

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.37069 of 2018

ORDER:

The alleged action of the 1<sup>st</sup> respondent-Visakhapatnam Steel Plant in qualifying Respondents 3 to 7 in technical bid evaluation in violation of the tender notification dated 22.8.2018 for supply of 198000 MT SMS Dolomite @ 24000 T/Month tentatively is under challenge in the present writ petition and consequentially, petitioner herein is seeking a direction to the 1<sup>st</sup> respondent not to consider the price bid of Respondents 3 to 7.

2. According to the petitioner, it has been supplying Dolomite to the 1<sup>st</sup> respondent for so many decades without any complaint. The 1<sup>st</sup> respondent issued open tender notification dated 22.8.2018, inviting tenders for supply of material as stated supra. Annexure-I of the said notification prescribes "Specification" of Dolomite, so also provided for "Absolute Limit" on which material will be accepted with deductions. The last date for submission of tenders was on 5.9.2018 and on which date, the technical bid was to be opened. In response to the notification, as many as 13 tenderers including the petitioner and Respondents 3 to 7 submitted their tenders. On 5.9.2018, the tenders were not opened as scheduled, but on 7.9.2018 the technical bids were opened. According to the petitioner, its representative was present at that time and noted down the deficiencies of technical specifications of Respondents 3 to 7. In the above background, with a request to restrain the 1<sup>st</sup> respondent from considering the price bids of Respondents 3 to 7, the present writ petition came to be filed. A counter affidavit is filed by Respondents 1 and 2.

3. Heard the learned counsel for petitioner Sri N.Vijay, and Sri K.Sarvabhouna Rao, learned Standing Counsel for Respondent Organisation, apart from perusing the material available before the Court.

4. According to the learned counsel for the petitioner, Respondents 3 to 7 are not eligible as per specifications of Dolomite offered to be supplied by them which does not meet the tender specifications and as such, the 1<sup>st</sup> respondent ought to have disqualified them at the stage of technical bid evaluation itself. It is further contended that contrary to the tender conditions, the 1<sup>st</sup> respondent accepted the test reports of Respondents 3 to

7. In elaboration, it is further submitted by the learned counsel that the products of Respondents 3 to 7 are close to "Absolute Limit" and not of specification and the same is contrary to paragraph 10.2(a) of Annexure-II i.e. instructions to the tenderers. It is further contended that "Absolute Limit" as mentioned in Annexure-I is an operative condition and if any deviation comes during execution or supply of material, then payment is required to be collected by imposing penalty as per Annexure-VII.

5. Per contra, reiterating the averments in the counter affidavit, it is contended by the learned Standing Counsel appearing for Respondents that as per Annexure-I of the tender notification, which deals with technical specification of SMS Dolomite Flux Grade, the 1<sup>st</sup> respondent is entitled to accept the material upto Absolute Limit though not as per the specifications and beyond the Absolute Limit, the 1<sup>st</sup> respondent is entitled to reject and for variation prescribed for standard specification and Absolute Limit, penalty would be imposed. It is further contended that the test reports of Respondents 3 to 6 are within Absolute Limit and the bid of Respondent No.7 was rejected at the technical stage.

6. It is also submitted by the learned Standing Counsel that all the suppliers from a particular place namely Bilha in Chattisgarh State are forming into a ring and not allowing the Respondent Company to have the material at actual price and in view of the same, the Respondent Company is forced to pay more and more price. It is further submitted that two other tenderers from the same region lodged complaint before Independent External Monitors (IEMs) as per Section 8 of Annexure-IX/Integrity Pack and after thorough scrutiny, the said authority turned down the said complaint.

7. In the above background, now the issue that emerges for consideration before this court is “*Whether the petitioner herein has made out a case, warranting interference of this Court under Article 226 of the Constitution of India.*”

8. It is not in dispute that the 1<sup>st</sup> respondent invited tenders by way of open tender notification dated 22.8.2018. Annexure-I of the said notification which deals with technical specification of SMS Dolomite Flux Grade reads as under:

“ANNEXURE -I to Open Tender ITT RFX no. 2100008082/ dt. 22.08.2018

TECHNICAL SPECIFICATION OF S M S DOLOMITE FLUX GRADE

| Sl.No. | Parameter                      | Specification | Absolute Limit |
|--------|--------------------------------|---------------|----------------|
| 1      | CaO                            | 29% Min.      | 29% Min.       |
| 2      | MgO                            | 21% Min.      | 19% Min.       |
| 3      | SiO <sub>2</sub>               | 1% Max.       | 2% Max.        |
| 4      | Al <sub>2</sub> O <sub>3</sub> | 0.5% Max      | 1% Max         |
| 5      | Fe <sub>2</sub> O <sub>3</sub> | 0.5% Max      | 1.5% Max       |
| 4      | Total Moisture                 | 0.5% Max      | 0.5% Max       |
| 5      | Size                           | 25-50 mm      |                |
| 6      | (-) 25 mm size                 | 5% Max        | 5% Max         |
| 7      | (+) 50 mm size                 | 5% Max        | 5% Max         |

Note: MgO is acceptable upto 19% Min with prorata penalty for every 1% decrease, SiO<sub>2</sub> Al<sub>2</sub>O<sub>3</sub> are acceptable upto absolute limits with Rs 2/- per every 0.1 % increase and for Fe<sub>2</sub>O<sub>3</sub> Rs 3/- for every 0.1% increase. CaO less than 29% the material will be rejected. The unit on which the penalty has to be levied is per Metric Tonne (T)

Material with parameters beyond absolute limits stands rejected.  
Please refer Annexure VII for penalty structure above absolute Limits

9. While referring to the said Annexure as stated supra, it is the case of the petitioner herein that the report submitted by the Respondents 3 to 7 are not in accordance with the figures mentioned at specification column and the 1<sup>st</sup> respondent herein ought to have rejected the technical bids of the Respondents 3 to 7. Column No.4 of Annexure-I deals with Absolute Limits and according to the same, the 1<sup>st</sup> respondent herein gave leverage. It is the further submission of the learned counsel that as per Clause 10.2(a) of Annexure-II, if the tender documents are not in accordance with specification, such documents are not acceptable and liable to be rejected. Clause 10.2 of Annexure-II cannot be read in isolation and needs to be read along with Annexure-I and as per the note to Annexure-I, the material supplied with Absolute Limits is acceptable.

10. It is also clear from Annexure-I that the material with parameters beyond Absolute Limits is liable to be rejected. Therefore, the contention that since the reports of Respondents 3 to 7 do not adhere to Column No.3 of Annexure-I i.e. specification, tenders of Respondents 3 to 7 are liable to be rejected at the technical evaluation level cannot be sustained in the eye of law. The further contention that question of imposing penalty arises during execution of contract as per Annexure-VII only, as such, Absolute Limit cannot be accepted, cannot be sustained as the said contingency does not at all exist at the time of considering the bid documents for technical and financial evaluation. It is also significant to note that as per Section 8 of Annexure-IX (Integrity Pack), two other similarly situated persons filed complaints before the Independent External Monitors and the said agency also opined against the complaints. It is a settled and well established principle of law that unless there is involvement of public interest and the impugned action suffers from malafides, a writ petition under Article 226 of

the Constitution of India in contractual matters cannot be maintained. In the instant case, there is no element of public interest nor any malafides are attributed against the respondents herein.

11. In view of the above reasons, this Court does not find any valid reason to interdict the impugned action. Accordingly, the writ petition is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

Date: 15.11.2018  
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A.V.SESHA SAI, J





THE HON'BLE SRI JUSTICE A.V.SESHA SAI



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