

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

Reserved on: 20.02.2018

Pronounced on: 12.03.2018

+ **W.P.(C) 1374/2018, C.M. APPL.5723/2018 & 5724/2018**
QUIPPO OIL AND GAS INFRASTRUCTURE LIMITED

.... Petitioner

Through: Sh. P. Chidambaram, Sr. Advocate with Sh. Abhimanyu Bhandari, Ms. Kartika Sharma and Sh. Cheitanya Madan, Advocates.

versus

OIL AND NATURAL GAS CORPORATION LIMITED AND ORS.

.... Respondents

Through: Sh. Sandeep Sethi, Sr. Advocate with Sh. Sunil. K. Jain, Sh. Pawanshree Agrawal, Ms. Reeta Chaudhary and Sh. Punya Garg, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioner is a wholly owned subsidiary of SREI Infrastructure Finance Limited, which owns 99.90% of the shares. The first respondent/Oil and Natural Gas Corporation Limited (ONGC Ltd.) floated the subject charter hire of four numbers of Drilling Rigs for Mehsanam and Rajamundhry Assets. The Petitioner is aggrieved by the interpretation of the financial criteria of the tender, whereby the bidding company is required to possess 15% net worth of annualized bid value. The total bid value is ₹ 500 crore; 15% of that works out to ₹ 75 crores.

2. The facts necessary to decide the case are that ONGC published a tender calling for bids, on 30.12.2016 for charter-hire of four Drilling Rigs

for Mehsanam and Rajamundhry Assets. The original tender did not contain the working capital criteria under the bid evaluation criteria. By its letter, dated 23.03.2017 ONGC informed the petitioner with regard to the amendments made in the tender. The BEC financial criteria of the Tender too were amended. The relevant criteria included consequently reads as follows:

"Working Capital :15% of annualized bid value or more as the working capital requirement besides other changes."

3. The tender was published on the ONGC's portal on 27.03.2017. The Financial criteria of its Bid Evaluation Criteria, stated that:

"FINANCIAL CRITERIA

- 1. Turnover of Bidders: 50% of annualized bid value or more;*
- 2. Net worth of Bidder: 15% of annualized bid value or more.*
- 3. Working Capital: 15% of annualized bid value or more*

Notes:

(vi - (a) A bidder (other than consortium) which is not able to meet the financial criteria by itself, can also submit its bid on the basis of financial capability of a supporting company provided each of the following conditions are fulfilled:-

1. The bidder is supported by a supporting company which holds more than fifty percent of the paid up equity share capital of the bidder.

11. The supporting company by itself and not through any other arrangement satisfies the financial criteria of the BEC.

iii. Supporting company shall furnish additional PBG equivalent to 50% of the amount of PBG submitted by-bidder as per the format provide at Annexure-A.

iv. In such cases, all applicable financial parameters viz. Turnover, Net-worth, Working Capital, D/E ratio of the supporting company only will be considered for evaluation and the financial capability of the bidding entity will not be considered for evaluation."

4. The petitioner submitted its bid by relying on the financial strength of the SREI Infrastructure Finance Ltd i.e. its 100% parent Holding Company(Supporting Company) on the basis of the consolidated audited financial accounts for the financial year 2015-16. The tender further categorically stated that in the event, a bidder is unable to meet the criteria, it can submit the bid on the basis of the financial capability of a supporting Company, provided the supporting company held more than 50% of the paid up equity share capital of the bidder. The tender also stipulated that in case the working capital of a bidder is inadequate in meeting the tender requirements provided under the Clause B.2.6 (3), the Tender provides that the bidder can make good this shortfall through a Line of Credit confirming the availability of unutilized line of credit for meeting the shortfall from a Scheduled banker, through a letter specifically mentioning the tender number. The Petitioner, along with its bid submitted a letter, dated 11.04.2017 issued by the Andhra Bank at the request of SREI stating the latter's cash credit limit.

