

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 05.08.2019
PRONOUNCED ON : 22.08.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.21276 of 2019 and
W.M.P.No.20485 of 2019

GVPR Engineers Limited
Having Registered office at
#8-2-293/82/A, Plot No.739-A,
Road No.37, Jubilee Hills,
Hyderabad - 500033(Telengana)
Rep. By its General Manager -
B.D & Tenders,
Mr.G.Bhaskar Rao

...Petitioner

Vs

1.Bharat Heavy Electricals Limited,
Power Sector - Southern Region,
690, Anna Salai, Nandhanam
Chennai - 6000035
Rep. By its Sr.Manager/Contracts

2.Tamil Nadu Generation &
Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai,
144 Anna Salai, Chennai - 600 002
Through Chairman and Managing Director

3.Coastal Marine Construction & Engineering Ltd.,
402 Madhava, Bandrakurla Complex,
Bandra East,
Mumbai (Maharashtra) - 400 051
Rep. By its Director.

...Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of Certiorarified Mandamus relating to the letter/proceedings of the first respondent dated 15.05.2019 and to quash the same and direct the respondents 1 and 2 to accept the bid of the petitioner and consider the same and award the contract pursuant to the notice inviting tender bearing Ref.No.BHEL PSSR SCT 1765 issued by the first respondent for the work Engineering, Procurement, Supply & Construction of onshore/offshore civil, structural and architectural works for sea water intake & outfall system of the proposed thermal power

plant No.2-2X660 MW Udangadi STPP Stage - I project of the second respondent at Kallamoli Village, Tiruchendur Taluk, Tuticorin District in favour of the petitioner.

For Petitioner	:Mr.Rajeev Kr.Panday for Mr.CT.Murugappan
For 1 st Respondent	:Mr.Krishna Srinivasan for Mr.Ramasubramaniam Associates
For 2 nd Respondent	:Mr.Abdul Saleem
For 3 rd Respondent	:Mr.Giridharan

ORDER

The petitioner herein is one of the participants in the tender invited by the first respondent vide notification dated 29/10/2018, for the work Engineering , Procurement, supply and construction of onshore/offshore civil, structural and architectural works for sea water intake & out fall system of the proposed thermal power plant project of the second respondent at Udangudi, Tiruchendur Taluk, Tuticorin District, Tamil Nadu. Though the petitioner has fulfilled the technical qualification criteria both in terms of 'description of work' as well as 'contract value' as stipulated in the Tender Document, the price bid submitted by the petitioner was not opened. On 14/05/2019, the petitioner sought reason for not opening his price bid. On 15/05/2019, the first respondent replied that the petitioner has not met the pre-qualification criteria specified under clause E (Approval of Customer) in the Notice Inviting Tender (NIT).

2.Through the officials of the first respondent, the petitioner has learned that the first respondent (contractor) after being satisfied with the fulfilment of tender qualifications, has forwarded 6 bids to the second respondent (customer) . The petitioner bid was one among them. The second respondent had consulted some other consultants and rejected 3 bids including the petitioner's bid. The petitioner learnt from reliable sources that the second respondent has rejected 3 bids to favour the 3rd respondent and to avoid reverse auction option which is inevitable, if there are more than 3 bidders.

3.The rejection of the petitioner bid without assigning reasons and refusal to open his price bid despite fulfilment of the technical conditions stipulated in the notice inviting tender bristles with arbitrariness and lack transparency. Hence, it warrants interference of the Court in its extraordinary jurisdiction.

4.The respondents have filed respective counters. The first respondent, being the Contractor under the second respondent besides questioning the maintainability of the writ petition in matter of contract and tender, on facts states that, the contract has been awarded to the 3rd respondent vide letter dated 09/05/2019. The detailed letter of intent was issued to the 3rd respondent on 30/05/2019 and that was accepted by the 3rd respondent. As per the letter of intent, the responsibility of the contract commenc from 09/05/2019. The third respondent has conducted geophysical investigation of the site and submitted its report on 30/07/2019. As such the prayer sought in the writ petition has become infructuous.

