submitted the tender document on or before 15.9.2017. Therefore, the petitioner has no locus standi to file the present writ petition, as he is not an person aggrieved. In this context, it is useful to refer to the ratio laid down by the Constitution Bench of the Apex Court in Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, AIR 1976 SC 578 holding as follows:-

> “In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No Objection Certificate.”

11. Secondly, if the petitioner was really interested in participating in the bid, the petitioner should have tendered its bid after getting all the doubts cleared from the Board well in advance, as per clause 6.1 of the bid document, which reads thus,

> "A Bidder requiring any clarification of the Bidding Documents shall contact the Employer in writing at the Employer's address specified in the BDS or raise his enquiries during the pre-bid meeting. The Employer will respond in writing to any request for clarification, provided that such request is received not later than twenty one (21) days prior to the deadline for submission of Bids. The Employer shall forward copies of its response to all Bidders who have acquired the Bidding Documents in accordance with ITB 5.3, including a description of the inquiry but without identifying its source. If so specified in the BDS, the Employer shall also promptly publish its response at the web page identified in the BDS. Should the clarification result in changes to the essential elements of the Bidding Documents, the Employer shall amend the Bidding Documents following the procedure under ITB 7 and ITB 24.2.,"

prior to the deadline for submission of the bid. As this has not been done, the petitioner has no locus to challenge the impugned tender now.

12. Thirdly, I fully agree with the submission made by the learned Advocate General for the first and second respondents that by virtue of Section 15 of the Act, the petitioner cannot seek to apply Rule 26(2) of the Tamil Nadu Transparency in Tenders Rules. A reading of clauses 19.1 and 19.2 of the bid document, which read thus,

> "19.1. Bids shall remain valid for the period specified in the BDS after the Bid submission deadline date prescribed by the Employer pursuant to ITB 24.1. A Bid valid for a shorter period shall be rejected by the Employer as non-responsive.
>
> 19.2 In exceptional circumstances, prior to the expiration of the Bid validity period, the Employer may request Bidders to extend the period of validity of their Bids. The request and the responses shall be made in writing. The Bid Security shall also be extended for twenty-eight (28) days beyond the deadline of the extended validity period. A Bidder may refuse the request without

> forfeiting its Bid Security. A Bidder granting the request shall not be required or permitted to modify its Bid, except as provided in ITB 19.3.”,

clearly show that the employer, in exceptional circumstances, prior to the expiration of the bid validity period, can extend the period on the request of the bidders to extend the period of validity of their bids. Secondly, the funding agency KfW in this case has accorded concurrence for extension of the bid validity by its communication dated 15.2.2018. Even the letter dated 9.2.2018 sent by the Managing Director of the Board to the Project Manager, KfW Development Bank, Frankfurt, Germany clearly shows that the bid validity for the design & build of 150 MLD capacity desalination plant based on sea water reverse osmosis at Nemmeli was to expire on 15.3.2018 and the bid validity for the conveyance of 150 MLD of water through pipeline from the desalination plant at Nemmeli upto Pallavaram was to expire on 31.3.2018. Noting these aspects, they proposed to extend the bid validity for three months for both tenders. Resultantly, the Managing Director of the Board requested the Project Manager of the funding agency at Germany to grant extension of time to submit the evaluation report on the technical bids received from the bidders upto 28.2.2018 and the concurrence for the extension of the bid validity upto 15.6.2018. In turn, KfW the funding agency, disliking the request for repeated extension of time, emphasising that according to KfW procurement regulations - cancellation of a tender is possible if the sole bidder is not technically qualified, as a final chance, concurred for the extension of the bid validity period for the plant tender upto 31.5.2018 and for the pipeline tender upto 30.4.2018. Since the KfW funding agency has accorded concurrence for the extension of bid validity, all the five proposed bidders also extended the validity of the bids by extending the bid security bank guarantee in the letter dated 28.2.2018 by VA Tech Wabag Limited, letter dated 1.3.2018 by SUEZ International, letter dated 6.3.2018 by Acciona Agua S.A. Similarly, Cobra Instalaciones Y Services S.A., in letter dated 12.3.2018 also extended the bank guarantee upto 31.5.2018 and IDE Technologies Ltd., in letter dated 8.3.2018 clarified that the guarantee was already valid upto 1.8.2018.

13. In this context, it is relevant to extract Section 15 of the Tamil Nadu Transparency in Tenders Act, 1998 and Rule 26 of the Tamil Nadu Transparency in Tenders Rules, 2000, which read thus:-

"15. Procedure to be followed in certain cases.--The provisions of this Act to the extent they are not consistent with the procedure prescribed in the Projects funded by International Agreements or by International Financial Agencies shall not apply."

"26. Time taken for evaluation and extension of tender validity.--(1) The evaluation of tenders and award of contract shall be completed, as far as may be practicable, within the period for which the tenders are held valid.

(2) The Tender Accepting Authority may seek extension of the validity of tenders for the completion of evaluation:

Provided that sum total of all extensions shall ordinarily not exceed 180 (one hundred and eighty) days.

(3) In case the evaluation of tenders and award of contract is not completed within extended validity period, all the tenders shall be deemed to have become invalid and fresh tenders may be called for."

14. A careful reading of Section 15 stating that the provisions of this Act to the extent they are not consistent with the procedure prescribed in the project funded by the international agreement shall not apply, clearly goes to show that the Kreditanstalt fur Wiederaufbau (KfW), Germany is an international financial agency. As every now and then the first and second respondents have to take prior approval including the extension for the bid validity, as per clauses 19.1 and 19.2 of the bid document, Rule 26(2) cannot be made applicable in the present case.

15. Finally, as rightly contended by the learned Advocate General for the first and second respondents, the Board has not declared and entrusted the project of designing and building the 150 MLD sea water reverse osmosis desalination plant in favour of any bidder. Moreover, Commondum Ex Injuries Sua Memo Habere Debet, a person cannot be allowed to take advantage of his own wrongs. Having not submitted the bid and having failed to participate in the tender, the petitioner is not a person aggrieved. Therefore, as it is a well settled law, when the petitioner has no legal right to question the respondents, more particularly, when there is no final decision taken on the bid till now, the petitioner, who has neither participated in the tender nor submitted his bid, cannot be held to be an aggrieved party at all.

16. For all the aforementioned reasons, the writ petition fails and it is dismissed accordingly. Consequently, interim order stands vacated and the W.M.P.Nos.12608, 12609, 16010 of 2018 are also dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

ss

To

1. The Managing Director
Chennai Metropolitan Water Supply
and Sewerage Board
No.1, Pumping Station Road
Chintadripet
Chennai 600 002

2. The Superintending Engineer
(Contracts & Monitoring)
Chennai Metropolitan Water Supply
and Sewerage Board
No.1, Pumping Station Road
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Chennai 600 002

+1cc to Mr.L.MuraliKrishnan, Advocate, S.R.No.46408.
+1cc to Mr.N.Ramesh, Advocate, S.R.No.46382.

W.P.No.10663 of 2018

VBA(CO)
BM 16/07/2018.