5. It is stated that by a letter of 15.09.2017, ONGC had queried the petitioner with respect to SREI Infrastructure's working capital. It is submitted that on 25.09.2017, in response to ONGC's queries it was clarified that there was no shortfall in the working capital of SREI capital and that this working capital of ₹241.19 crores of unutilized line of credit was in consonance with Clause B.2.6 of the tender. It was stated that this amount was available and therefore the question of any shortfall in the net assets did not arise. Since the petitioner wanted the ONGC to respond one way or the other to the bid, it addressed a letter to the Independent External Monitor

(IEM) which was received by the ONGC on 14.11.2017. This was based upon the petitioner's opinion that the price bid had been opened on 17.10.2017. Pursuant to the application to the IEM, the petitioner made a power point presentation and followed up with certain letters to ONGC and IEM on 29.01.2018 and 30.01.2018. It is urged that based upon these presentations, the IEM by the opinion of 02.02.2018 stated that ONGC was actively contemplating the deletion of the working capital requirement as it was unduly restrictive, by its letter of 02.02.2018. The said letter of the IEM's letter *inter alia* reads as follows:

***“Sub: IEM opinion on your representation against
ONGC Tender No
ZNSVC16010 for Hiring of Drilling Rigs.*”**

Your representation to the Independent External Monitors (IEMs) against subject tender was examined by the IEMs.

The operative part of the opinion inter alia reads as under:

Quote:

- a. In respect of two out of three groups, ONGC has landed up in a single bid situation due to rejection of other bids for various reasons. Even in Category-3 only two offers have emerged techno-commercially acceptable and the price bids of only two bidders has been opened in Category-3. Thus competition is lacking in the tender.*
- b. The working capital requirement introduced by ONGC in the Financial Criteria clause in the tenders for service contracts recently in March 2017 appears to be restrictive in nature. ONGC is now contemplating to delete the working capital requirement from their service contract tenders shortly. (The instant tender for charter hire of onland drilling rigs falls in the category of service contracts).*

Unquote:

The IEM opinion is non-binding in nature and the above part of the opinion is being shared in the interest of transparency.

This is for your kind information.

Sd/-”

6. Mr. P. Chidambaram learned senior counsel contends that the ONGC's omission to consider the petitioner's bid is arbitrary. It is stated that according to basic accounting principles, the unutilized line of credit, i.e. ₹249.19 crores confirmed by the letter of Andhra Bank to SREI Infrastructure (the petitioner's holding a company) is sufficient to meet working capital requirements of the tender stipulation and satisfies the financial criteria spelt out in the PEC. The utilization of such credit was explained in detail through a power point presentation to the IEM. Learned counsel contends that the provision in sub-Clause (iv) which defines "working capital" as current assets minus current liabilities and specifically the sub paragraph dealing with inadequate working capital is meant to deal with particular situations. The petitioner's inadequate working capital was addressed by the "line of credit" by the confirmed "availability of unutilized line of credit for meeting the shortfall" from the banker of SREI Infrastructure. Thus, in ignoring the petitioner's bid and in proceeding to consider the bids of other tenderers, the ONGC contravened the tender conditions and acted arbitrarily. Learned counsel relied upon the judgment of the Supreme Court reported as *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation* (2007) 8 SCC 1 which had discussed advance accounts and fundamentals of corporate accounting. It is submitted

that these principles clearly recognized the cash flow reporting method, which incorporates both the direct and indirect method which lead to identical results in regard to final total and only differ in regard to presentation. It was submitted that a short-term line of credit cannot be treated as a long term liability and therefore the infusion of ₹249.19 crores meant specifically for the project, ensures liquidity of the petitioner's net assets.

7. Mr. Sandeep Sethi, learned senior counsel appearing for ONGC stressed on the expression "this shortfall" in the relevant part of Clause B.2.6(iv) and contends that it unambiguously refers to the shortfall in working capital. It is submitted that a line of credit availed by a bidder either directly or through its holding company from a banker to meet a business requirement is insufficient to meet the shortfall in their working capital. It was pointed out that the petitioner's total current liabilities are ₹15,315 crores including ₹12,101.18 crores of short term borrowings and the total current assets were only ₹718.64 crores. Such assets are most likely under the clog of security or mortgage to specify the liabilities. The eventuality of recovery by creditors who might enforce the liabilities cannot be ruled out. Thus, the assets including the rigs offered for performance of the contract may be also taken over for auction at any time during such recovery proceedings. In the event of award of the contract to the petitioner, it would be unable to perform the job and might then urge the plea of "*force majeure*". The line of credit availed of would be of no consequence. It is submitted that the inadequacy of working capital in the present case could have been made good by disclosing the unutilized line of credit to meet the shortfall which in this case was not ₹249.19 crores but ₹7,526 crores.