5.The first respondent admits the petitioner's averment regarding floating of tender, submission of tender by the petitioner and others, short listing of 6 bidders including the petitioner and forwarding it to the second respondent for consideration. He, further state that as per the NIT, the bidders who meet the eligibility criteria for Techno Commercial Evaluation will be short listed by the first respondent and forwarded to the second respondent for its approval. This is alone as per the clauses 12.2 and 12.3 of Volume 1 Section 2.0 of the General Terms and Conditions of the Contract and clause 14.2 of the detailed letter of Intent issued by the second respondent to the first respondent in respect of the supply and civil works for Thermal Plant at Udangudi.

6.With regard to the information alleged to have received from his sources in first respondent, about rejection of the petitioners bid, the counter reads as follows:-

"the first respondent does not inform any bidder regarding acceptance or non-acceptance of the bid by the 2nd respondent. The 1st respondent had only forwarded the profiles of all bidders who had fulfilled the pre-qualifying criteria stipulated in Serial Nos.A to D together with their relevant experience certificates and the petitioner's case alone. It would be relevant to mention here that a consultant, M/s.Tata Consulting Engineers has been engaged by the 2nd respondent for the evaluation of vendor credentials. Suffice it is to state that the 1st respondent while forwarding the names, had requested the 2nd respondent to approve all the names so as to increase the competition."

7.The bid of the petitioner was not opened because, he did not fulfil the pre-qualification criteria. As per the tender condition, any subcontractor under the first respondent has to be approved by the second respondent. Out of six bids, three bids were rejected by the second respondent for non fulfilment of the pre bid qualification prescribed under the Notice Inviting Tender (NIT). As per the agreement between the first and second respondents and as per the NIT, names of bidders who stand qualified after compliance of criteria A to D shall be forwarded to customer for their approval as per clause E. The price bid of those bidders who are approved under clause E alone will be opened. The first respondent forwarded the profiles of all the bidders who had fulfilled the Pre-Qualifying criteria stipulated in serial numbers A to D together with their relevant experience certificates to the second respondent. The first respondent forwarded the profiles with request to approve all the 6 bidders so as to increase the competition. However, the second respondent has engaged M/s.Tata Consulting Engineers for the evaluation of vendor credentials and based on their report, out of 6 bidders who satisfied the requirements mentioned in clause A to D, 3 were approved by the first respondent under clause E. The petitioner is one among the three bidders not approved by the customer (second respondent). Hence, the price bid of the petitioner was not opened.

8.The second respondent in his counter has stated out the reason for not approving the bid of the petitioner and two others. The counter provides sufficient informations 'why the petitioner price bid was not opened'. For the sake of better clarity, the relevant portion of the second respondent counter is extracted below:-

"d.That pursuant to the receipt of the Tenders from the prospective aspirants, BHEL had evaluated the same and shortlisted 6 tenders and on 22.02.2019 submitted the credentials of six tenderers including the credentials of the petitioner herein for approval by TANGEDCO.

e.That, TANGEDCO in order to verify and weigh such tenders had appointed M/s.Tata Consultancy Engineering, Bengaluru (hereinafter referred as TCE) as Project Management Consultant for the entire project of the 2 x 660 MW Udangudi Supercritical Thermal Power Project, stage I. It is the responsibility of the TCE to verify all aspects such as drawing approval, vendor approval based on the credentials and etc., by coordinating with BHEL, TANGEDCO and other vendors for Engineering and site

coordination for scheduled completion of the entire project.

f. That upon verification of the credentials of the, TCE called for BHEL to submit sufficient credentials of the six tenderers and based on the further credentials submitted by the BHEL on 23.03.2019, the tenderers recommended were evaluated and on 01.04.2019, TCE after careful verification has approved the three tenders out of the six tenders and the bid of the petitioner herein was one among the not approved tenders. While granting approval for three tenders, it was intimated to BHEL to ensure that the work executed by the successful bidder should be monitored by a third party agency who have sufficient off shore experience to meet the project schedule.

g. Pursuant to the above, BHEL by letter dated 02.04.2019, requested to approve the other rejected tenders and provided certain clarifications with regard to the not approved tenders and sought to reconsider the same. Hence, the not approved tenders were again reconsidered by the consultant TCE and it was recommended to approve the case of one tenderer M/s. Gayatri and the tender of another tenderer and that of the petitioner was not recommended for reconsideration by the consultant.

h. Thereafter the issue was taken up by TANGEDCO reviewed the request of BHEL by letter dated 02.04.2019 and it was decided to approve the initial approval already granted and not to reconsider the already not approved tenderers. Pursuant to the said decision of TANGEDCO, TCE by main dated 16.04.2019 advised BHEL that the vendors approved on 01.04.2019 is valid and an additional vendor has not been approved."

9. The second respondent being the owner of the project, have reserved the right to approve the subcontractor engaged by the first respondent. The petitioner company lack experience in sea water. The experience of the petitioner confine to river water lift irrigation. Its river pipe laying work not proved. Apart from the petitioner, two other bids were rejected for want of expertise and experience. This respondent rejected the bid of

the petitioner and two others since, they did not possess the expertise of doing the work for which the tender called.

10.The counter of the third respondent to whom the contract has been awarded reveals that, on finalisation of the tender, they have entered upon Letter of Intent Contract with the first respondent on 30/05/2019. Towards preparation of the project, substantial work and investment have already been incurred by the first respondent which includes execution of Bank Guarantee on 14/05/2019 for Rs.14,65,35,000/- in favour of the first respondent and placement of order with Jain Irrigations for purchase of HDPE pipes worth Rs.51.74 crores. The petitioner knowing well that the contract was awarded to the 3rd respondent in May 2019 itself, belatedly has filed this writ petition to cause hardship and with ulterior motive.

11.The submissions made by the learned counsel for the petitioner and the respondents heard. Considered the pleadings of the respective parties and the documents relied by them. The point for consideration is, 'whether the writ petition is maintainable and if so, whether the rejection of the petitioner bid is contrary to tender terms'.

12.Regarding maintainability of the writ petition, in the matter related to contract and tenders, the Hon'ble Supreme Court in Bakshi Security and Personnel Services Private Ltd -vs- Devkishan Computed Private Limited and others reported in 2016 (8) SCC 446 has relied upon the following observation of the Supreme Court made in Jagdish Mandal -vs- State of Orissa reported in 2007(14) SCC 517 :

"19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be

permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone. OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under [Article 226](#)....."

13. From the counters filed by the respondents 1 & 2 , they say in unison that, as far as technical criteria mentioned in the tender document, the satisfaction of the contractor (first respondent) is subject to approval of the customer (second respondent). When first respondent has sent six bids for approval being satisfied that they have fulfilled the technical criteria mentioned in clause A to D, the second respondent has rejected 3 after consulting M/s.Tata Consultant Engineering (TCE). The reasons for rejecting their bids is extracted in the counter of the second respondent, which is extracted below for easy reference:-

"m. That for the execution of the thermal power plant, the sea water through

this system is required, right from conducting hydraulic test to the boiler. The boiler light up is scheduled for this project during December 2020 to February 2021 and further followed by synchronising and full load operation by April 2021 as per the revised catch up plan by BHEL. As time period is essence in the execution of the Sub Contractor work as it has a direct bearing in the commissioning of the entire schedule, it was considered to recommend tenderers who had utmost experience in the performance of such work with sea water and as such from among the six tenderers, three tenderers i.e.,

1.M/s L&T Geostructure LLP, Chennai,
2.M/s Coastal Marine Construction & Engg. Ltd., Mumbai

3.M/s ITD Cementation Ltd., Mumbai
were recommended for approval as they had executed similar work in sea as per the credentials submitted by them and same suited to our technical requirement, expertise and experience.

n. That considering the credentials of three remaining tenderers including that of the petitioner herein was not approved for recommendation for the following reasons:

1.M/s.Tecton Engineering & Construction LLC, Ajman, UAE.