Consequently, the petitioner's bid was rejected. It was also urged in addition that ONGC obtained expert opinion from an independent Chartered Accountant M/s Andros & Co. with respect to calculation of the working capital of a non-banking finance company (NBFC) i.e. the second respondent –SREI Infrastructure. According to the opinion given, it was pointed out that the working capital of the petitioner in this case was ₹7,399.88 crores. Learned counsel relied upon the decision of the Supreme Court in *Central Coal Fields Ltd. v. SLL – SML (Joint Venture) &Ors.* (2016) 8 SCC 622 and *Consortium of Titagarh Firema Adler Spa v. Nagpur Metro Rail Corporation Ltd.* (2017) 7 SCC 846 and *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* (2016) 16 SCC 818 and stated that the interpretation given by ONGC to tender condition B.2.6(iv) was reasonable and should not be interfered with under Article 226 of the Constitution.

8. The controversy, which the court has to address, is as to the precise scope of the Clause B.2.6(iv) which is extracted earlier. According to the main part of Clause B.2.6, several essential conditions have to be met with. These included the turnover criterion; the net worth criterion and the working capital criterion. In the present case, what is involved is the working capital criterion. The term “working capital” is defined in Clause B.2.6 as current assets minus actual liabilities in terms of the latest year's audited consolidated annual financial statements. The sub paragraph immediately succeeding Clause B.2.6 (iv) provides that in case of inadequacy in working capital, the bidder can make good the shortfall through line of credit confirming the availability of unutilized line of credit for meeting the shortfall from his banker through a letter specifically

mentioning the tender number. In the present case, Andhra Bank provided such a letter. The question is whether the petitioner's bid could be considered as compliant and that the petitioner deemed eligible to have fulfilled the criteria spelt out in Clause B.2.6 as a whole.

9. The petitioner urges that although there is a substantial shortfall of its working capital on account of the liabilities, what is important to note is that these liabilities are long term and the working capital and asset base to the extent of inadequacy does not in totality have to be addressed. It is emphasized that to meet the tender specification i.e. that the bidder ought to fulfill the working capital requirement of 15% of the overall tender value (working out to ₹75 crores), the extent of shortfall had to be satisfied by making available a line of credit for the purpose. The petitioner seeks support from *Reliance Energy Ltd. (supra)* which broadly seems to support its contention that direct and indirect methods of accounting can be taken into consideration while reporting or presenting the accounts including assets, liabilities, capital and other heads.

10. The Court, however, is not to view the interpretation of the tender documents as if it were the body charged with the primary duty of doing so. As repeatedly emphasized by the Supreme Court in its numerous decisions – including those cited by ONGC, judicial review is concerned with whether the impugned action is illegal, procedurally unfair, lacking in bona fides or patently and manifestly unreasonable in its effect. The last expression is to be resorted to only and only if the result is of such a threshold that the decision is one that no reasonable man placed in a like situation could have arrived at such a conclusion. In this case, ONGC argues that the interpretation given by it is plausible and reasonable and that given the

petitioner's extensive liabilities, considering its bid to have been qualifying, can result in the real possibility of non-performance of the contract itself. Facially, the petitioner's argument with respect to inadequate working capital being addressed through a line of credit made available by SREI Infrastructure banker seems plausible. At the same time, this Court is of the opinion that though plausible, that interpretation is not the only reasonable one. The ONGC's argument that the shortfall or inadequacy in working capital requirements addressed through a short term credit, in the manner done, in the circumstances of the case, is not adequate at all is reasonable on several grounds. The line of credit made available in terms of to what extent and in what terms the banker would make good the inadequacy and whether the terms are such that there would be sufficient cash flow for specifically funding the contract (if awarded) during the performance period and whether, importantly, such liability will be, in any way, kept apart from the other liabilities so that in the event of creditors moving in and seizing the assets, the contract can nevertheless perform, are matters that are left unsaid and unclear. It is, in these circumstances, that the inadequate working capital requirements assume importance as a relevant factor.

11. As remarked in *Afcons (supra)*; *JSW Infrastructure (supra)*, the public agency i.e. the ONGC was the author of the tender specifications. It is the commercial entity, though an arm of the Central Government, which primarily interprets the document and its terms and decides whether to award the contract. The considerations, which weighed with the ONGC, therefore, are entirely commercial. The Court's role is not to oversee the whole but only to ensure that there is no unfairness or arbitrariness. Having regard to these factors that the ONGC adopted, an interpretation of the terms under

which it ultimately awarded the contract, an interpretation of the terms which will control the decision to award the contract finally that are unfavourable to the petitioner, cannot in the facts of the case be said to constitute an arbitrary decision warranting interference under Article 226 of the Constitution.

12. For the above reasons, it is held that there is no merit in the writ petition which is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MARCH 12, 2018

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