Work of desalination plant to SEWA, UAE has been carried out in the sea. But does not prove that the vendor has carried out pipe laying work and Intake facility.

2.M/s Gayatri Projects Ltd., Hyderabad

Submitted credentials for having carried out 2 nos similar work as EPC contractor. The NCCPL work sub contracted to UPI Polymers and the other work of TPCIL sub contracted to M/s Coastal Marine Construction & Engg Ltd., Mumbai who is already considered for the project.

3.M/s.GVPR Engineers Ltd., Hyderabad

Work related to lift Irrigation only in the river has been carried out and also under river pipe laying work not proved and not carried out any power plant/industry related works."

14.The main reason for not considering the bid of the petitioner is lack of experience in carrying on projects in sea water. Their experience is confined to river water. But then, in the Notice Inviting Tender (NIT) while prescribing technical qualification criteria (technical part) in Annexure -3, clause B-2 includes past experience in execution of engineering design of complete sea/river water intake system. (B-2.1) and Bidder should have executed works like intake well/well foundation velocity cap in river or sea. (B-2.2) - This mean, that a person who have requisite experience in river water also technically eligible to participate in the tender. Precisely, that is the reason, the first respondent has found the petitioner fit for consideration and forwarded his bid along with other bids for approval. It is also now by way of affidavit, the first respondent has placed on record that they sought for approval of all the six names since, it will increase the competition. Despite the request of the first respondent, the second respondent has rejected 3 of the names including the petitioner for the reasons extracted above.

15.The decision of the second respondent to reject the petitioner and two others is based on the report given by TCE. Whereas, the learned counsel for the petitioner contention is that, while inviting tender, the experience either in sea water or in river water was considered to be eligible. The first respondent has also considered the tender documents of the petitioner and found suitable and eligible. Thereafter, the second respondent has eliminated the petitioner for not having experience in sea water. This amounts to alteration of tender condition after inviting the tender. Secondly, the first respondent itself an expert body in the said field. The second respondent need not have resorted to the opinion of a private body and acted upon their advice. Further, by doing so, they deprived themselves the option of exercising the reverse auction process. Thus, the element of mala fide has crept in.

16.The second respondent (TANGEDCO) for implementation of its Rs.7359 crores thermal project at Udangudi has awarded the Engineering, Procurement and Construction Contract (EPC) to the first respondent (BHEL). As per the terms of EPC contract, BHEL can either perform the contract on its own or can sub-contract certain works by inviting tender. As per the contract and tender conditions, BHEL cannot engage a sub-contractor without approval of TANGEDCO. Particularly, clause 12.0 of the contract between TANGEDCO and BHEL vest the right of approval / rejection of sub-contractors with the TANGEDCO.

17. In the light of the above terms, when BHEL forwarded the profiles of 6 aspirants, TANGEDCO as the owner of the project / customer has engaged TCE to verify and weigh the tenders in all aspects including the drawing, credential, expertise in the field of work and experience. Since, TANGEDCO has every reasons and materials to hold that the petitioner lack experience in the required project while other three have sufficient experience in the similar field, it has approved three aspirants and rejected three. The discretion to choose one among the three approved sub-contractor is with the BHEL. Therefore, it cannot be gainsay, that the second respondent has acted with mala fide to favour someone. The process and reason for rejecting the bid of the petitioner does not indicate it was done arbitrarily. The consultation process adopted by the second respondent cannot be faulted. When persons with better experience in sea water available and the petitioner never carried work in sea water merely because he satisfies the technical criteria A to D of the tender document does not ipso facto entitles him to get the tender award. Eligibility and suitability are not synonyms or interchangeable. When better suitable bidders with direct experience in similar project are available, the owner/customer has right to reject the bid of persons with no experience in the field. This is not change of tender conditions but a mode of identifying most suitable bidder among the bidders who are eligible. If this Court is asked to say in the given facts 'whether the process adopted by the respondents and the decision to reject the bid of the petitioner is legal', the answer is in affirmative. If asked to say 'whether it is sound', the answer may be negative.

18. Since, the Hon'ble Supreme Court has mandated in Jagdish case (cited supra) and same being reiterated in Bakshi security case (cited supra) that the Court while exercising its power of 'judicial review' in contractual matter, should check 'whether the decision made lawfully' and not to check 'whether it is sound'. For the reasons stated above, the writ petition deserves to be dismissed.

19. In the result, the writ petition is dismissed. No order as to costs. Consequently, connected miscellaneous petition is closed.

jbm

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

To

1.The Senior Manager/Contracts,
Bharat Heavy Electricals Limited,
Power Sector - Southern Region,
690, Anna Salai, Nandhanam
Chennai - 6000035

2.The Chairman and Managing Director,
Tamil Nadu Generation &
Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai,
144 Anna Salai, Chennai - 600 002

3.The Director,
Coastal Marine Construction & Engineering Ltd.,
402 Madhava, Bandrakurla Complex,
Bandra East,
Mumbai (Maharashtra) - 400 051

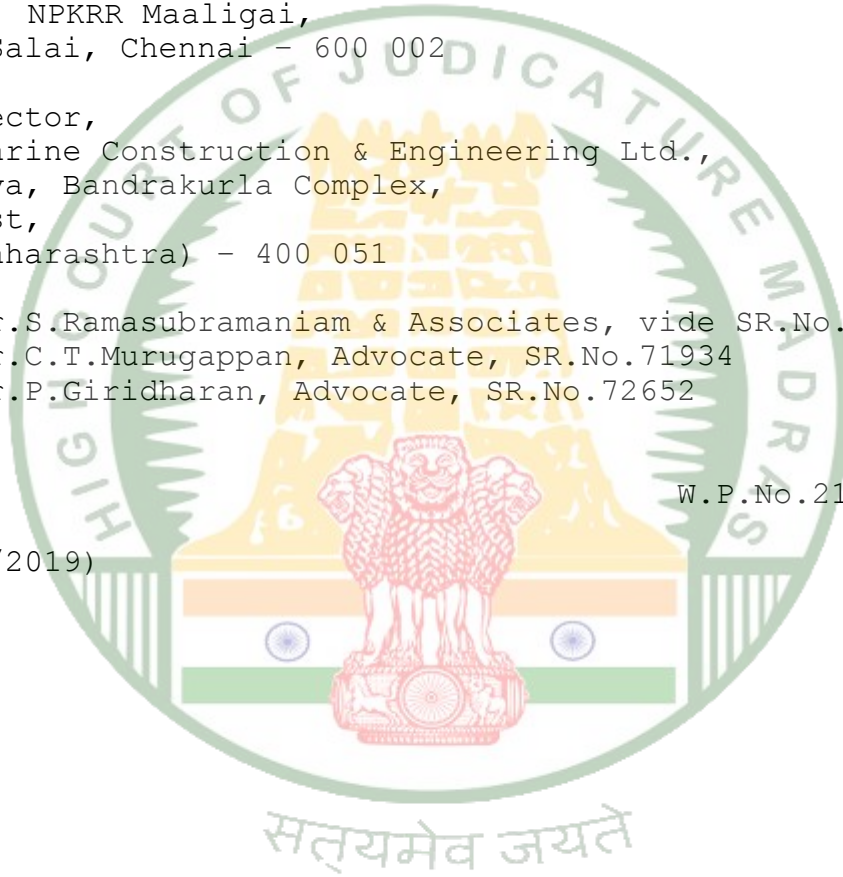
+1cc to Mr.S.Ramasubramaniam & Associates, vide SR.No.72355

+3cc to Mr.C.T.Murugappan, Advocate, SR.No.71934

+1cc to Mr.P.Giridharan, Advocate, SR.No.72652

W.P.No.21276 of 2019

Kak(27/08/2019)



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